AVOIDING AND EXTENDING TIME LIMITS ON H-1B AND L-1 STATUS*

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Most nonimmigrant categories that allow employment in the United States do not limit the number of years for which an alien is permitted to hold that status (*e.g.*, E-1, E-2, TN-1, O-1). Other nonimmigrant categories do have limits (F-1 practical training limited to one year; J-1 time limit varies depending on category; H-2B limited to three years; H-3 limited to two years).

The focus of this article is on the limit imposed on H-1B professionals in a specialty occupation and L-1 intracompany transferees. Specifically, 8 C.F.R. §214.2(h)(13)(iii) provides that an H-1B nonimmigrant who has spent six years "in the United States" in H status may not seek an extension or change of status, or be readmitted to the United States in either H or L status, unless the alien has resided and been physically present outside the United States, except for brief trips, for the immediate prior year. 8 C.F.R. §214.2(1)(12) provides the same prohibition for an alien who has spent five years "in the United States" in a specialized knowledge capacity or seven years "in the United States" in a managerial or executive capacity. Extended processing delays by the Department of Labor and USCIS in processing labor certification applications, immigrant petitions, applications for adjustment of status and employment authorization contribute to many H-1B and L-1 aliens approaching the end of the maximum regulatory time period. This problem may be exacerbated if quota backlogs reappear. Practitioners are under increasing pressure to devise ways to work around the 5, 6, or 7-year limit. This article will present creative ways to work around these limits.

This discussion will be divided into five parts:

- Strategies for totally avoiding the time limits;
- Strategies for delaying the onset of the time limits;
- Strategies for extending H-1B time;
- Extensions of H-1B status after six years; and
- Strategies for remaining legally in the United States - and working - after the time limit is reached.

Avoiding Time Limits

Four categories of employees are not subject to the limits at all; in other words, they can remain in H or L status indefinitely subject to no time limits. 8 C.F.R. §214.2(h)(13)(v); 8 C.F.R. §214.2(1)(12)(ii). These categories are:

1. Seasonal employment. Although "seasonal" is not defined for purposes of H-1B, it is defined for purposes of H-2B. To qualify, the employment must be "traditionally tied to

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a season of the year" and be of a "recurring nature." It does not include employment that is permanent but for vacation periods. 8 C.F.R. §214.2(h)(6)(ii)(B)(2).

2. Intermittent employment. For this purpose, the alien's employment with the employer need not be intermittent. Rather, the employment "in the United States" must be intermittent. 8 C.F.R. §214.2(h)(13)(v); 8 C.F.R. §214.2(l)(12)(ii). If an employee spends significant amounts of time outside of the United States working for the employer, it could be argued that his employment "in the United States" is intermittent.
3. Employment in the United States six months or less per year. It is noteworthy that this is a separate basis for avoiding the limits. Therefore, the need to evaluate seasonal employment or intermittent employment only comes into play if the alien is in the United States more than six months per year. In other words, it seems clear that employment could be seasonal or intermittent and therefore not subject to any time limits even thought the employment in t he United States is in excess of six months per year.
4. Aliens who reside abroad and regularly commute to the United States to engage in part-time employment.

It is important to note that, in order to qualify under one of the first three categories, the foreign national must show that he did not "reside continually in the United States." 8 C.F.R. §214.2(h)(13)(v). INA §1011(a)(33), however, defines "residence" as "principal, actual dwelling place in fact, without regard to intent." Presumably, most aliens who would qualify in these categories should be prepared to demonstrate that their principal, actual dwelling place is abroad during the periods of absence from the U.S.

Extending Time Limits

Assuming the nonimmigrant cannot fit into one of the categories that enables her to totally avoid the time limits, the next level of analysis goes to developing options to delay the onset of the time limits and to extend time in the United States for as long as possible. In many cases, the goal is to extend the stay in H or L status long enough to enable the alien to file an application for permanent residence and application for employment authorization document. The following strategies should be considered:

1. Delaying the commencement of time in H-1B status. For example, F-1 aliens in practical training may wish to avail themselves of the full one year of practical training before changing status to H-1B. This strategy, of course, requires analyzing the H-1B quota to ensure that H-1B numbers are available when the alien needs to change status to H-1B. One strategy that can accommodate both goals is to file the change of status to H-1B with an effective date six months in advance of the date of filing. Students have reported experiencing difficulty entering the U.S. on an F-1 visa after the change of status to H-1B has been approved but before the start date of the H-1B, however. Apparently the names of the students may have been removed from SEVIS.
2. Neither the date of approval of the H or L petition nor the start date of employment on the approval notice is the appropriate date for starting to count the five, six or seven years. Rather, the start date for counting purposes should be the date on which the alien actually arrives in the United States (assuming that the approval notice is not a change of status).
3. Adding on time spent out of the United States may be a possibility. The language of the regulation is clear regarding the calculation of time that counts toward five, six, or seven years. The regulations state expressly that the calculation is based on time spent "in the

United States. 8 C.F.R. §214.2(h)(13)(i)(B) and 8 C.F.R. §214.(l)(12)(i). They do not, for example, state that the period of petition approval is the relevant time period. They do not state that the relevant issue is whether the alien has "resided continually" in the United States -- which is the language used in determining whether the five, six, or seven year limit does not apply at all. (8 C.F.R. §214.(h)(13)(v); 8 C.F.R.§214.(l)(12)(ii)). Rather, the regulations very clearly create a physical presence standard, and not a residence standard. As a result, time spent out of the United States --on vacation, overseas assignments, etc. -- should not count as time spent "in the United States" for purposes of counting time against the limits.

This interpretation is consistent with USCIS' rules for extension of status. USCIS does not allow an alien to extend status if the alien is not "in the United States" at the time of application." Likewise, USCIS uses a literal approach in calculating the qualifying one-year period of employment overseas for L-1 qualification -- every day spent in the United States is excluded in calculating the one-year period. Another example is calculation of the two-year home country residence requirement under 8 U.S.C. §212(e). Any days spent in the U.S. are excluded in calculating the two years. These rules are strictly and literally interpreted to apply to aliens who are not physically in the United States, even for one day.

As further support for this interpretation, USCIS agrees that an alien who has completed five, six or seven years in H or L status can legally work for a U.S. company on U.S. payroll as long as the alien is working outside of the United States. This time spent outside of the United States as an employee of the U.S. company is not considered time spent in the United States. The same rules should apply for time periods preceding the five, six or seven year limit in which the alien is working for the U.S. company on the payroll but performing services outside of the United States. That time also should not be counted as time spent in the United States.

Despite the literal language of the regulation and USCIS' literal interpretations in this area, USCIS has been at best inconsistent in it adjudications on this issue. Although many extensions requesting addition of days spent out of the United States have been approved, another significant number have not been approved. At times, USCIS appears to use a "meaningfully interruptive" standard -- in order for the time spent out of the United States to be added on, that time must have been "meaningfully interruptive." Such a standard, of course, is inconsistent with the regulatory language and inconsistent with USCIS' literal interpretations in calculating whether an alien is "in the United States" for other purposes.

At least one federal court has addressed this issue. In *Nair v. Coultice*, 162 F.Supp.2d 1209 (S.D. Cal. 2001), the court adopted the physical presence standard and rejected USCIS' "meaningfully interruptive" standard. The result was that the alien was able to recapture 97 days accumulated outside of the U.S. during the six years.

4. If the H-1B or L-1 recaptures time, the H-4 or L-2 should be able to recapture the same amount of time, even if the H-4 or L-2 has never left the U.S. The regulations provide that H-4s and L-2s should have the same periods of admission as their principals. 8 C.F.R. §214.2(h)(9)(iv); 8 C.F.R. §214.2(l)(7)(ii).

Extensions of H-1B Status After Six Years

If a labor certification application or immigrant petition has been pending for 365 days or

more at the time the alien's six years in H-1B status will expire, the alien's employer is able to file for one-year extensions of H-1B status until the labor certification application or immigrant petition is denied or until a decision is made to grant or deny the alien's application for immigrant visa or for adjustment of status to permanent residence. This section of the law has not been the subject of any regulation. As a result, there are significant ambiguities and there is significant room for counsel to take aggressive advocacy positions on behalf of clients. The following are some examples of these ambiguities and possible advocacy positions:

1. Applicability to Alien Whose Sixth Year in H-1B Status Expired Prior to Conclusion of the One Year

There is a very good argument for the proposition that such an alien should be eligible to obtain approval of a seventh-year H-1B petition and apply for a new H-1B visa at a U.S. Consulate. Section 11030A of the Twenty-First Century Department of Justice Appropriations Authorization Act (Pub. L. No. 107-273, 116 Stat. 1758) is divided into two sections, each of which should be read independently. Subsection (a) is entitled "Exemption from Limitation" and states clearly that the six-year limit does not apply at all if 365 days or more have elapsed since the filing of the application or petition. Subsection (b) entitled "Extension of H-1B Worker Status" allows for the extension of H-1B status for an alien who qualifies under Section (a).

