

THE ETERNAL ADJUSTMENT APPLICANT

Frequently Asked Questions

Tammy Fox-Isicoff*
and
H. Ronald Klasko**

1) Who can travel after an adjustment application is filed?

Adjustment applicants who have a valid H-1B, H-4, L-1 or L-2 visa can travel. Adjustment applicants with advance parole documents can travel.

The travel outside of the United States by an applicant for adjustment who is not under exclusion, deportation, or removal proceedings shall not be deemed an abandonment of the application **if he or she was previously granted advance parole** by the Service for such absences, and was inspected and paroled upon returning to the United States.¹

2) Do those who hold H-1B or L visas or their derivatives need evidence of the filing of an adjustment to travel on an H or L?

The travel outside of the United States by an applicant for adjustment of status who is not under exclusion, deportation, or removal proceedings and who is in lawful H-1 or L-1 status shall not be deemed an abandonment of the application if, upon returning to this country, the alien remains eligible for H or L status, is coming to resume employment with the same employer for which he or she had previously been authorized to work as an H-1 or L-1 nonimmigrant, and is in possession of a valid H or L visa (if required) **and the original I-797 receipt notice for the application for adjustment of status.** The travel outside of the United States by an applicant for adjustment of status who is not under exclusion, deportation, or removal proceedings and who is in lawful H-4 or L-2 status shall not be deemed an abandonment of the application if the spouse or parent of such alien through whom the H-4 or

¹ 8 C.F.R. 245.2 (a)(4)(ii)(B).

* Tammy Fox-Isicoff (tfox@rifkinfox.com) of [Rifkin & Fox-Isicoff, P.A.](#) is a former Trial Attorney for the United States Immigration and Naturalization Service and Special Assistant United States Attorney. She is a Past President of the South Florida Chapter of the American Immigration Lawyers Association and currently serves on the Board of Governors of AILA National, where she has chaired the Media, Congressional and Bar Association Committees. She has served as AILA's representative to the American Bar Association's Immigration Coordinating Committee. Tammy is on the Board of Directors of Catholic Charities Legal Services and has been the recipient of three AILA Presidential Awards for advocacy on behalf of immigrants.

** H. Ronald Klasko [Ron] (rklasko@klaskolaw.com) is the Managing Partner of [Klasko, Rulon, Stock & Seltzer, LLP](#), with offices in Philadelphia and New York. Ron and his firm were chosen by clients and peers as one of the top six immigration firms in the country. (*Chambers Global, The World's Leading Lawyers 2007*). Ron is a former National President of the American Immigration Lawyers Association (AILA) and served for three years as that association's General Counsel. He is a past Chair of AILA's Business Immigration Committee, Department of Labor National Liaison Committee and its Task Force on H and L Visas. Ron has been selected for inclusion in *Best Lawyers in America* since 1991. He was selected as the "most highly-regarded" immigration lawyer in the world by *The International Who's Who of Corporate Immigration Lawyers 2007*. Ron is the recipient of the AILA Founders Award, bestowed upon the individual who has had the most positive impact on immigration law.

L-2 status was obtained is maintaining H-1 or L-1 status, the alien remains otherwise eligible for H-4 or L-2 status, and the alien is in possession of a valid H-4 or L-2 visa (if required) and the original of the I-797 receipt notice for the application for adjustment of status.²

As a matter of general practice, USCIBP has not required the presentation of the adjustment receipt for aliens traveling on an H or L visa. USCIS has announced that it will take months to issue receipts for July 2007 filings. Accordingly, it may be impractical for USCIS to enforce this provision in practice.

3) Does an adjustment applicant need employment authorization to work if the adjustment applicant reenters the United States on advance parole and remains the beneficiary of an expired, valid H-1B or L-1A visa?

An adjustment applicant's otherwise valid and unexpired nonimmigrant employment authorization is not terminated by his or her temporary departure from the United States, **if prior to such departure the applicant obtained advance parole** in accordance with 8 CFR 245.2(a)(4)(ii). If the alien's H-1 or L-1 employment authorization would not have expired had the alien not left and returned under advance parole, the applicant's failure to obtain a separate employment authorization document will not negate the alien's ability to work. It is important to note that this rule only applies to those who have not been employed outside the terms of their H or L.³

4) Can an alien who enters on advance parole extend H-1B or L status?

