

MEMORANDUM

HQ 70/6.2.5, 70/6.2.9, 70/6.2612, 70/23.1, 120/17.2

Subject: Special Considerations for Adjustment of Status Applicants:

Date: Aug. 5, 1997

A: Maintenance of E, H, or L Nonimmigrant Status.

B. Continued Validity of Unexpired Nonimmigrant Employment Authorizations.

To All Regional Directors

Attn. ROADN, ROINS, ROINV, ROCOU

From

All District Directors (Including Foreign)

Office of Programs

Attn. EXM, INS, INV, COU

All Officers in Charge (Including Foreign)

All Service Center Directors

All Asylum Office Directors

Training Academics (Glynco and Artesia)

This office has received a number of inquiries from the public concerning the ability of an E, h-1b, or L nonimmigrant alien both to maintain such nonimmigrant status and to see an extension of temporary stay during the pendency of his or her application for adjustment of status to that of permanent resident. This memorandum clarifies the Service's interpretation of section 214(h) of the Immigration and Nationality Act (INA) as it applies to these issues.

A. Maintenance of E, H, or L Nonimmigrant Status.

Section 214(h) of the INA provides, in pertinent part, "The fact that an alien is the beneficiary of an application for a preference status filed under section 204 or has otherwise sought permanent residence in the United States shall not constitute evidence of an intention to abandon a foreign residence for purposes of obtaining a visa as a nonimmigrant described in subparagraph (H)(i) or (L) of section 101(a)(15) or otherwise obtaining or maintaining the status of a nonimmigrant described in such subparagraph..."

Further, the regulation at 8 CFR 214.2(h)(16) provides, in part, that an H-1B nonimmigrant alien may legitimately come to the United States for a temporary period as an H-1B nonimmigrant and depart voluntarily at the end of his or her authorized stay and, at the same time, lawfully seek to become a permanent resident of the United States. Similar language is contained in the regulation at 8 CFR 214.2(1)(16) with respect to L-1 nonimmigrant aliens.

Also, section 101(a)(15)(e) of the INA does not subject treaty nationals in E nonimmigrant classification to a requirement to maintain a foreign residence that they have no intention of abandoning. E nonimmigrants have long been able to extend their

stay indefinitely in the United States in order to pursue their treaty-based activities and to return to E classification, should an application for adjustment of status be denied.

Based on the language contained in the statute and the supporting regulations, an E-1, E-2, h-1b, or an L-1 nonimmigrant alien (and any of such person's derivatives) may maintain status or obtain an extension of temporary stay while, at the same time, pursuing an application for adjustment of status. Therefore, an application for an extension of stay that is timely filed on behalf of an E-1, E-2, h-1b, or L-1 nonimmigrant alien may be approved in spite of the alien's pending application for adjustment of status. Note that H-1B and L-1 nonimmigrants with pending adjustment applications remain subject to statutory limit on the duration of such status (set forth in INS sections 214(g)(4) and 214(c)(2)(D)(i) and (ii) respectively) and along with E nonimmigrants must continue to observe the requirements of their nonimmigrant status, including limiting employment to the designated employer. Also, pending a change in 8 CFR 245.2(a)(4)(ii), an E-1, E-2, H-1B, or L-1 nonimmigrant must continue to follow the requirement of obtaining advance parole for travel outside of the United States in order to avoid automatically abandoning his or her adjustment application.

An E-1, E-2, h-1b, or L-1 nonimmigrant who has filed an application for adjustment of status may choose between working pursuant to their continued nonimmigrant employment authorization under 8 CFR 274a.12(b)(5), (9), (12), or (20) or filing form I-765 for employment authorization as an adjustment applicant under 274a.12(c)(9). E-1, E-2, h-1b, or L-1 adjustment applicants choosing to apply for an employment authorization document (EAD) under 8 CFR 274a.12(c)(9) may continue to work under their unexpired nonimmigrant employment authorization, while waiting for adjudication and receipt of the EAD. After receiving the EAD, the alien may work for any employer desired and is not subject to E, H, or L restrictions. However, such an alien would lose his or her E-1, E-2, h-1b, or L-1 nonimmigrant status by working in open-market employment.

If the I-485 adjustment application is denied, the alien will only be subject to removal proceedings if he or she is not otherwise qualifies to continue to maintain E, H-1, or L nonimmigrant status in the United States.

B. Continued Validity of Unexpired Nonimmigrant Employment Authorizations.

The Service has previously announced a clarification of the term "unauthorized alien" in new section 245(c)(8) of the Act. Under this clarification, nonimmigrants may, after filing for adjustment status, continue working in the same job and for the same employer for the duration of an unexpired employment authorization without being deemed to have been employed while an "unauthorized alien" as defined in section 274A(h)(3) of the Act. The clarification allows not only E-1's, E-2's, H-1's, and L's, but all nonimmigrants to continue to work pursuant to an unexpired employment authorization while waiting for adjudication and receipt of the EAD issued under 8 CFR 274a.(12)(c)(9). This provision includes not only those categories under 8 CFR 274a.12(b) incident to status but also those categories which must be specifically applied for under 274a.12(c) and which must

also be evidenced by EAD cards. Those with open-market employment authorization under 8 CFR 274a.12(c) may change employment and employers.

Any applicant relying on an expiring nonimmigrant employment authorization must apply for an adjustment-based EAD at least ninety days before the expiration in order to ensure continuity of employment authorization. Because of normal processing requirements and heavy workloads, the Service cannot provide any assurances that applications filed within ninety days of expiration can be adjudicated prior to the lapse of employment authorization. See 8 CFR 274.a13(d). Adjustment applicants are urged to file a Form I-765 application on the basis of 8 CFR 274a.12(c)(9) concurrently or as soon as possible after filing the Form I- 485 to avoid a lapse of employment authorization. Otherwise, the adjustment applicant must await issuance of an EAD from the Service before he or she may engage lawfully in employment. INS Service Centers will continue to entertain requests for expeditious handling of form I-765 employment authorization requests in accordance with prevailing criteria.

For any period of time until September 30, 1997, an adjustment applicant may overcome unauthorized employment described in INA 245(c)(8) by supplemental filing under the provisions of INA 245(i) and the recent interim rule at 8 CFR 245.10(c), (d), and (f).

Furthermore, the adjustment applicant's otherwise valid and unexpired nonimmigrant employment authorization described above 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 I-485 adjustment application is denied, any employment authorization granted to the alien on the basis of the adjustment application will be subject to termination pursuant to 8 CFR 274.a14(b) and the alien will be subject to removal proceedings.

For further clarification on the effect of section 245(c)(8) on adjustment applicants, please refer to the INS Office of Examinations memorandum of May 1, 1997 and the supplementary Information of the interim rule that was published on July 23, 1997 (62 F.R. 39417, 39421).

The Office of Field Operations has concurred with this memorandum. Questions regarding maintenance and extension of E-1, E-2, h-1b, or L status may be directed through appropriate supervisory channels to HQBEN, ATTN: John W. Brown, Adjudications Officer, 202-514-5014. Questions regarding the continued validity of nonimmigrant employment authorization after adjustment of status filing may be directed through appropriate supervisory channels to HQBEN. ATTN: Gerald Casale, Adjudications Officer, 202-514-5014. Questions regarding advance parole travel by adjustment of status applicants may be directed through appropriate supervisory channels to HQBEN, ATTN: Ron Chirlin, Adjudications Officer, 202-514-5014.

Paul W. Virtue, Acting Executive Associate Commissioner, Programs

