CHAPTER 3

Obtaining the Visa Status

Chapter Contents

---

§ 3.01 Introduction

Two federal government agencies are involved in overseeing the U.S. immigration process. The Department of State ("DOS") adjudicates applications for visas that are used during admission to the U.S. at its Consulates and Border Posts. The Department of Homeland Security ("DHS") is responsible for the adjudication of petitions and applications for various immigration benefits, as well as for the admission of foreign nationals to the U.S., through two of its bureaus. The U.S. Citizenship and Immigration Service ("USCIS") adjudicates applications and petitions for various immigration benefits, including those for nonimmigrant classifications, at its four Service Centers. The Bureau of Customs and Border Protection ("CBP") operates the ports of entry to the U.S. and determines whether to grant admission to individual foreign nationals. The CBP also grants the foreign national's immigration status (such as F-1, B-1, or H-1B) and sets the authorized stay (the length of time the foreign national may remain in the U.S.).

For example, most foreign nationals seeking a work-authorizing status in the U.S. while they are residing outside the U.S. must first apply to the USCIS for approval of their classification, then apply to a local consulate for the appropriate visa stamp, and then apply for admission to the U.S. at a port of entry.

Below are charts showing the immigration process for most nonimmigrants and their dependents.

Table 3-1: Overview of Work-Authorizing Statuses

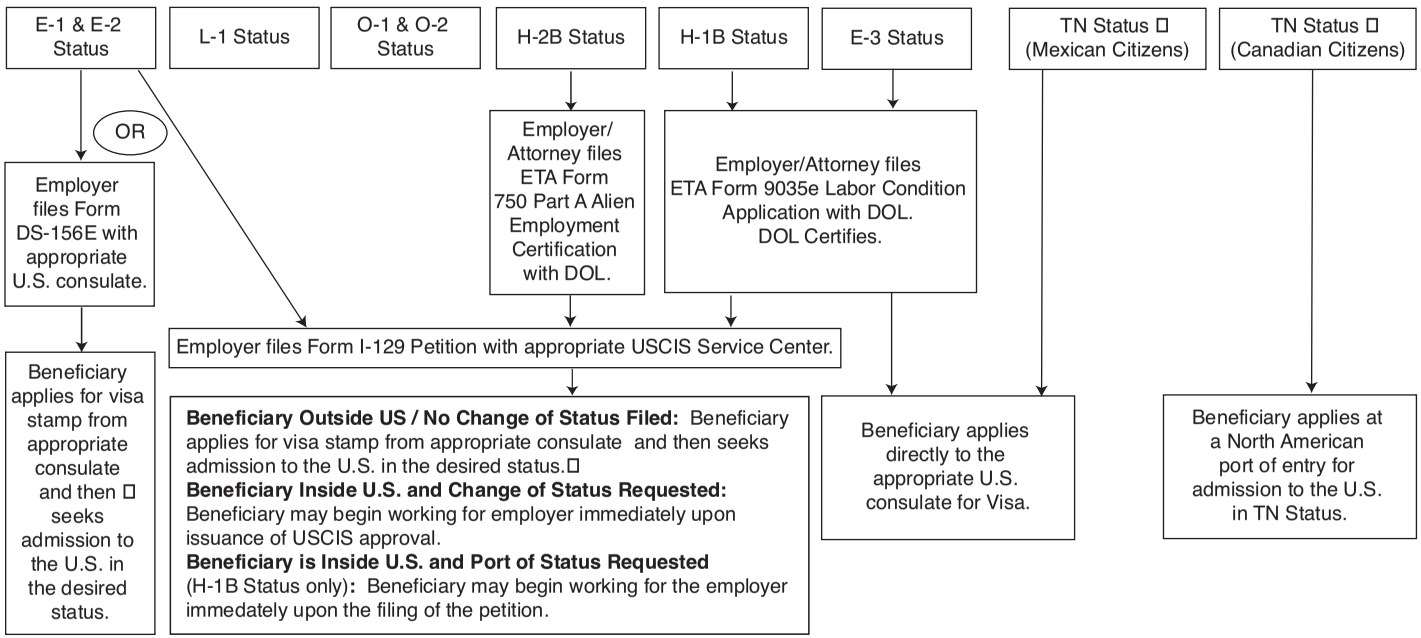
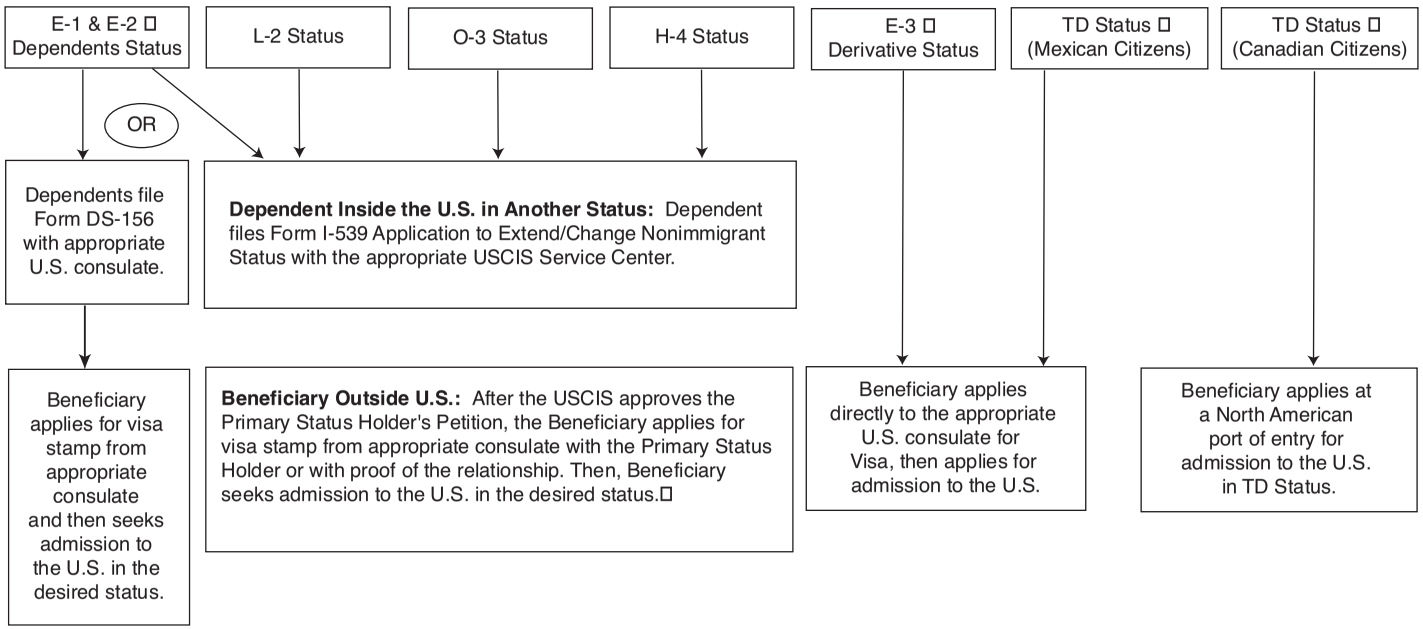


