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Immigration and Naturalization Service

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AMENDED VERSION

MEMORANDUM FOR REGIONAL DIRECTORS
SERVICE CENTER DIRECTORS
DISTRICT DIRECTORS
OFFICERS IN CHARGE
ASYLUM DIRECTORS
PORT DIRECTORS

FROM: MICHAEL D. CRONIN
ACTING ASSOCIATE COMMISSIONER
OFFICE OF PROGRAMS

SUBJECT: AFM Update: Revision of March 14, 2000 Dual Intent Memorandum.

This memorandum supersedes and amends the March 14, 2000 memorandum on dual intent for H-1 and L-1 nonimmigrants with pending applications for adjustment of status, which changes the *Adjudicator's Field Manual*, Chapter 23.

Please note that the Service intends to address these issues definitively when the Service finalizes the interim rule published on June 1, 1999, at 64 *Fed. Reg.* 29,208 (1999). When the final rule enters into force, the final rule, not this memorandum, will be controlling.

I. In Chapter 23 of the Adjudicator's Field Manual, the questions and answers added at APPENDIX 23-4, entitled *FREQUENTLY ASKED QUESTIONS ABOUT TRAVEL OUTSIDE THE UNITED STATES BY AN H-1 OR L-1 NONIMMIGRANT WHO HAS APPLIED FOR ADJUSTMENT OF STATUS*: by the March 14, 2000 memorandum, are removed and replaced with the questions and answers below:

1. If an H-1 or L-1 nonimmigrant has filed for adjustment of status under an employment-based preference category that requires an offer of employment in the United States, does the interim rule affect the applicant's responsibility to establish his/her intent to work for the petitioning entity?

No. If an H-1 or L-1 has filed for adjustment of status under an employment-based preference category that requires an offer of employment in the United States, the applicant still has the responsibility of establishing his/her intent to work for the petitioning entity after becoming a permanent resident. Neither the rule nor the guidance has modified this requirement or the corresponding requirement that the employer establish his/her intent to employ the applicant.

In the interim rule and initial guidance, the term "open-market employment" was used to mean unrestricted access to employment. Applicants with pending applications for adjustment of status are eligible to apply for an employment authorization document (EAD). With an EAD, an alien has access to unrestricted employment, the "open-market". However, if the applicant is adjusting status under an employment-based preference category that requires an offer of employment in the United States, the fact that an applicant is able to work in the open-market does not alter the applicant's responsibility to demonstrate an intent to work for the petitioning employer.

2. If an H-1 or L-1 nonimmigrant or H-4 or L-2 dependent family member obtains an EAD based on their application for adjustment of status but does not use it to obtain employment, is the alien still maintaining his/her nonimmigrant status?

Yes. The fact that an H or L nonimmigrant is *granted* an EAD does not cause the alien to violate his/her nonimmigrant status. There may be legitimate reasons for an H or L nonimmigrant to apply for an EAD on the basis of a pending application for adjustment of status. However, an H-1 or L-1 nonimmigrant will violate his/her nonimmigrant status if s/he uses the EAD to *leave* the employer listed on the approved I-129 petition and *engage* in employment for a separate employer.

3. If an H-1 or L-1 nonimmigrant has traveled abroad and was paroled into the United States via advance parole, the alien is accordingly in parole status. Does this interim rule allow him or her to now apply for an extension of nonimmigrant status?

Until the final rule is published, an alien who was an H-1 or L-1 nonimmigrant, but who was paroled pursuant to a grant of advance parole, may apply for an extension of H-1 or L-1 status, if there is a valid and approved petition. If the Service approves the alien's application for an extension of nonimmigrant status, the decision granting such an extension will have the effect of terminating the grant of parole and admitting the alien in the relevant nonimmigrant classification.

4. If an H-1 or L-1 nonimmigrant has traveled abroad and reentered the United States via advance parole, the alien is accordingly in parole status. How does the interim rule affect that alien's employment authorization?

A Service memorandum dated August 5, 1997, stated that 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)." The Service intends to clarify this issue in the final rule. Until then, 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 Service will not consider a paroled adjustment applicant's failure to obtain a separate employment authorization document to mean that the paroled adjustment applicant engaged in unauthorized employment by working for the H-1 or L-1 employer between the date of his or her parole and the date to be specified in the final rule.

5. Should an alien returning to the United States from travel abroad who has a valid I-512 and a valid H-1 or L-1 nonimmigrant visa be paroled in or readmitted in H-1 or L-1 status?

If an alien has a valid H-1 or L-1 nonimmigrant visa and is eligible for H-1 or L-1 nonimmigrant status and also has a valid Form I-512, he or she may be readmitted into H-1 or L-1 status or be paroled into the United States. It is the alien's prerogative to present either document at inspection. However, if an alien presents both a valid H-1 or L-1 nonimmigrant visa and a valid Form I-512, and the alien is eligible for the H-1 or L-1 nonimmigrant classification, the Service should inform the alien that H-1 and L-1 nonimmigrants no longer need to use advance parole to preserve pending applications for adjustment of status and should admit the alien in H-1 or L-1 nonimmigrant status. The fact that an alien has applied for advance parole and received Form I-512 does not compel him or her to use the advance parole.

If the alien is not admissible as an H-1 or L-1 nonimmigrant, then he or she cannot be readmitted as an H-1 or L-1 nonimmigrant. Instead, such an alien may be paroled into the United States.

6. Is an alien who has a multiple entry I-512 and who has previously been paroled into the United States now eligible for admission as an H-1 or L-1 if he or she is still in possession of a valid H-1 or L-1 visa?

Yes, the alien may be admitted as an H-1 or L-1. However, aliens returning from abroad may only be admitted as an H-1 or L-1 when they have a valid H-1 or L-1 visa (unless visa exempt), remain eligible for H-1 or L-1 classification, and, where there has been a recent change of employer or extension of stay, have evidence of an approved I-129 petition in the form of a Notice of Action, Form I-797, indicating approval or a notation

on the nonimmigrant visa indicating the petition number and the employer's name. If they do not meet these criteria, then they use their I-512.

II. In Chapter 15.4 of the *Inspector's Field Manual*, the Special Note A for nonimmigrant classification H-1B should be revised to read as follows:

(A) Foreign residence requirement. H-1B does not have to establish he or she has a foreign residence. For information pertaining to dual intent, see AFM Appendix 23-4.

III. In Chapter 15.4 of the *Inspector's Field Manual*, add Special Note E for nonimmigrant classification L-1 to read as follows:

(B) Dual intent. For discussion of applicability of dual intent, see AFM Appendix 23-4.

Field Inquiries

All operational regional program units should familiarize themselves with this memorandum and related procedures in order to be responsive to any inquiry from the field. Questions regarding this memorandum may be directed, through appropriate supervisory channels to HQADN. For issues concerning H or L status, contact John Brown or Irene Hoffman, respectively, at 202-353-8177. For issues concerning advance parole, contact Michael Valverde at 202-514-4754.