The alien whose status expired before the one year is exempt from the six-year limit under subsection (a) once the one year period is reached. Since the alien is exempt from the six-year limitation under subsection (a), there should be nothing to preclude the alien from applying for a new H-1B visa, even if he is ineligible to extend his status under subsection (b).

Further support for this proposition can be found in the language of subsection (a), which states that it applies to "any nonimmigrant alien previously issued a visa or otherwise provided…H-1B status". This is the same language as appears in INA §214(m) regarding portability. Even in the absence of regulations, it is rather well settled that this same language enables an alien who was granted H-1B status to be portable even if he is now out of status and therefore not extendable. Likewise, the out of status alien should get the benefit of being exempt from the six-year limit, even if he is not extendable.

There is even a good argument to be made that the alien in this example is eligible for an extension under subsection (b) even if he is out of status by the time the one-year pendency of the application or petition creates the eligibility for extension of status. Again, a reading of the exact language of subsection (b) is critical. Unlike, *e.g.*, Section 245(a) of the Immigration and Nationality Act, which states that the Attorney General "may" adjust status of a qualifying alien, subsection (b) states that the Attorney General "shall" extend the status of an alien who qualifies for an exemption under subsection (a). Since we have already seen that the alien in our example qualifies for the exemption under subsection (a), it is arguable that the language of subsection (b) equally entitles the alien to extension of status in the United States even if the alien does not meet the requirement of maintenance of status that would otherwise apply.

The sole USCIS Memorandum on this subject does not address either argument. The memorandum from William R. Yates dated April 24, 2003 (HQBCIS 70/6.2.8-P) ("Yates Memo") (posted on AILA Infonet at Doc. No. 030501.45 (May 1, 2003)), only deals with subsection (b) and only addresses applications to extend status in the US. It makes no reference to the availability or unavailability of obtaining a seventh-year H-1B visa at a US Consulate.

What if the labor certification application or immigrant petition has been pending for less than 365 days at the time of the filing of the extension petition but more than 365 days at the

time of the adjudication? USCIS has not taken a consistent position. The Yates Memo apparently states that the 365 day requirement must be met at the time of filing. USCIS Service Center Operations initially advised AILA that the extension could be approved as long as the one-year period is met at the time of adjudication, but subsequently reversed its position.

2. Different H-1B Employer and Labor Certification/Immigrant Petition Employer

The H-1B extension can be obtained with a different employer than the employer who filed the labor certification application or immigrant petition. This result follows from a reading of subsection (a)(1), which refers to the filing of "*any* application for labor certification" (emphasis added). USCIS has concurred. (See letter from Efren Hernandez, Director, Business and Trade Services, to Attorney Naomi Schorr, No. HQ70/9.1 (April 24, 2002), *reprinted in* 79 Interpreter Releases 658-9, 676-80 (May 6, 2002); AILA Infonet Document No. 02050231). For example, if a labor certification application with Employer A has been pending for one year and the six-year H-1B alien leaves Employer A but Employer A does not withdraw the labor certification application (because the alien may return or because the employer may want to consider substitution), the alien can get a 7th year extension to work for Employer B.

3. Availability of Extensions Where Labor Certification or Immigrant Petition Denial on Appeal

The Yates Memo makes clear that a labor certification application denial is not a final decision if it is on appeal. As a result, as long as the appeal is pending, extensions of H-1B status can be obtained. Of course, if the appeal is sustained, extensions can continue to be obtained. The Yates Memo does not state that an extension can be obtained if an immigrant petition is denied and on appeal.

4. Availability of Extension Where Application or Petition Was Approved and No Longer Pending

The statutory language does not require that the application or petition be pending. Subsection (b) states that the end of the extension eligibility comes upon the *denial* of the labor certification application or immigrant petition, but not upon its approval. Query how long the gap can be between the approval of the labor certification application and the filing of the immigrant petition or the approval of the immigrant petition and the filing of the application for permanent residence.

