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Change of status/ Traveling while petition pending

B visa

A foreign business person or tourist may have legitimate reason to change his or her status from the B-1 or B-2 category to a different nonimmigrant status.

If a change of nonimmigrant status is sought, be aware that such an application can raise questions about the intention of the B-1 or B-2 nonimmigrant at the time of applying for a visa or at the time of seeking admission at a U.S. port of entry. Most B-1 or B-2 trips are relatively short in duration, and a quick application for change of nonimmigrant status could arouse suspicions that the visitor had the intention **at the time of admission to the United States** to engage in the activity for which the change of status is sought. Such intention would be a violation of the terms under which the visitor was originally issued his or her visa and admitted to the United States, and could lead to a denial of the change of status application. The Immigration Service has sometimes denied change of status applications on the basis of preconceived intent in cases involving changes from B-2 tourist classification to F-1 student status.

J visa

The USCIS approval of the change of status application gives the exchange visitor the right to remain in the U.S. subject to the conditions of the J-1 category. However, if the student leaves the United States, he or she cannot reenter without first obtaining a J-1 visa from a U.S. consulate outside of the U.S. This visa is obtained in much the same way that the original visa would be obtained if the exchange visitor applied from abroad for student status.

An alien on whose behalf a change of status application has been filed and who travels outside the United States before the request is adjudicated is considered to have abandoned the application. As a result, the application should be denied. This has been the agency's long-standing policy on the issue. The practical result of this policy is that such persons will need to apply for a J-1 visa abroad before seeking readmission.

The USCIS takes the position that if someone has an approved change of status application, and then travels and re-enters prior to the time that the change takes place, the person may continue to assume the approved status on the effective date. The new USCIS letter (issued in August 2004) re-confirms the policy regarding the effect of travel on an approved change of status that was set out in correspondence issued in 1995. The 1995 letter applied the so-called "last action rule" that had been articulated in earlier INS correspondence and stated that if someone has an approved change of status from F to H, and then travels and re-enters prior to the time that the change of status is effective, the person's status will automatically change from F to H on the effective date (so long as the re-entry in F-1 status was bona fide). The August 2004 opinion confirms this, and specifically refers to the "last action rule." Note that it still remains USCIS policy, however, that a foreign national on whose behalf a change of status application has been filed and who travels outside of the United States before the application is adjudicated is considered to have abandoned the request for a change of status.

E visa

The alien has two ways to become an E treaty alien:

- He or she can return to his or her home country or a consulate in a third country and make an E visa application at the U.S. consulate there. Note that the U.S. consulates in Canada and Mexico often place restrictions on E visa applications from third country nationals (i.e., non-Canadians) when the alien is already in the United States in valid status. The policy of these consulates changes frequently, and must be checked before attempting to process an E visa application at one of them.
- He or she can file a change of status application in the United States with the USCIS. This application, as noted above, is normally from B-1 business visitor status to the E treaty status.

L visa

An alien on whose behalf a change of status application has been filed and who travels outside the United States before the request is adjudicated is considered to have abandoned the application. As a result, the application should be denied. This has been the agency's long-standing policy on the issue. The practical result of this policy is that such persons will need to apply for an L-1 visa abroad before seeking readmission (and have the post abroad notified of the L-1 petition approval).

The USCIS takes the position that if someone has an approved change of status application, and then travels and re-enters prior to the time that the change takes place, the person may continue to assume the approved status on the effective date. The new USCIS letter (issued in August 2004) re-confirms the policy regarding the effect of travel on an approved change of status that was set out in correspondence issued in 1995. The 1995 letter applied the so-called "last action rule" that had been articulated in earlier INS correspondence and stated that if someone has an approved change of status from F to H, and then travels and re-enters prior to the time that the change of status is effective, the person's status will automatically change from F to H on the effective date (so long as the re-entry in F-1 status was bona fide). The August 2004 opinion confirms this, and specifically refers to the "last action rule." Note that it still remains USCIS policy, however, that a foreign national on whose behalf a change of status application has been filed and who travels outside of the United States before the application is adjudicated is considered to have abandoned the request for a change of status.

H-2B

If an alien is already present in the United States in a nonimmigrant classification, it is unlikely that a reason will exist to apply for a change of his or her status to the H-2B category. This is because of the nature of the H-2B category, which is designed for workers who enter the United States to provide skills for which the employer has a temporary need, generally for a period of stay not in excess of one year.

The USCIS and DOL issued proposed rules in January 2005 that would significantly alter the H-2B program. Under the proposed one-step process, most employers will no longer be required to file for a labor certification from the Labor Department before filing a petition with the USCIS. Instead, most employers would be required to electronically file a petition and an H-2B attestation directly with the USCIS after conducting their recruitment for U.S. workers.

H-3 visa

There are occasions when an alien who qualifies for H-3 status is already present in the U.S. in a different nonimmigrant category. For example, an alien may be present in the U.S. pursuing a course of study at an approved U.S. university (F-1 visa category). Upon graduation, a company might decide to give the alien training in its U.S. operations, with the intention of transferring him or her later to a foreign subsidiary. This scenario is not uncommon and can justify a change of nonimmigrant status from the F-1 category to the H-3 category.

Under the USCIS regulations, an explicit basis for denial of an H-3 change of status is when an employer is seeking to change a practical trainee in the F-1 category to H-3 status in order to provide training that could not be completed in the one-year period for practical training.

An alien on whose behalf a change of status application has been filed and who travels outside the United States before the request is adjudicated is considered to have abandoned the application. As a result, the application should be denied. This has been the agency's long-standing policy on the issue. The practical result of this policy is that such persons will need to apply for an O or P visa abroad before seeking readmission (and have the post abroad notified of the O or P petition approval).