Table 3-2: Overview of F and M Statuses

Table 3-3: Overview of Process to Obtain Derivative Statuses



§ 3.02 USCIS Filings

There are essentially only two types of USCIS filings regardless of whether a USCIS "petition" or "application" is filed; the type of filing actually filed on behalf of a beneficiary is determined both by the foreign national's circumstances and by the immigration strategy developed to expedite the goals of the employer and the foreign national.[1] The two types of filings are (1) those involving beneficiaries who are lawfully present in the U.S., and (2) those involving beneficiaries who are not lawfully present in the U.S. The critical time to determine lawful presence is the date the petition is filed with the USCIS.[2]

[1]—Lawful Presence Generally

Foreign nationals are considered to be "lawfully present" in the U.S. when they (1) are properly admitted to the U.S., (2) maintain their status, and (3) do not overstay.

A foreign national who is not "lawfully present" in the U.S. (due to, for example, a failure to maintain status, a violation of status, or overstaying) is not necessarily "unlawfully present." "Unlawful presence" is presence in the U.S.:

(1) after the expiration of the authorized period of stay as noted on the foreign national's I-94 Arrival Departure Card,

(2) after an immigration judge makes a determination of a status violation in inadmissibility, deportation, or removal proceedings,

(3) after the USCIS makes such a determination while adjudicating an immigration application, or

(4) without admission or parole.[3]

Unlawful presence is not counted in the aggregate.[4]

---

[1] See § 2.01 *supra*.

[2] Lawful or unlawful presence in the U.S. before or after the date of filing must be considered when formulating the overall filing strategy for the employer and beneficiary, but the benefits to which the beneficiary is *entitled* are determined primarily by his or her status on the date of filing.

[3] 9 FAM § 40.92 n.1; Memorandum from Paul W. Virtue, Acting INS Executive Associate Comm'r, to all field offices, File No. 96 Act #058, HQIRT 50/5.12 (Sept. 19, 1997), reprinted in 74 Interpreter Rel. 1498 (Sept. 29, 1997), and 2 Bender's Immigr. Bull. 842 (Oct. 15, 1997). The State Department has confirmed this interpretation. State Dep't. Cable No. 97-State-235245 (Dec. 17, 1997), reprinted in 17 AILA Monthly Mailing 138 (Feb. 1998), 3 Bender's Immigr. Bull. 120 (Feb. 1, 1998), and 75 Interpreter Rel. 53 (Jan. 12, 1998). See also § 2.03[1][j][ii] *supra*.

[4] See § 2.03[1][j][ii] *supra*.

[2]—When the Beneficiary Is Not Lawfully Present in the U.S.

The USCIS does not differentiate in its filing requirements, supporting documentation, and information required among beneficiaries who are, at the time of filing: (1) unlawfully present in the U.S., (2) not lawfully present in the U.S., or (3) outside the U.S. Thus, for example, the same type of filing and supporting documentation would be appropriate for a beneficiary who:

- has never resided long-term in the U.S.
- has resided or worked in the U.S. previously, but is physically outside the U.S. at the time the petition is filed
- is physically present in the U.S., but is not lawfully present. Careful consideration must be given, however, to whether the beneficiary is likely to be granted admission to the U.S. in nonimmigrant status. The USCIS will consider only the beneficiary's eligibility for a classification; it might issue an approval notice, even though the beneficiary's circumstances makes issuance of a visa or admission to the U.S. unlikely.[5]

When a filing for a beneficiary who is not lawfully present in the U.S. is approved by the USCIS, the Form I-797 issued by the USCIS will state that the classification is approved, but that the approval is not a visa and may not be used in place of a visa.[6]

[3]—When the Beneficiary Is Lawfully Present in the U.S.

If a beneficiary is lawfully present in the U.S., then the filing can request that a modification be made to the beneficiary's current status. The request for a given classification (such as H-1B) and a request for a modification of status or stay (such as an extension) are completely separate requests. Thus, a petition to extend H-1B status might result in the USCIS issuing an approval of the classification but also a denial of the extension, resulting in the need for the beneficiary to make a visa application and then seek readmission.

Such modifications include changing to another status, amending the status (such as to accommodate changes in the underlying employment), or extending the status. In all cases, evidence must be provided to show that the beneficiary is both (1) in valid, unexpired status at the time of filing and adjudication, and (2) eligible for the

---

[5] See § 2.03[1][a][i] *supra* for a discussion of the security clearances performed by consulates prior to issuance of visa stamps. See § 2.03 *supra* for a general discussion of the grounds of inadmissibility.

