

# UNITED STATES

## REPORTS OF CHANGES TO H-1B EXTENTIONS IN 2018



January 4, 2018

### EXECUTIVE SUMMARY

McClatchy DC [reported](#) on Dec. 31 that the Department of Homeland Security (DHS) may stop renewing H-1B extensions for individuals caught in the green card backlog. DHS has not made any official announcements of a new policy toward H-1B extensions and no changes have taken effect yet.

This FAQ discusses current DHS policy on H-1B extensions, what is being considered, which H-1B workers would be impacted, and the scope and timeline of any potential changes.

### What is the current policy on H-1B extensions?

Generally, a foreign worker may remain in H-1B status for up to six years. In 2000, Congress passed the American Competitiveness in the 21<sup>st</sup> Century Act (“AC21,” which was later amended by the 2002 Department of Justice Appropriations Act) to allow for extensions of H-1B status beyond six years in certain limited situations.

Section 104(c) of AC21 says that DHS **may grant** H-1B extensions, in a maximum of three-year increments, if (1) an immigrant petition (Form I-140) has been approved and (2) the beneficiary would be eligible to adjust to permanent resident status but for the per-country numerical limits for his or her visa category.

Section 106(a) of AC21 **requires** DHS to extend H-1B status beyond the six-year period if at least 365 days have passed since the filing of a permanent labor certification application (PERM) or an immigrant petition (Form I-140).

### What is being considered?

According to the McClatchy report, DHS is considering a different policy going forward and may elect not to extend H-1B status in three-year increments based on per-country backlogs. This change would be based on the language of section 104(c) of AC21 that makes such extensions discretionary, i.e., DHS “may” grant H-1B extensions but is not required to.

The statutory language in section 106(a) of AC21 is not discretionary (i.e. DHS “shall” extend the stay), and there is no indication in the article that DHS is considering changes to how it interprets or applies the one-year H-1B extensions based on section 106(a) of the law.

### Who would be impacted?

If the change takes effect, most H-1B beneficiaries who are beyond their sixth year of H-1B status will be able to qualify for one-year extensions under section 106(a) of the law. Though there are rumors that DHS will prohibit individuals caught in the per-country backlog from obtaining one-year extensions under section 106(a), there is no evidence yet that the government will adopt that interpretation.

### How likely is this policy and how long would it take to implement?

As of today, the government has not made any changes to how it adjudicates H-1B extensions. While some political appointees may be advocating for a policy that forces H-1B workers to “self-deport,” it is not yet known whether there is a consensus within the administration to change how the government interprets and applies section 104(c) of AC21. Traditionally, both Republicans and Democrats have supported relief for H-1B workers caught in the green card backlog, but some appointees in the Trump administration are focused on reducing the total number of H-1B workers in the U.S. workforce and may see this policy change as a means of attaining that goal.

If the government does elect to change its policy, the timing of the change will depend on whether the government seeks to impose a bright-line rule or whether it simply allows individual adjudicators to exercise discretion on a case-by-case basis. A bright-line rule that DHS will not approve any H-1B extension for an individual caught in the per-country green card backlog would likely require formal notice and comment rulemaking under the Administrative Procedure Act, a six- to nine-month process. We cannot rule out, however, that individual adjudicators could on a case-by-case basis decide to deny an H-1B extension under section 104(c). Any change in policy would be applied the next time an H-1B visa holder seeks to extend his or her status.

### What should companies do today?

The latest leak out of the Trump administration is a reminder that U.S. immigration policy will continue to be unpredictable in 2018 and that companies should develop global immigration policies and options to protect their workforce interests. BAL will continue to engage directly with DHS and through business coalitions to monitor this development.