An alien who held an unexpired, valid H-1 or L-1 nonimmigrant visa, but who was paroled into the U.S., may apply for an extension of H-1 or L-1 status if there is a valid and approved petition, as long as the alien has not worked outside the H-1 or L-1. If the Service approves the application for an extension, the alien's parole is terminated.⁴

5) If the principal H-1B enters the United States on advance parole, can the spouse continue to enter the United States on an H-4?

There are two schools of thought on this. One is that the H-4's status is dependent on the principal's status; and if the principal is on advance parole, the spouse must also enter on advance parole. The other is that if the spouse has not violated the essential terms of his/her H status, a legal fiction is created that the H status is still valid and thus the H-4 can continue to travel on the H-4.

² 8 C.F.R. 245.2(a)(4)(ii)(C).

³ USCIS Memorandum, Michael D. Cronin, Acting Associate Commissioner Office of Programs, HQADJ 70/ 2.8.6, 2.8.12, 10.18, "AFM Update: Revision of March 14, 2000 Dual Intent Memorandum" (May 25, 2000).

⁴ *Id.*

6) Is it wise to extend H or L visas if an adjustment is pending?

This depends on a number of factors:

- a) cost
- b) easier to travel with H or L as opposed to advance parole and there is no need for annual extensions of these documents
- c) there is a limit to the period of stay in H or L; an applicant might use up this limit while the adjustment is pending, negating any possibility of using the visa if the adjustment is denied
- d) the sponsor employer's H-1B dependency
- e) if the adjustment application is denied, the applicant will still have H or L status if the underlying visa is extended
- f) employment authorization is automatically extended on the filing of an H or L extension; this is not the case with employment and advance parole extensions.
- g) employment authorization and advance parole extensions require name checks that can take a long time
- h) advance parole and employment authorization must be renewed four months before expiration to be safe; the failure to calendar this will result in the loss of these benefits
- i) maintenance of the H or L by the principal will enable a spouse or child who did not file for adjustment, or missed the priority date cut-off, to continue to remain in the United States with the principal. It will also protect the after-acquired spouse by according status as an H-4 or L-2

7) Does an H-4 lose status as an H-4 if granted EAD?

Only if the H-4 uses the EAD. If the H-4 has the EAD and does not use it, the H-4 maintains H-4 status.⁵

8) Does this same analysis apply to the L-2?

No. Since the L-2 has employment authorization, employment on the L-2 will not disrupt L-2 status.

9) What period of time can an H-1B obtain when filing for an extension?

The H-1B can be approved for any period of time remaining on the H-1B plus recover any time spent outside the United States. Moreover, the H-1B can be approved for an additional three years if the I-140 has been approved and the priority date is not current when the H-1B extension is filed, or one year if 365 days have elapsed since the filing of the labor certification or I-140. The I-140 or labor certification must have been pending at least 365 days from the

⁵ *Id.*

requested start date on the extension.⁶

10) Is an alien still eligible for the extension if the I-140 has been denied, but an appeal has been filed?

Yes.⁷

11) Will the principal lose O-1 status upon applying for adjustment?

Not necessarily. If the O-1 continues to work in a manner commensurate with the O-1 status, then the O-1 maintains O-1 status. On the other hand, if the O-1 works other than for the O-1 petitioner, the O-1 will lose O-1 status.

12) Does this also hold true for an F or an H-3 who maintains status during the pendency of the adjustment?

Yes, although the F or H-3 may not be able to extend status, the filing of the adjustment application does not terminate lawful nonimmigrant status.⁸ If the adjustment is denied, the alien would be very likely be unable to obtain an F-1 or H-3 visa and would likely encounter problems seeking readmission because of lack of nonimmigrant intent.

13) If an adjustment application is filed for the principal, and a child or spouse is outside of the United States, can the child or spouse reenter the United States on an H or L visa?