[6] The foreign national must first apply for the requisite visa stamp (if applicable) and then seek admission to the U.S.

change, extension, or amendment. The specific immigration benefit sought by the beneficiary is the primary factor that determines which request is made; the overall immigration strategy devised for the beneficiary might also affect this selection.[7]

[4]—Modifications to Lawful Beneficiary Status

[a]—Change of Status

Change of status ("COS") filings request that the USCIS change the foreign national's status from the existing status to a new status.

Not all changes of status require the formal filing of a petition or application. For example, changes from B-1 to B-2 status without a simultaneous extension of status require only the submission of a letter notifying the USCIS of the change.[8]

The following foreign nationals are ineligible to change status:

- Foreign nationals admitted to the U.S. under the Visa Waiver Program
- C status holders in transit
- D status crewmembers
- K status fiancées and fiancés
- S status witnesses and informants
- J-1 status holders admitted to engage in graduate medical training
- J-1 status holders who are subject to a requirement to return to their home country for two years and who have not received waivers of this requirement

Foreign nationals may not change to F-1 or M-1 status if their proposed studies are being undertaken solely to qualify later for H status.[9] M-1 students may not change to F-1 status.[10] In addition, M-1 students may not change to an H classification if the training they received while in M status has made them qualified for H status.[11]

The circumstances of the filing should not suggest that the foreign national has sought admission to the U.S. and then submitted the COS filing to circumvent U.S. immigration law. For example, if a foreign national sought admission to the U.S. as a tourist and immediately filed to change to F-1 student status, an assumption might arise that

---

[7] See § 3.02[4] *infra*.
[8] 8 C.F.R. § 248.3(e).
[9] 8 C.F.R. § 248.1(c)(1).
[10] *Id*.
[11] INA § 248; 8 U.S.C. § 1258; 8 C.F.R. § 248.21(d).

the foreign national was deceptive during the visa interview as to the true purpose of his or her visit to the U.S. In such circumstances, the USCIS might approve the classification but direct the foreign national to return abroad and submit to a second consular interview and obtain a new visa.[12] Attorneys and foreign nationals should carefully decide whether full disclosure of the foreign national's intentions during the initial consular interview is appropriate, and then whether a COS filing is appropriate, given the manner and timing of the initial admission to the U.S.[13]

COS filings must include evidence that the foreign national holds valid, unexpired status in the U.S. at the time of filing.[14] If the filing occurs after the foreign national's authorized stay has expired, the USCIS can deny the request to change status. It might exercise its discretion to overlook the overstay if (1) the failure to file a timely application was excusable and (2) the foreign national has not otherwise violated the nonimmigrant status, is a *bona fide* nonimmigrant, and is not in deportation proceedings.[15]

The foreign national should remain in status in the U.S. throughout the pendency of the petition.[16] If the USCIS determines that the foreign national is not in valid status or is outside the U.S., it might deny any request for change of status on the basis that the foreign

---

[12] If a finding of fraud is made during the second or subsequent consular interview following admission about the facts presented during the first consular interview, the foreign national could be barred from readmission to the U.S. for five years. INA § 212(a)(6)(C)(i); 8 U.S.C. § 1182(a)(6)(C)(i).

[13] When foreign nationals disclose plans that do not adversely affect their eligibility for nonimmigrant status (such as by disclosing a desire to attend U.S. schools while applying for a tourist visa), consulates generally note the foreign national's intentions in the passport. As a result, the USCIS can then conclude that the foreign national was completely forthright during the interview. 9 FAM § 41.61 n.9.

[14] INA § 248; 8 U.S.C. § 1258; Instructions to Form I-129 Petition for Nonimmigrant Beneficiary, p. 8.

See also:

District of Columbia Circuit: Tsui v. Attorney Gen., 445 F. Supp. 832 (D.D.C. 1978).

Immigration and Naturalization Service: Matter of Hsu, 14 I. & N. Dec. 344 (Reg. Comm'r 1973); Matter of Lee, 11 I. & N. Dec. 601 (Reg. Comm'r 1966); Matter of Buckland, 10 I. & N. Dec. 706 (Reg. Comm'r 1964); Matter of Kyriakrakos, 10 I. & N. Dec. 646 (Reg. Comm'r 1963).

But cf. Unification Church v. Attorney Gen., 581 F.2d 870 (D.C. Cir. 1978), (conceding in *dicta* that it is unclear from the statute whether the applicant must maintain status during the pendency of the application).

[15] *Id*.

[16] *See* memorandum by Thomas Cook, INS Acting Ass't. Comm'r, Programs, "Travel After Filing a Request for a Change of Nonimmigrant Status," File No. HQ 70/6.2.9 (June 18, 2001), posted in AILA Infonet as Document No. 01081635; Letter by Jacquelyn A. Bednarz, Chief, Nonimmigrant Branch, Adjudications, INS CO, to attorney Francis E. Chin, file 248-C (Oct. 29, 1993), discussed and reproduced in 70 Interpreter Rel. 1604, 1626 (Dec. 6, 1993).

national abandoned the application. Even if approval of the nonimmigrant classification is approved, the foreign national likely would be directed to apply to a U.S. consulate or Border Post for a new visa and then apply for readmission to the U.S.[17]

Regulations require merely that the foreign national be in status at the time of filing,[18] but the USCIS takes the position that the foreign national must remain in status throughout the pendency of the application (regardless of how long it takes the USCIS to process it), and up to and including the "start" date of the new status, taking into account any grace periods provided by regulations before and after the validity dates of the statuses in question.[19]

For example, consider an H-1B status holder who files an application to change to F-1 status pursuant to a Form I-20 that shows that the prospective student must report to the school no later than September 1, 2006. Regulations provide a thirty-day grace period before the commencement of school. Thus, the USCIS's position is that the H-1B status must be valid and unexpired through August 2, 2006, which would be thirty days prior to the start date of the studies. This assumes, of course, that the USCIS timely processes the I-539 Application to Change Status.[20]

---

[17] 8 C.F.R. § 214.2(l)(15)(i); 9 FAM § 41.54 n.17c. Departure from the U.S. during the pendency of a change of status petition does not cancel the underlying visa, provided the petition was timely filed and non-frivolous, and the foreign national has not engaged in any unauthorized employment. State Dept. Cable No. 2000-State-102274 (May 30, 2000).

