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EXTENDING VISITOR VISA STATUS DURING COVID-19 AND AFTER THE BIRTH TOURISM RULE

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Visitors who have been admitted in B-2 visa status may extend their status while in the United States. Even if a visitor has a multiple entry visa in the passport for a duration of ten years, the visitor is admitted into the US for a more limited time at a port of entry, which is generally a period of six months in B-2 status.

Since the COVID-19 pandemic, many visitors have sought to extend their status as flights are not yet plying to their home country or they may wish to avoid flying out of fear of contracting the infection. Some countries have put restrictions on travelers from the US. A request to extend B-2 status may be made by filing Form I-539 pursuant to 8 CFR 214.1(c)(1) either electronically or through a paper-based application. Although this blog's focus is on filing an extension for B-2 status, it is also possible to change from another nonimmigrant status to B-2 status pursuant to 8 CFR 248.1. Many nonimmigrants in H-1B or L status who have lost their jobs due to the economic downturn caused by Covid-19 have had to resort to changing to B-2 status due to non-availability of flights to their home country. Note that one who was admitted under the Visa Waiver as a visitor for 90 days is not eligible for filing for an extension of status, although a Visa Waiver entrant may apply for a 30 day extension directly wither with USCIS or CBP called Satisfactory Departure.

In order to be eligible to request an extension of B-2 status or a change to B-2 status, it is important for the applicant to have maintained her current nonimmigrant status. If the visitor has engaged in unauthorized employment, he will be ineligible to request an extension of status. Although the extension or change of status request must be filed timely, the USCIS has authority to

exercise its discretion in excusing an untimely filing based on extraordinary circumstances beyond the control of the applicant. The applicant must also demonstrate that she has not otherwise violated nonimmigrant status, continues to remain a bona fide nonimmigrant and is not the subject of removal proceedings. The USCIS has indicated that it will consider late filings caused as a result of Covid-19. See 8 CFR 214.1(c)(4) for authority for excusing untimely filings for extensions of status and 8 CFR 248(b) for excusing untimely filings for change of status.

There are very harsh consequences if the applicant overstays the terms of his stay in the US. Overstaying one's visa results in the automatic voidance of the multiple entry visa on the passport under INA 222(g). Overstaying beyond the expiration of the nonimmigrant status, governed by the I-94, for more than 180 days results in a 3-year bar against re-entry under INA 212(a)(9)(B)(i)(I). Furthermore, overstaying the visa for more than one-year results in a 10-year bar against re-entry under INA 212(a)(9)(B)(i)(II). Therefore, ensuring that the I-539 is timely submitted (of if not timely submitted, it is at least excused by USCIS) will toll the accrual of unlawful presence, and thus avoid the triggering of automatic voidance of the visa stamp or the accrual of unlawful presence that will result in the 3- or 10-year bars to reentry into the United States.

At the time of submission, Form I-539 must be accompanied by evidence that the reason for the extension is consistent with the purpose of the visitor visa, and the visitor continues to maintain a residence in the home country as well as ties with that country. It is also strongly recommended that a sworn statement is included that clearly indicates the need for the extension and the change of intention since the initial admission to stay longer, along with an I-94 printout and other evidence of financial sufficiency and support. A Form I-134, Affidavit of Support, may also be submitted to bolster the evidence of financial support. The new public charge rule took effect on February 24, 2020 and applies to extension and change of status requests. The USCIS will consider whether an applicant seeking an extension of stay or change of status has received, since obtaining the nonimmigrant status she seeks to extend or from which he or she seeks to change, public benefits for more than 12 months, in total, within any 36-month period, such that, for instance, the receipt of two benefits in one month counts as two months. Among the prohibited benefits is federally funded Medicaid, although Medicaid funding for an emergency medical condition will not be considered, which includes emergency labor and

delivery. Noncitizens regardless of status are eligible to receive Medicaid for an emergency medical condition. See 42 CFR 440.255A. Form I-539 has new sections that require applicants to check off whether they have accepted prohibited benefits.

Notwithstanding the Medicaid exception for emergency medical conditions, including pregnancy and birth, applicants have to be very careful regarding applying for extensions based on health reasons, especially relating to pregnancy and birth. The Trump administration has amended the definition of visitor for pleasure at 22 CFR 41.31(b)(2) to prohibit so called birth tourism. The original version of this rule, before it was amended on January 24, 2020, defined "pleasure" as stated in INA 101(a)(15(B) "to legitimate activities of a recreational character, including tourism, amusement, visits with friends or relatives, rest, medical treatment, and activities of a fraternal, social, or service nature." Now 22 CFR 41.31(b)(2)(i) includes the old definition for pleasure but adds that the term "pleasure" does not include obtaining a visa for the primary purpose of obtaining US citizenship for a child by giving birth in the United States. The new rule at 22 CFR 41.31(b)(2) is reproduced in verbatim below:

> *(i) The term pleasure, as used in INA 101(a)(15)(B) for the purpose of visa issuance, refers to legitimate activities of a recreational character, including tourism, amusement, visits with friends or relatives, rest, medical treatment, and activities of a fraternal, social, or service nature, and does not include obtaining a visa for the primary purpose of obtaining U.S. citizenship for a child by giving birth in the United States.*
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> *(ii) Any visa applicant who seeks medical treatment in the United States under this provision shall be denied a visa under INA section 214(b) if unable to establish, to the satisfaction of a consular officer, a legitimate reason why he or she wishes to travel to the United States for medical treatment, that a medical practitioner or facility in the United States has agreed to provide treatment, and that the applicant has reasonably estimated the duration of the visit and all associated costs. The applicant also shall be denied a visa under INA section 214(b) if unable to establish to the satisfaction of the consular officer that he or she has the means derived from lawful sources and intent to pay for the medical treatment and all incidental expenses, including transportation and living expenses, either independently or with the pre-arranged assistance of others.*

> *iii) Any B nonimmigrant visa applicant who a consular officer has reason to believe will give birth during her stay in the United States is presumed to be traveling for the primary purpose of obtaining U.S. citizenship for the child.*

President Trump has always intended to abolish birthright citizenship even though it is protected under the Fourteenth Amendment of the US Constitution. Knowing fully well that the abolition of birthright citizenship would require a constitutional amendment, the Trump administration quietly amended the State Department regulation as a step towards discouraging pregnant women from entering the US to give birth to children who then automatically become US citizens. While birthright citizenship has advantages, and abolishing it will be a bureaucratic nightmare as it may be applied retroactively (see Why Birthright Citizenship is so Wonderful for America), visa applicants now have to confront needless scrutiny while applying for a tourist visa. A pregnant person may be denied a visa even if the primary goal is not to give birth to a child in the US for the purpose of conferring US citizenship. The applicant may wish to seek the best medical care for a potentially complicated pregnancy, or may be more comfortable with a doctor and hospital facility in the US than in her own country. An applicant may be travelling purely for business or a holiday and intending to return to her home country to give birth, and could still be denied the visa. Even if the applicant wishes to seek a visa for pursuing medical treatment, even if it is not associated with pregnancy and birth, the rule now requires a demonstration that the applicant will be able to pay for the costs of the medical treatment, and has the ability to pay for them through lawful sources.

Although 22 CFR 41.31(b)(2) applies to a visa issuance at a US Consulate, the USCIS would also likely refer to it when applying for an extension of status even though an applicant previously was issued the B-2 visa at the US consulate. The USCIS routinely issues a Request for Evidence (RFE) asking for further evidence of ties with the home country and financial sufficiency after a request for an extension if filed. An extension request based on medical reasons will result in more scrutiny as a result of 22 CFR 41.31(b)(2). This author has seen RFEs asking for a detailed letter from the applicant's physician regarding the medical condition, the prescribed treatment and its duration, the physician's opinion on the applicant's ability to travel, and the availability of similar treatment in the

applicant's home country. The RFE may also ask for the stated reason for the trip when applying for the B-2 visa at the US Consulate. If the applicant was already suffering from symptoms of the medical condition, the RFE may question whether this was disclosed to the Consular Officer, and if not, an explanation for why the applicant did not disclose the possibility of her seeking treatment in the US. The RFE may also demand extensive proof of financial ability of the applicant to pay the medical bills. Finally, the RFE will also ask for proof of foreign residence when the applicant departs the US.

The timely filing of the I-539 application tolls the accrual of unlawful presence for purposes of the 3- and 10-year bars to reentry into the US if the applicant stays beyond the expiration of the validity date on the I-94. If the I-539 remains pending beyond the requested date, as the request can be made for up to 6 months, another I-539 application must be filed before the date the first extension if granted would have expired even if there has been no decision on the first I-539. The applicant may, however, depart the US during the pendency of the I-539 application. If the application is denied, there is no right of appeal, although the applicant may request a motion to reopen or reconsider. Requesting a reopening or reconsideration will not toll unlawful presence for purposes of the 3- and 10-year bars. If the extension is granted, it is imperative that the applicant depart the US timely prior to the expiration of the extended date. While there is no limit in seeking additional extensions, the USCIS will take issue with immigrant intent.

Finally, even if all goes well and the applicant timely departs the US, the Consular Officer could still question why the applicant sought an extension at the time of next applying for a renewal of the B-2 visa at the US Consulate. Given all the risks and pitfalls, one should avoid seeking an extension or change of status to B-2 unless it is truly necessary and made in good faith.

(***This is blog is for informational purposes only, and should not be viewed as a substitute for legal advice***)