5. Availability of Extension in the Event of Labor Certification Substitution

If an alien seeking a seventh-year extension is being substituted into a labor certification application that was filed more than one year ago on behalf of a different alien, the substituted-in alien is eligible for a seventh-year extension. Support for this comes both from the language of subsection (a)(1) ("any application for labor certification") and from the Yates Memo, which concurs with this result.

What about the substituted-out alien? USCIS has always taken the position that only one alien can get the benefit of the labor certification application. See 8 C.F.R. §245.10(j). Presumably, it would take the position that the substituted-out alien is not eligible for a seventh-year extension. If the substituted-out alien, however, has already obtained a seventh-year extension, there is no indication that USCIS would attempt to revoke the approved extension petition.

6. Status of Extended Alien Where Labor Certification Application or Immigrant Petition Denied

If the labor certification application or immigrant petition is denied, no more extensions will be available to the alien. If the seventh- or eighth-year extension has already been approved prior to the denial, however, it is likely that USCIS will not take any action to revoke the approved extension.

7. Extension in the Event of Quota Retrogression

Extension for a seventh year and beyond may be available to an alien who is the beneficiary of an immigrant petition but is unable to file for, or obtain approval of, adjustment of status because of quota backlogs in the alien's preference category. American Competitiveness in the Twenty-First Century Act of 2000, Pub. L. No. 106-313 §104(c), 114 Stat. 1251, 1253-54.

Several issues are worth noting with regard to such an extension:

-- It is not by its terms limited to H-1B aliens. There is nothing in the language of the statute that would preclude another nonimmigrant, such as an L-1B alien coming close to the five-year limit from obtaining an extension based on this section.

-- The extension is not a one-year extension. Rather, it is an extension "until the alien's application for adjustment of status has been processed and a decision made thereon." Furthermore, by its terms it provides only "one time protection". Although USCIS has not had occasion to interpret this section, it appears to the authors that only a "duration of status" (D/S) extension would be appropriate to cover the alien until a decision is made on the adjustment of status application.

-- This extension is not available to an alien with a pending labor certification application. It only benefits an alien with an immigrant petition pending. Note, however, that there is no requirement that the immigrant petition have been pending for any specified period of time.

8. Strategies Relating to Seventh-Year Extensions

If an H-1B alien's fifth year is nearing an end with no labor certification application or immigrant petition pending, the key issue for counsel is to get an application filed. If the employer will cooperate with a labor certification application, the strategy is to file a regular labor certification application (not reduction in recruitment) in order to get it filed promptly and not have to await the conclusion of any recruitment period. Alternatively, if the PERM regulations are promulgated, the labor certification process may be expedited, permitting an alien to benefit from the filing of a concurrent I-140/I-485 at an earlier time. If no employer is willing to file a labor certification application, counsel should look at the possibility of filing a self-sponsored extraordinary ability or national interest waiver petition. Even if the petition is ultimately not approved, the filing of the petition (presuming it is non-frivolous) may enable the alien to obtain the benefit of a seventh-year extension. This would enable the alien to utilize the sixth-year to find an employer willing to file a labor certification application on his behalf.

If the labor certification application or immigrant petition will not have been pending for 365 days by the expiration of the alien's six years, another strategy to consider is to have the alien leave the United States for a number of months before the six-year period ends. Upon return, the alien could apply to recapture the time spent out of the U.S. Alternatively, the employer could terminate the approved H-1B petition and file a new H-1B petition to enable the alien to return to the U.S. in H-1B status for the remaining months available before the end of the six years. By

doing so, when the six-year limit is reached, the alien will be eligible to extend H-1B status because the application or petition will at that time have been pending for one year.

Another strategy can be used for the L-1B who is reaching the end of five years and is not employed in a managerial capacity. For that alien, it may be possible to change status to H-1B to obtain a sixth-year. Before the sixth year begins, the employer could file a labor certification application on behalf of the alien, which will enable the alien to obtain seventh-year and possibly further extensions.