[18] 8 C.F.R. § 248.1(b): ". . . a change of status may not be approved for an alien who failed to maintain the previously accorded status or whose status expired *before the application or petition was filed* . . ." (*emphasis added*).

[19] Questions 8 and 9, AILA NAFSA Open House, June 27-28, 2006, available on AILA InfoNet as Document No. 06062964 (www.aila.org).

[20] This raises certain ethical issues. USCIS processing of Form I-539 applications varies widely—occasionally taking fewer than four months, but more often taking much more than six months. For example, when a filing has been made for a person who is in status at the time of filing but falls out of status six months later, the filer probably has an ethical duty to withdraw the application, notwithstanding that the cause of the failure to maintain status is USCIS delays in processing.

Consider, as another example, an H-1B employee who is terminated during a reduction in workforce on June 1, 2006. The employer gives employee Electra Harris thirty days' notice of the intention to terminate, during which she performs no substantive services but instead only looks for new employment. At the end of thirty days, the employer terminates the relationship completely and provides a small severance. The employer's immigration attorney files on behalf of Ms. Harris (and on behalf of all 100 other foreign employees that were terminated during the layoff) a Form I-539 Application to change to B-2 visitor status. At the time of filing it might be argued that Ms. Harris has no H-1B status to change because she has not provided the services outlined in the petition, even if she has continued to receive the promised wages and benefits, but the USCIS has indicated on several occasions that it usually will exercise its discretion and ignore gaps in status that are about thirty days or shorter after an involuntary termination of employment (Memorandum from

Before the foreign national can engage in the new activities anticipated for the new status, the USCIS must approve filings requesting changes of status.[21] For example, an employer who offers an F-1 student employment and files an H-1B petition on the student's behalf must wait for the petition to be approved by the USCIS before beginning the employment, and a tourist who changes to F-1 status must wait until the USCIS issues its approval before attending school.

When deciding whether to file to change status, applicants should consider the following elements:

(1) processing of the application likely will exceed six months[22]; the application therefore should be filed no less than six months prior to the start of the desired activities;

(2) if the application to change status involves changing to F-1 or M-1 student status, engaging in the student activities before USCIS approval of the application will constitute a failure to maintain the pre-existing status,[23] and therefore invalidate the application; and

(3) if the foreign national's status expires before the adjudication of the COS application and the COS application is denied, the denial will be retroactive to the date of expiration of the pre-existing status. If more than 180 days have passed since that expiration, the foreign national will be subject to the three-year bar.[24]

Michael Cronin, Acting INS Executive Associate Commissioner for Programs, to Michael A. Pearson, Executive Associate Commissioner, Office of Field Operations, "Initial Guidance for Processing H-1B Petitions as Affected by the 'American Competitiveness in the Twenty-First Century Act' (Public Law 106-313) and Related Legislation (Public Law 106-311) and (Public Law 106-396)," HQPGM 70/6.2.8 (June 19, 2001). As more time passes, and the Form I-539 continues to pend with the USCIS, it becomes clear that Ms. Harris no longer has any claims to H-1B status. Once this becomes clear, the employer probably has an ethical obligation to withdraw the application. If, as is promised, premium processing becomes available, then immediate processing of the Form I-539 application would eliminate this issue; unfortunately, without premium processing, attorneys and employers must analyze and decide this issue for themselves.

[21] INA § 248; 8 U.S.C. § 1258.

[22] Check online for current processing times, at www.uscis.gov, before filing the application.

[23] In limited circumstances, nonimmigrants in statuses other than F-1 or M-1 student statuses may engage in full-time studies, but only if such studies are incidental to the activities authorized by the nonimmigrant's valid and unexpired status. Thus, an H-1B worker might be able to engage in full-time studies *if* it can be argued that the full-time studies are incidental to the H-1B work activities and that the work activities continue to be the worker's primary focus. Letter from Jacqueline A. Bednarz, Chief, INS Nonimmigrant Branch, Adjudications, to attorney Jose I. Perez, File CO 214h-C (Jan. 5, 1995), reproduced in Interpreter Rel. 227 (Feb. 6, 1995). Engaging in full-time studies without authorization, while in another status, is risky because it might lead to questioning of whether the foreign national is validly maintaining status.

[24] See § 2.03[1][j][ii] *supra*.

[b]—Amendment of Status

Filings that request amendments of status ask the USCIS to approve material changes in previously approved situations. A material change is a change in a term or condition of the nonimmigrant status that is sufficiently significant to warrant USCIS notification.[25] The USCIS and DOS have declined to define precisely what constitutes a material change.

For employment-based petitions, changes in any of the elements comprising, or relating to, the regulatory conditions for the current nonimmigrant status held by the foreign national constitute material changes.[26] Thus, material changes generally include changes to work sites, duties, or compensation, or to the identity of the employer.