Yes, if the principal is maintaining status on an H-1B or L.

14) What if the principal has entered the United States on advance parole?

This is not clear. The Cronin memo permits the holder of an unexpired, valid H or L visa to extend status if the principal is on advance parole and has not otherwise failed to maintain status. Thus, it can be argued that the derivative is in status as long as the H or L has not otherwise violated status. USCIS has never held that an H-4 is out of status because the principal traveled outside the United States. Nevertheless, this area remains unsettled.

⁶ INS Memorandum, Michael Aytes, Acting Director of Domestic Operations, December 27, 2005, HQPRD, 70/6.2.8-P, "Interim guidance for processing I-140 employment-based immigrant petitions and I-485 and H-1B petitions affected by the American Competitiveness in the Twenty-First Century Act of 2000 (AC21)(Public Law 106-313)." *See also* Frequently Asked Questions issued by USCIS on July 23, 2007.

⁷ *Id.*

⁸ *Matter of Hosseinpour*, 15 I&N Dec. 191(BIA 1975), *aff'd* on other grounds, *Hosseinpour v. INS*, 520 F.2d 941 (5th Cir. 1975).

15) If the principal filed for adjustment when his/her priority date was current, can a spouse or child later file for adjustment, even if the priority date is not current?

No. The priority date must be current at the time of the filing of the adjustment.

16) Can an H-4 who has employment authorization travel and reenter on an H-4?

Yes, unless the H-4 has actually taken up employment. The holding of the employment authorization document does not in and of itself alter the H-4's status.⁹

17) If the principal H-1B is in the United States and working outside the parameters of the H-1B with an employment authorization document, can the spouse use the H-4 to travel?

No. If the principal is present in the United States and has not maintained H-1B status, the H-4 is not entitled to that status.

18) Can a principal be the beneficiary of a nonimmigrant visa petition filed by a different sponsor while the principal's adjustment is pending?

Yes. There is no requirement that the alien be employed by the sponsor on a permanent residence petition. Nevertheless, there is a requirement that the alien have the intention to be employed by the sponsor. This intention can change once the visa petition is approved and the adjustment application has been pending 180 days.¹⁰

19) Does an alien have to be in the United States when an advance parole is filed? When approved?

The applicant must have been granted advance parole, unless present in the United States on an H-1B or L, before leaving the United States.¹¹

20) Does it make a difference if the alien departs the United States with a valid advance parole, that advance parole expires, and a new advance parole is issued when the alien is abroad?

Although the regulatory language (8 C.F.R. 245.2 (a)(4)(ii)(B)) is not completely clear, there is a good argument under the regulations that as long as the alien left the country after one advance parole had been approved, he should be able to return to the country with a second advance parole document. However, the instructions to Form I-131 (which are in many respects

⁹ Cronin, *supra*, at note 3.

¹⁰ Matter of [name deleted], (AAO January 12, 2005), USCIS Adopted Decision, AILA InfoNet Doc. No. 05102761.

¹¹ 8 C.F.R. 245.2 (a)(4)(ii)(B).

outdated) state that the application is deemed abandoned by the alien's departure. As a practical matter, this issue has rarely arisen at ports of entry.

21) How will USCIS treat absences for adjustment applicants who departed the United States on or after July 2, 2007, upon learning that the USCIS was going to reject adjustment filings?

As of the date of this article, the answer is unknown.

22) When is the I-485 deemed filed - - the date it was received, or the date on the USCIS receipt notice?

The date it was physically received by USCIS.¹²

23) What can be done to protect the children of the principal adjustment applicant from aging out if they are abroad and will visa process?

File an I-824 with the adjustment application. This will constitute the child's application for the visa.¹³

24) Can an adjustment applicant change to consular processing?

Yes, but both cannot be pending at the same time. The I-824 is treated as a request to withdraw the I-485.¹⁴

25) What is the procedure for doing this?