Strategies When Time Limit is Reached

For some aliens the day of reckoning arrives when the five, six or seven year limit is reached. For these aliens, what advice can be given that would enable the person to continue employment and/or continue residing in the United States? The following strategies should be considered:

1. Filing a timely extension to recapture time spent out of the United States.

   Even if the application is not approved, it may result in the alien being able to work in the United States for up to 240 days following the end of the five, six, or seven years. Assuming the extension application is filed on or before the last day of the approval period, the alien is authorized to be employed for up to 240 days while the extension is pending. 8 C.F.R. §274a.12(b)(20). As a practical matter, assuming USCIS issues a Request for Evidence requesting further details of overseas travel or the like, the possibility of such an application pending for 240 days is very real. Although ethical issues could be raised, it would appear that such a strategy is in conformity with the clear language of the regulations. It would also appear that the application should be "non-frivolous" such that no "unlawful presence" time would be accumulated for purposes of §222(g) or §212(a)(9)(B), even if the extension application is ultimately denied. See INS Memoranda dated March 3, 2000 (HQ 70/12-P and HQADN 70/21.1.24-P).

2. Changing categories.

   a. L-1B to L-1A

      The first change of category to extend beyond the specified time limit is the change from L-1B (five year limit) to L-1A (seven year limit). Many aliens who are L-1B status may possibly qualify for L-1A status; e.g., as a functional manager or a project manager. Also, many aliens in L-1B status may be promoted during their time in L-1B status to a managerial level position. In either of these scenarios, the extension application can be filed to gain two additional years; and it can be filed until the last day of the initial five-year period.

      The relevant regulation is 8 C.F.R. §214.2(l)(15)(ii). A review of this regulation removes the misconception that the extension application must be filed at least six months prior to the expiration of the 5th year of L-1B status. First of all, the six month rule in the regulation is not applicable at all if the alien was not promoted; *i.e.*,. if the alien qualified all along as a managerial level employee. In the event that the alien qualifies based upon a promotion, only the promotion must occur at least six months before the expiration of L-1B status. The filing does not have to be completed six months before. Furthermore, the regulation only applies to extensions and does not apply at all if the petition does not request an extension and the alien will be applying for an L-1A visa at a U.S. Consulate.

b. Change to derivative status

If an alien who has spent the maximum period of time in H-1B or L-1 status has a spouse who is or qualifies for H-1B or L-1 status, can the alien change to H-4 or L-2 status at the conclusion of the five, six or seven year period? The answer to this question is difficult because of a conflict within the statutory and the regulatory scheme. The statute -- INA §214(g)(4) -- by its very terms, only creates the six year limit for H-1B nonimmigrants, not for H-4 nonimmigrants. The regulations, on the other hand, preclude change of status of any alien who has been in the United States for the maximum time period "under sections 101(a)(15)(H) or (L)" to any other H or L status, presumably including H-4 or L-2. 8 C.F.R. §214.2(h)(13)(i)(B) and 8 C.F.R. §214.2(l)(12)(i). Arguably, although not definitively, these sections should be trumped by the regulatory sections that allow derivatives to remain in the U.S. for the same length of time as the principals. 8 C.F.R. §214.2(h)(9)(iv); 8 C.F.R. §214.2(l)(7)(iii).

What if the alien in H-1 or L-1 status leaves the United States shortly before the conclusion of the five, six or seven year period? If the alien then applies for an H-4 or L-2 visa at the U.S. Consulate, there would not seem to be a statutory or regulatory bar to the issuance of the visa. The relevant regulations would not come into play since the alien had not spent five, six or seven years in H or L status; which is the event that triggers the application of the regulation.

c. Change of derivative to principal

What about the reverse situation where the H-4 wants to change to H-1 after six years or the L-2 wants to change to L-1 after five or seven years? Although USCIS policy appears to be opposed to such an application, the approval of such an application is not restricted by any language in either the statute or the regulations. 8 C.F.R. §214.2 (h)(13)(iii)(A)'s limitation only applies to an alien who has spent six years in the U.S. as an H-1B; 8 C.F.R. §214.2(l)(12) (i) only applies to an alien who has spent five or seven years in the U.S. as an L-1.