For example, foreign nationals often will change duties or locations in the U.S. without changing their employer or nonimmigrant classification (i.e., remaining in H-1B status at all times). If a change is made to some aspect of an employment relationship, the employer, or the foreign national's circumstances, and this change is not material, the USCIS need not be advised immediately. Instead, the employer or foreign national can advise the USCIS of the change in the next extension filing (should this arise). For example, a change in the employer's business address is not material unless it arises from a broader corporate reorganization.

The USCIS generally must approve an amendment filing before the new circumstances are authorized.[27] The foreign national usually need not obtain a new visa to reflect the amended USCIS approval.[28]

Applications or petitions requesting amendments should be filed before the change takes place even though frequently the application or petition is simply filed as soon as possible after the change occurs if advance notice is not feasible.

---

[25] See, e.g., 8 C.F.R. §§ 214.2(*l*)(7)(C), 214.2(h)(2)(i)(E).

[26] Letter by Yvonne M. LaFleur, Chief, Nonimmigrant Branch, INS Office of Adjudications, to attorney Susan J. Cohen, File No. 214h-C (Oct. 12, 1995), reproduced in 72 Interpreter Rel. 1578, 1600 (Nov. 20, 1995).

[27] The exception to preapproval of an amendment filing is H-1B status. H-1B status holders can "port" their status to a new employer and begin working for the new employer the day the portability petition is filed. INA § 214(m); 8 U.S.C. § 1184(m).

[28] Regulations prohibit the issuance of more than one unexpired visa of a given classification to a foreign national. 9 FAM § 41.113 n.2. A foreign national cannot, therefore, hold two unexpired H-1B visas. When a foreign national amends status but remains within the same classification, the earlier visa must be used during admission and departure, notwithstanding that the employer or other information listed on the visa may no longer be accurate. In such circumstances, the foreign national should also carry a letter from the current employer confirming the employment, and a copy of the Form I-797 Notice of Action confirming the USCIS approval of the amended status. It is also wise for the foreign national to be in possession of a copy

[c]—Extension of Status

Filings that request extensions of status ask the USCIS to extend the foreign national's authorized stay while all other aspects of the previously approved status remain the same. The foreign national need not depart and re-enter the U.S. nor obtain a new visa prior to the status being effective. Instead, the USCIS issues a new I-94 Arrival Departure Card for the foreign national when it approves the filing.

Filings for extension of status must be received by the USCIS on or before the expiration date of the foreign national's current status[29]; however, filing should occur no more than six months prior to the expiration date.[30] Foreign nationals holding C, D, or K status are ineligible to extend their status.[31] Foreign nationals who were admitted to the U.S. under the Visa Waiver Program and F-1 students admitted for "duration of status" may extend their status only in extremely limited circumstances.[32] Timely filed nonfrivolous petitions to extend A-3, E-1, E-2, G-5, H-1, H-2A, H-2B, H-3, I, J-1, L-1, O-1, O-2, P-1, P-2, P-3, R-1, or TN serve to toll the beneficiary's status. Following the expiration of their original stay and for as long as the application or petition is pending, beneficiaries are "in a period of stay authorized by the Attorney General"[33] and continue to be work-authorized for the employer that filed the extension petition.[34]

If the filing occurs after the foreign national's authorized stay has expired, the USCIS can deny the extension request. However, it might exercise its discretion to overlook the overstay if: (1) the failure to file a timely application was excusable; and (2) the foreign national has not otherwise violated the nonimmigrant status, is a *bona fide* nonimmigrant, and is not in deportation proceedings.[35] In such cases, the approval issued by the USCIS will retroactively date the approval

---

of the complete filing, should any questions be raised during admission. See correspondence by Michael L. Aytes, Assistant Commissioner, INS, "Validity of Certain Nonimmigrant Visas" (July 8, 1997), available at www.aila.org as Document No. 97071690.

[29] 8 C.F.R. § 214.1(c).

[30] See Instructions to the Form I-129 Petition reproduced in Appendix A(1) *infra*.

[31] 8 C.F.R. § 214(c).

[32] See §§ 4.01 and 4.02[7] *infra*.

[33] "DOS on Unlawful Presence During EOS/COS Application," DOS memorandum, available on www.aila.org at Document No. 00060202. The filing of the petition does not serve to extend the beneficiary's status—it merely authorizes continued presence in the U.S. and "tolls" status. See Memorandum by Janice Podolny, Chief Inspections Law Division, Office of General Counsel, "Interpretation of 'Period of Stay Authorized by the Attorney General,'" File No. HQCOU 90/15 (Mar. 27, 2003), also reproduced in Appendix H(2) *infra*.

[34] 8 C.F.R. § 274a.12(b)(20).

[35] 8 C.F.R. § 214.1(c)(4).

back to the expiration date of the previous authorized stay and the foreign national will thereby have never been out of status.[36]

Foreign nationals need not remain in the U.S. throughout the pendency of the extension petition although care must be taken. Departure from the U.S. affects neither the petition nor the request for extension of status, but an unexpected quick or slow decision on the pending petition might result in unexpected consequences for the foreign national.[37] If the foreign national has returned to the U.S. by the time the USCIS issues an approval of the extension petition, then the approval will extend the foreign national's status. If the foreign national is outside the U.S. at the time the USCIS issues its approval and the foreign national has time remaining on the previous visa, then the foreign national has a choice between (1) seeking admission to the U.S. with the old but unexpired visa, the new approval notice, and a letter from the employer confirming ongoing employment, or (2) applying for a new visa based on the new approval.[38]

Extensions of status are sometimes possible even if the foreign national has resided in the U.S. for the maximum stay authorized for the nonimmigrant classification in question.[39] Nonimmigrant statuses

---

[36] *Id*.