File form I-824. Some posts will create an immigrant visa application with a copy of the receipt notice for Form I-824; however, they will not adjudicate the visa application until they receive the petition from NVC. A DOS cable encourages posts to process cases utilizing the I-797 approval notice of an I-140, a copy of the I-140, a receipt for the I-824 and evidence that the applicant was last resident in the consular post.¹⁵

¹² USCIS Update (August 3, 2007).

¹³ See "DOS Issues Revised Cable on Child Status Protection Act," AILA InfoNet at Doc. No.03020550.

¹⁴ See INS Memorandum, Michael Cronin, August 8, 2000, "Prohibition on Concurrent Pursuit of Adjustment of Status and Consular Processing," HQ 70.23.IP, AILA InfoNet doc. No. 00101803.

¹⁵ See DOS Cable, 00 State 180792 (Sept. 2000), AILA InfoNet Doc. 0009273.

26) Can an adjustment applicant port if the adjustment applicant decides to consular process?

Yes. As long as the visa petition is approved and the adjustment application was pending for 180 days.¹⁶

27) Will concurrent filing of the adjustment application and visa petition freeze a child's age?

If the principal files an I-140 and I-485 concurrently and the beneficiary "child" is in the United States and wishes to adjust with the principal, the filing of an I-485 by the child contemporaneous with the parent's concurrent filing should protect the child. The child's I-485 will be pending when the parent's I-140 is approved; and, assuming the priority date is current, the child's age will be frozen at the time the I-140 is filed. However, if the priority date is not current when the I-140 is approved, the Child Status Protection Act, which did not anticipate concurrent filing, is rather ambiguous. We believe that the better argument is that the child's age is protected on the date of filing of the concurrent I-485 irrespective of subsequent quota retrogression.¹⁷

28) What if the child was 21 when the adjustment was filed for the principal, is the child eligible to adjust?

Assuming the priority date is current, the child may still be eligible to adjust. Deduct the period of time the I-140 that was filed on behalf of the principal was pending, and subtract this period of time from the child's age to determine the child's filing age. The child must still seek to procure residence within one year of the approval of the parent's I-140.¹⁸

29) Does the child have an argument that he is protected by the CSPA if he failed to file for adjustment when his priority date became current, and subsequently the priority date retrogressed for more than a year?

The CSPA itself does not take into account the possibility that a priority date might be current for a one month period and then subsequently retrogress for over a year. The statute contemplates giving the child a one year period to make an application for the visa or adjustment. Thus, one could argue that the period of time that the child could not apply because the priority date retrogressed tolls the year by the period of time that the priority date was unavailable. One would argue that there was impossibility of performance within the one year filing deadline.

¹⁶ See AILA – Visa Office Liaison Minutes (March 22, 2001), AILA InfoNet doc. 01041804.

¹⁷ See Tammy Fox-Isioff & H. Ronald Klasko, "The Child Status Protection Act - Is Your Child Protected?" 80 Interpreter Releases 973 (July 21, 2003).

¹⁸ *Id.*

30) What happens if an adjustment applicant works without an EAD and without valid nonimmigrant status after the filing of the adjustment application?

The USCIS position, as evidenced in its training materials, is that unauthorized employment after the filing of the adjustment application can bar adjustment. CIS will accumulate any unauthorized employment prior to the filing of the adjustment and unauthorized employment after the filing of the adjustment and, if the total exceeds 180 days since the last entry, the applicant will be considered ineligible to adjust and not protected by INA section 245(k).

31) What if the adjustment applicant fails to maintain any nonimmigrant status after the filing of the adjustment, but does not work without authorization?

The USCIS position is that, as long as any violation of status was less than 180 days after last entry and before the filing of the adjustment application, INA section 245(k) protects the alien's eligibility for adjustment of status.

32) Can an alien have more than one adjustment of status application pending at the same time? For example, what if two spouses have approved I-140s and both spouses file I-485s with their approved I-140s and separate I-485s as derivatives of their spouse's I-140 adjustments?

Although USCIS discourages such duplicate filings, they are not violative of any law or regulation. However, as a practical matter, multiple adjustment filings may result in confusion regarding multiple biometrics, multiple security clearances, multiple RFEs and possible Service withdrawal or denial of one of the two adjustment applications.