If the spouse is in a status other than H or L, such as F-1 or J-1, there should be no problem --either by USCIS regulation or adjudicatory policy -- for the H-1 or L-1 to change to F-2 or J-2 (or any other derivative nonimmigrant status). Of course, if the change is to J-2, L-2 or E-2, employment authorization is an option.

d. Change to other working visa

The H or L alien who has spent the maximum time in the U.S. in H or L status does not necessarily have to leave the U.S. Such an alien has no prohibition against changing status to another nonimmigrant employment category, such as O-1, TN-1, E-1 or E-2. H-2B and H-3 are not options, however. 8 C.F.R. §214.2(h)(13).

3. Working outside of the U.S.

If options for working in the United States do not appear to be viable, it may be possible for the alien to work for the same U.S. company but perform services outside of the United States for a period of time (at least one year if he wishes to return to the United States in H-1 or L-1 status). There is, of course, nothing to preclude such an alien from entering the United States periodically as a B-1 or B-2 even during this one year period. Such entries are not

considered interruptive of the one year period outside of the United States, but the days in the United States do not count toward the required one-year period outside the United States. Note, however, that if the alien is paid by the employer in the United States for his services outside of the United States, and if she continues to be paid during her B-1 visits to the United States, there may be issues of unauthorized employment to consider, both for the alien and for the employer.

What if the alien, during a B-1 entry, wants to change status to H-1B or L-1? Presumably, this is barred by the 5, 6, or 7 year limit rules. That is certainly true with respect to L-1, since 8 C.F.R. §214.2(l) precludes approval of a new L-1 petition. Curiously, 8 C.F.R. §214.2(h)(13)(iii) does not preclude approval of a new H-1B petition. Rather, it precludes "an H-1B alien" from extension, change of status, or readmission under H or L. Arguably, the alien in this example is a "B-1 alien" seeking to change status. Since the H-1B regulation does not preclude approval of a new H-1B petition, could the "B-1 alien" change status to H-1B (assuming, of course, H-1B numbers are available)?

4. Adjustment of status

Of course, for many aliens caught in the time limit trap, the ability to apply for adjustment of status to permanent residence is the promised land. From the date of filing the adjustment application, the alien can remain in the United States even if the time limit is reached on the nonimmigrant status. Concurrently with the filing of the adjustment of status application, the alien can file an application for employment authorization, which must be adjudicated within 90 days by regulation. 8 C.F.R. §274a.13(d).

What if the time limit is reached before the alien's quota is current or before the immigrant petition has been approved? Assuming the immigrant petition is in the employment-based first, second, third or fourth category, and assuming the alien's status has not expired for more than 180 days before the adjustment application is filed, the alien will still be eligible to adjust under INA §245(k). If the alien worked during this period, it would not prejudice his ability to adjust status (although the employer would be subject to employer sanctions penalties).

What if the alien "volunteered" during this period? If the alien received no wages or other remuneration, it is at least arguable that the employer would not be subject to employer sanctions penalties. 8 C.F.R. §274a.1(c), (f), (g), (h). The employer may be subject to penalties under the Fair Labor Standards Act, however, for paying less than the minimum wage.

Once the adjustment application is filed, the issue of the time limits on H-1B or L-1 status are normally not a concern anymore. Because H-1 and L-1 aliens can work and travel utilizing their H-1 or L-1 visas (8 C.F.R. §245.2 (a)(4)(ii)(C)), however, they may wish to keep their nonimmigrant status alive and extended while the adjustment is pending. Maintaining such status may also be important in the event that the adjustment is denied or if, for example, the alien switches employers and loses the original eligibility upon which the adjustment application was based. For these reasons, the alien may wish to keep his nonimmigrant status alive during the pendency of the adjustment application until the limit is reached.

There is an issue as to whether the alien is using up his H-1 or L-1 time while the adjustment is pending, especially if the alien has obtained an employment authorization document which gives him independent work authorization. In that event, it is arguable that

the alien is no longer "in H or L status," which would lead to a conclusion that he is not accruing time toward the limits in the event that the adjustment is denied or withdrawn and he needs to resume H or L status. To clarify the issue, however, it may be best in some cases to have the employer revoke the H-1B or L-1 petition, so as to make clear that the alien has not used up this time while working with the EAD. Of course, if this option is chosen, the alien would need advance parole in order to travel.

Conclusion

Time limits for H-1B and L-1 nonimmigrants have become a bigger issue than ever before. Advance planning and creative lawyering may be the difference between such aliens being required to leave the U.S. or being able to stay in the U.S. permanently or as long as required by their employers.

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