[37] See memorandum by Thomas Cook, INS Acting Ass't. Comm'r, Programs, "Travel After Filing A Request for Change of Nonimmigrant Status," File No. HQ 70/6.2.9 (June 18, 2001), posted in AILA Infonet as Document No. 01081635; Letter from Jacqueline A. Bednarz, Chief, Nonimmigrant Branch, Adjudications, INS CO, to attorney Francis E. Chin, File 248-C (Oct. 29, 1993), discussed and reproduced in 70 Interpreter Rel. 1604, 1626 (Dec. 6, 1993). See also § 3.02[5][a] *infra* discussing travel and pending extension applications.

[38] See § 3.02[5] *infra*.

[39] The various limits on authorized stay are set by Congress and listed in the Immigration and Nationality Act for each nonimmigrant classification. See generally INA § 214; 8 U.S.C. § 1184.

An "authorized admission" is "the lawful admission of the alien into the United States after inspection and authorization by an immigration officer." INA § 101(a)(13)(A); 8 U.S.C. § 1101(a)(13)(A). The INS initially permitted recapture of each day spent outside the U.S., but since 1994 has permitted recapture only of periods that were "meaningfully interruptive" of the U.S. employment. Memorandum from Lawrence J. Weinig, Acting Assoc. Comm'r., to all INS offices, "Limitations on Admission of H and L Nonimmigrants," File No. CO 214h-C, CO 214L-C (Mar. 9, 1994), reprinted in 71 Interpreter Rel. 582-583 (Apr. 25, 1994); Letter from Jacquelyn Bednarz, Chief, Nonimmigrant Branch Adjudication, to attorney Jeffrey Rummel, File No. CO 214h-C (Feb. 15, 1994), reprinted in 71 Interpreter Rel. 340-341 (Mar. 7, 1994). The USCIS also favors this position.

But see:

Ninth Circuit: Ramirez v. Poulos, 2002 WL 418888286 (C.D. Cal. 2002); Nair v. Coutlice, 162 F. Supp.2d 1209 (S.D. Cal. 2001), holding that permitting recapture only of meaningfully interruptive periods outside the U.S. was unjustifiable and unlawful. These cases hold that *each day* spent by the beneficiary outside the U.S. should be eligible for recapture. Nevertheless, the USCIS has not consistently changed its practice outside these two district courts' jurisdiction.

created under U.S. immigration law exist only while foreign nationals are physically inside the U.S. When they are outside the U.S., foreign nationals do not hold U.S. nonimmigrant status. As a result, most foreign nationals in the U.S. are unlikely to have been physically present in the U.S. for the full period of the authorized stay applicable to the status they have held. Thus, for example, an H-1B status holder who is entitled to six years of H status is unlikely to have held six full years of H status. Vacations or business trips outside the U.S. might have deprived the H status holder of significant time periods of possible H status. The days that were spent outside the U.S. can arguably be "recaptured" for use by the foreign national. Hence, foreign nationals must carefully document each day spent outside the U.S. Forms I-94 Arrival Departure Cards showing the dates of admission to the U.S. and passport stamps showing the dates of departure are generally necessary for such documentation. Canadian citizens who are not issued Forms I-94 upon admission or departure often have difficulties with documentation although they can specifically request issuance of the Form I-94 or obtain other evidence of their admissions and departures.

Regulations exempt certain L and H status holders from complying with the maximum stays if they reside in the U.S. for fewer than 183 days each year, if the employment is part-time, intermittent, or seasonal, or if the foreign national does not otherwise reside in the U.S. "continually."[40] Foreign nationals in such circumstances are eligible to continue extending their status indefinitely without regard to the maximum stays listed in the regulations. Petitions for extensions of status beyond the maximum stays must include evidence of such eligibility, such as copies of Form I-94 Arrival Departure Cards showing the dates of admission to the U.S., and copies of the foreign national's passport showing the dates of departure from the U.S. As with recapture petitions, Canadian citizens might have difficulty providing such evidence unless they have methodically collected documentation of their admissions and departures throughout their stay in the U.S.

The requirements for requesting an extension of status are generally the same as the requirements for the original grant of status, except that the foreign national's passport need not be valid for six months beyond the requested period of stay.[41]

---

[40] 8 C.F.R. § 214.2(*l*)(12)(ii). Beneficiaries whose families reside in the U.S. in L-2 status are ineligible for exemption from the maximum stays. 9 FAM § 41.54 n.22.1c. For L status holders, see § 6.10[2] *infra*. For H status holders, see 5.19[2] *infra*.

[41] Foreign nationals must, however, ensure that their passports remain valid throughout authorized stays. 8 C.F.R. § 214.1(a).

[5]—Variations on the Theme: Complex Filing Situations

[a]—Foreign Nationals Who Travel During Pendency of an Extension Petition

The USCIS's "Last Action Rule" is an important consideration when the appropriate filing strategy for beneficiaries who travel is created. This Rule states simply that the most recent action taken with respect to a specific foreign national—regardless of which DHS agency has taken the action in question—determines the foreign national's immigration status.

Problems can arise if the "last action" by the DHS occurs earlier than expected, or without the foreign national's awareness. Consider, for example, the common situation of a foreign national who, on July 1, 2006, files an application to extend H-1B status from October 1, 2006 through to September 30, 2009. He temporarily departs the U.S. on August 30, and re-enters on September 10. Unknown to the foreign national, the USCIS approved the extension petition a day before the foreign national's return, or on September 9, and its approval notice was in the mail on the way to the attorney. By entering the U.S. using the original approval notice *after* the approval and extension of status were issued by the USCIS, the foreign national eliminated the extension of stay granted by the USCIS, and instead his ongoing authorized stay in the U.S. is the period granted at the port of entry based on the original approval notice, i.e., until September 30. The foreign national must depart again, apply for a new visa based on the new approval of the classification, and then re-enter the U.S to get an authorized stay that matches the period of the new approval. If he does not, but remains in the U.S. after September 30, he will have overstayed, notwithstanding the existence of a new and apparently valid I-797 from the USCIS.

