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COPING WITH DELAYS FACING H-4 AND L-2 SPOUSES WHEN THEY HAVE A PENDING ADJUSTMENT APPLICATION - PART 2

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Although H-4 and L-2 extensions continue to be delayed since our last blog "Coping with Delays Facing H-4 and L-2 Spouses", we highlight another issue, which adds further hardship for H-4 and L-2 spouses faced with unjust processing delays. In October 2020, the EB-3 Dates for Filing in the Visa Bulletin advanced significantly, which allowed many born in India to file Form I-485, Adjustment of Status (AOS) applications. The surge in AOS cases, coupled with the H-4/L-2 processing delays, have left many with the inability to travel abroad as they await both their H-4/L-2 extension and Advance Parole (AP) processing. This blog tackles the threat to abandonment of AOS when traveling internationally while AP and H-4/L-2 are processing. We also discuss the complex interplay with employment authorization for H-4/L-2 spouses who have pending AOS applications.

Preserving H-4 and L-2 Status When an AOS is Pending

Since the H-1B and L visas allow for dual intent, it is possible to maintain H or L nonimmigrant status while an AOS application for permanent residence has been filed.

Due to the delays in the processing of H-4/L-2 extensions and requests for EAD, travelling abroad poses a conundrum. In order to preserve the AOS that is still processing, one needs to have either AP or valid H-4/L-2 status before leaving. Accordingly, 8 CFR 245.2(a)(4)(ii)(B)-(C) outlines two distinct pathways. Under (B), it allows those with approved AP to leave the country and then subsequently return in AP without abandoning their AOS, absent any specific situations

outlined in the regulation. Under (C), the same is true for those who leave in H-4/L-2 status and return in H-4/L-2.

In 2000, the Cronin Memo was published and clarified that although an H-1B or L is considered to be paroled after entering the United States via AP, he/she is still able to apply for an extension of H-1B or L if there was a valid and approved petition. Upon the granting of the H-1B or L extension, the grant of parole would be terminated, and the H-1B applicant would then be admitted into the relevant H-1B status. Although the Cronin Memo contemplates one who is already in H-1B and L status before traveling abroad and being paroled via AP, it could also apply to one who has a pending extension of H-1B or L-1 status application and who traveled abroad under AP and was paroled into the US. Likewise, upon the approval of the H-1B or L-1 request, the parole would be terminated, and the beneficiary would be admitted in H-1B or L status. This allows the H-1B beneficiary to travel abroad while simultaneously preserving the AOS when both the H-1B and AOS are pending.

There is an inherent vagueness as to whether the Cronin memo applies to derivatives since H-4s and L-2s are not mentioned in the memo in respect to this issue. One may however argue, through anecdotal experience, that the Cronin Memo should apply to H-4s and L-2s and therefore, the H-4/L-2 should be able to enter the United States in AP and be able to switch to H-4/L-2 status once the H-4/L-2 extension is approved.

Preserving Adjustment of Status When Advanced Parole and H-4 are Pending

What happens when an H-4 has a pending AOS and has not received AP or H-4 approval but wants to travel based on an emergency? This issue is two-fold and is specifically applicable to those whose prior H-4/L-2 statuses have expired and have timely filed their extensions but still await processing. As mentioned before in our prior blog, although the H-4 can get a visa stamp at a US consulate, the AOS may be deemed abandoned if the H-4 left the US without H-4 status or AP.

In this scenario, the only recourse for the H-4 is to apply for an emergency AP by calling the USCIS 800 number to schedule an appointment with the local USCIS office, however, it is not definite that one will be able to connect to a live-person, let alone convince the USCIS that the emergency qualifies for expeditious AP processing.

Does an L-2 Spouse Need an EAD?

Out of the many downfalls of the H-4/L-2 processing delays, one of the most significant is the Employment Authorization Document (EAD) processing gaps afflicting families around the nation. At large, this issue has subjected many spouses and their families to financial struggle, and it remains a leading issue that the USCIS and the Biden administration must immediately resolve. The hardship is compounded by the fact that there are delays in the processing of the EAD under both the AOS and the H-4/L-2. Nonetheless, there may be an arguable legal basis for an L-2 spouse to engage in employment without obtaining an EAD.

In the Matter of Do Kyung Lee, the Board of Immigration Appeals (BIA) held that employment authorization is incident to E-2 status. INA 214(e)(6) explicitly states that an E-2 spouse shall be authorized to engage in employment. In this unpublished decision, the BIA reasoned that the regulation at 8 CFR 274a.12(c)(2) only specified that the dependent spouse and child of an E-1 visa holder must apply for work authorization, but the same regulation did not specifically state that the spouse of an E-2 must do the same. The Court held that since INA 214(e)(6) specifically authorized the E-2 spouse to engage in employment, the E-2 spouse's failure to apply for an EAD did not result in a violation of status. Based on the reasoning of this BIA decision, the same logic can be applied to L-2 spouses since INA 214(c)(2)(E) explicitly authorizes L-2 spouses to engage in employment. The regulations at 8 CFR 274a.12 do not have a specific category for L-2 spouses, and USCIS requires L-2 spouses to use the catchall reserved provision under 8 CFR 274a.12(a)(18).

Nevertheless, this is still a gray area and E-2 and L-2 spouses are therefore still recommended to apply for an EAD. Even if the reasoning of this unpublished BIA decision is accepted by the USCIS, a lack of EAD could potentially trigger I-9 noncompliance issues with respect to the employer as ICE may not recognize the holding of an unpublished BIA decision.

The reasoning of this BIA decision is not appliable to H-4 spouses as there is no explicit INA provision that specifically authorizes H-4 spouses to engage in employment. The Department of Homeland Security (DHS) under the Obama administration specifically created a regulation which authorizes EAD for an H-4 under 8 CFR 274a.12(c)(26), based on implied authority in the INA to issue work authorization to any class of noncitizens. The Trump administration tried to

unsuccessfully rescind the rule as it was hostile towards H-4 EADs, but could not get it past the Office of Management and Budget. The Trump administration then imposed the biometric requirement for every I-539 extension, which in turn delayed the grant of the H-4 EAD. The pandemic that followed in March 2020 caused further delays and backlogs.

Conclusion

We reiterate our request that the Biden administration remove the biometric requirement imposed by the prior Trump administration when an I-539 application is filed. The justification by the Trump administration, as revealed in a recent WSJ article, that the biometric requirement was necessary so that dependents did not misrepresent themselves is spurious. Until 2019, there was never a biometric requirement when dependents filed I-539s, and there were no widespread incidents of such misrepresentations. Many of these dependents were already vetted when they obtained H-4 and L-2 visa stamps at US consulates. Moreover, subjecting infants and toddlers seeking H-4 and L-2 extensions to this is downright cruel. Eliminating this unnecessary biometric requirement will go a long way in eliminating the delays facing H-2 and L-2 spouses as they can then be processed under the premium processing request filed through the principal spouse's H-1B or L-1 petition. The DHS should also initiate premium processing for EAD requests since Congress authorized additional premium processing last year. Finally, since INA 214(c)(2)(E) explicitly authorizes an L-2 spouse to engage in employment, what is the need to require the L-2 spouse to go through the lengthy process of applying for an EAD? Under the logic of the BIA decision in *Do Kyung Lee*, an E-2 or L-2 spouse who engages in employment without an EAD will not be viewed as engaging in unauthorized employment. Therefore, even if the Biden administration cannot speed up EAD processing quickly, it can officially pronounce that L-2 and E-2 spouses need not obtain an EAD.

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

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