It is not uncommon for a foreign national to be in the U.S. at the time of filing, and then leave the U.S. during adjudication. The foreign national might either return to the U.S. prior to final adjudication by the USCIS (provided the underlying visa stamp is unexpired)[42] or remain abroad when the USCIS issues its decision. Travel

---

[42] The visa stamp and the authorized stay usually expire on the same date. If the petition was filed well before the expiration date, then the foreign national might be able to depart the U.S. and return prior to USCIS adjudication being completed. If the petition is filed close to the expiration date, then it is less likely that the foreign national will have time to depart and return prior to the expiration date and prior to adjudication. The need of the employer and/or beneficiary to travel during the pendency of the petition is an important reason to plan far ahead, and file petitions for extension, amendment, or change of status well in advance of expiration of the existing status.

can therefore pose significant strategy considerations for filings. The following permutations arise:

(1) The foreign national returns to the U.S. following a temporary departure before the USCIS issues its decision *and* before the visa has expired, and the petition is for an extension of status. In this case, the approval notice issued by the USCIS subsequent to re-entry can be relied upon by the foreign national to authorize continued stay and employment in the U.S. because the "last action" taken was the USCIS decision on the filing.

(2) The foreign national's visa expires before or during the temporary departure. This is because the approval of a new petition does not act to cancel or end a pre-existing approval. The only way a pre-existing USCIS grant of status can be ended before its expiration is by violating the status, withdrawing the petition, or formally notifying the USCIS of the termination of the underlying activity (such as employment).

In this case the foreign national must remain outside the U.S. until the USCIS issues its approval notice on the pending petition. The foreign national must then apply with the new approval notice to a U.S. consulate for a new visa stamp for re-admission to the U.S. The foreign national may not use the USCIS approval notice in place of a visa.[43]

(3) The foreign national's visa has not yet expired and the USCIS has issued its decision, but the start date of the new status is postponed until after anticipated travel. For example, an H status holder's authorized stay is valid until December 30, 2005, but a petition requesting a change to E status is filed in March 2005 and approved in June 2005, and the start date of the E status is September 2005. Foreign nationals may travel using old visas and approval notices during readmission, provided they return to their former activities until the start date for the new status. Thus, the foreign national in this example can travel using the previous visa until September 30, 2005, but thereafter must obtain a new visa for re-entry based on the new status.

(4) The visa has not yet expired, but the foreign national is outside the U.S. when USCIS issues its decision on the extension petition. The foreign national thus has (a) a valid visa based on the previously approved status and (b) a new USCIS approval notice that extends or amends the previously approved status:

---

[43] Canadians who do not require visas for the classification in question can use the USCIS approval, once issued, to seek admission to the U.S.

(i) If the petition was for extension of status, then the foreign national may rely on the approval notice and the pre-existing visa for admission to the U.S.

(ii) If the petition is to amend and extend status, then in most cases the foreign national should be able to rely on the approval notice and the pre-existing visa for admission to the U.S. However, admission using the pre-existing visa is inappropriate.

The most common petition is to transfer status from one employer to another while remaining within the same occupational classification. In this case, the foreign national may use the new approval notice and the pre-existing visa. It is possible, however, that the amendment petition contemplates more radical changes, such as participating in an entirely new occupational classification (architect to writer, or computer programmer to lawyer). In these cases, it is unlikely that the CBP will admit the foreign national if reliance is made on the pre-existing visa. Accordingly, when considerable amendment is made to virtually every element of a classification, the foreign national should obtain a new visa based on the petition's approval prior to re-admission

[b]—Multiple Filings for the Same Beneficiary

Given the slowness with which the USCIS adjudicates petitions and applications, and the speed of change in modern employment, situations often arise where the foreign national changes circumstances faster than the USCIS can approve them. This can result in the filing of multiple and/or sequential petitions or applications for the same foreign national.

(1) Consider, for example, a foreign national who holds F-1 student status and graduates in December 2005. Just prior to graduation, she files a Form I-539 to change to tourist status to enable her to tour the U.S. for six months before returning home. USCIS processing of Form I-539 Applications to Change Status can range between four and six months. In March, 2006, she unexpectedly receives an offer of employment. Because of the H-1B Quota situation, the employer files a petition on her behalf on April 1, 2006, requesting a change of her status from B-2 to H-1B, for employment beginning October 1, 2006. Processing of this petition will take approximately two and one-half months. The employer's H-1B petition depends on the approval of the B-2 application that is still pending.

(2) Another common example involves an H-1B status holder who petitions to port (transfer) from Employer A to Employer B on May 15, 2006. The foreign national's H-1B status with Employ-

er A is valid until September 30, 2007. H-1B portability provisions permit the foreign national to begin working at Employer B the day the petition is "filed" even though processing likely will not be complete for another two to three months.[44] The foreign national accordingly begins employment at Employer B on May 16, 2006. Then the foreign national decides to change to Employer C, who files a second portability petition with the USCIS on June 30, 2006. Again, the foreign national uses the H-1B portability provisions and begins working at Employer C on July 1, 2006. This second portability petition depends on the USCIS approval of the first portability petition, because portability is permitted only if the foreign national has not engaged in unauthorized employment.[45] Since the foreign national already was working at Employer B, the employment must be authorized, which means that Employer C depends on the USCIS approving Employer B's portability petition.

(3) A final example involves those beneficiaries who cannot make up their minds. On January 1, 2006, a foreign national whose H-1B status with Employer A is valid until September 30, 2008, might decide to port to Employer B. After a year with Employer B, Employer A might convince the beneficiary to return. No new petition need be filed if Employer A's H-1B approval has not been withdrawn or otherwise ended.[46]

In each case, a series of relatively simple considerations will help clarify the foreign national's situation:

- A petition or application is timely if it is filed before the expiration of the current status.[47]
- The filing of a timely nonfrivolous application or petition does not extend status.[48]

---

[44] See § 5.17 *infra* discussing portability petitions.

[45] And, as a corollary matter, maintenance of the H-1B status that the employer seeks to port depends also on compliance with the terms of the petition in question. Violation of the terms, such as engaging in unauthorized employment, results in a loss of status, and there is consequently no longer any status to port.

[46] There are potential serious consequences to failing to withdraw an H-1B petition or otherwise notify the USCIS of the termination of the employment. See § 5.16 *infra*.

[47] See 8 C.F.R. § 248.1(a) (for changes of status); 8 C.F.R. § 214.1(c)(4) (for extensions of status).

[48] See Memorandum by Janice Podolny, Chief Inspections Law Division, Office of General Counsel, "Interpretation of 'Period of Stay Authorized by the Attorney General,'" File No. HQCOU 90/15 (Mar. 27, 2003); Memorandum by Thomas E. Cook, INS Acting Ass't. Comm'r, Adjudications, "Guidance on 'Period of Stay Authorized by the Attorney General' in Determining 'Unlawful Presence' under section 212(a)(9)(B)(ii) of the Immigration and Nationality Act," both available at http://uscis.gov/graphics/lawsregs/handbook/chronpol.htm. See also Appendices H(2) and H(3) *infra*.

- During the pendency of a timely filed nonfrivolous application or petition, the foreign national is "in a period of stay authorized by the Attorney General" and hence, the foreign national is not unlawfully present.[49] However, a denial of an application or petition will result in a finding of unlawful presence retroactive to the date of expiration of the original status.[50]
- USCIS approval of a subsequent petition or application, or a subsequent CBP grant of status, does not "end" a previously approved grant of status.[51]
- The Last Action taken by any DHS agency will determine the status of the beneficiary.[52]

Accordingly, in Example 1 above, involving the student, she was in "in a period of stay authorized by the Attorney General" between (1) sixty days following graduation (which is when her F-1 status ended) and (2) the approval of the B-2 application by the USCIS. She is not "in status" during either period. Accordingly, the employer cannot petition to change her status from F-1 to H-1B; it must petition to change her status from B-2 to H-1B and hope that the USCIS will approve the B-2 COS application.

In Example 2 above, involving the porting H-1B status holder, the foreign national is in status the entire time. This is because the I-94 governing the status never expires, despite the many changes in employment. Status will end, however, if the USCIS denies one of the portability petitions, in which case it will end on the date of the USCIS adjudication.

In Example 3 above, the foreign national is, again, in status the entire time. He is authorized to move from Employer A to Employer

---

[49] See Memorandum by Thomas E. Cook, INS Acting Ass't. Comm'r, Adjudications, *id*.

[50] *Id*. With lengthier adjudications, such as those for Form I-539 Applications to Change or Extend Status, care should be taken to monitor the time following the expiration of the original status. A three-year bar to readmission arises if the foreign national is unlawfully present in the U.S. for more than 180 days. Thus, for example, if the foreign national applies on February 27 (the day before the expiration of status on February 28) to change status and the USCIS denies the application on September 15, the foreign national will have been unlawfully present for more than 180 days (in this example, 199 days). The foreign national will therefore abruptly find his status changed from having been in a period of stay that is authorized by the Attorney General to having been unlawfully present the entire time, and thus subject to the three-year bar.

[51] Letter from Efran Hernandez III, Director, Business and Trade Services, to attorney Sheila Murthy, File HQ 70/6.2.8 (Apr. 24, 2002), available on AILA Infonet at Document No. 02051432.

[52] Letter from Jacqueline A. Bednarz, Chief, Nonimmigrant Branch, Adjudications, INS CO, to attorney Francis E. Chin, File 248-C (Oct. 29, 1993), discussed and reproduced in 70 Interpreter Rel. 1604, 1626 (Dec. 6, 1993).

B and then back to Employer A because Employer A's approval continues to be valid the entire time.[53]

[6]—Naming Conventions

Full names must be used on all USCIS applications, petitions, and requests for benefits.[54]

It is not uncommon for foreign nationals to have slightly (or, occasionally, significantly) different names on their different documents. This is particularly widespread where the foreign national's original alphabet is not Roman, and thus the name is transliterated. This also commonly arises with certain ethnicities, where it is popular to choose "American" names upon arrival in the U.S. and to use those names as if they were their real legal names, on official documents. In such cases, the USCIS adjudicator will analyze the case on its individual merits, given the number and frequency of the different spellings and the types of documents where each different version of name appears.[55] The most weight will be given to birth certificates and similar, contemporaneous documents. Weight also will be given to legal documents effecting changes of names.[56]

In filings, it is critical—both to ensure timely and efficient processing of the petition and to minimize later problems by the foreign national during applications for visas and/or admission—that the correct legal name be used in the filing, notwithstanding the foreign national's preference for other, non-legal names. Full compliance with the USCIS's policies about legal name conventions should be followed, and all other "less" legal versions of the applicant's names should appear on the filing as "also known as."

---

[53] Again, serious consequences could arise as a result of failing to withdraw an H-1B petition or otherwise notify the USCIS of the termination of the employment. See § 5.16 *infra*.

[54] USCIS Adjudicator's Field Manual, §§ 15.17, 51.4 (available online at www.uscis.gov).

[55] Question 14, NAFSA Open House, June 27-28, 2006, available online as AILA InfoNet Document No. 06062964 (www.aila.org).

[56] Although most name changes are effected through court or similar legal proceedings, many countries permit foreign nationals to adopt new names during naturalization. The only documentation of this type of name change is the naturalization certificate in the new name.