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US IMMIGRATION & NATIONALITY LAW

LONG LIVE MATTER OF HOSSEINPOUR: MAKING THE CASE FOR DUAL INTENT IN ALL NONIMMIGRANT VISAS

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One of the many benefits of filing an Adjustment of Status Application (AOS) is the ability to concurrently apply for work authorization (Form I-765/EAD). In addition, the applicant can remain in the United States while the AOS is pending without maintaining status, although most opt to maintain their **dual intent** nonimmigrant status for as long as possible. One of the most popular dual intent visas are H-1Bs. By extending their nonimmigrant H-1B status, the individual would not start accruing unlawful presence if the AOS is denied for whatever reason. Extending nonimmigrant status while the AOS is pending is also beneficial in some nonimmigrant visa categories, including the H-1B visa, because it allows the individual to continue to work with the same employer without having to separately apply for an EAD.

As USCIS service centers continue to be severely backlogged, we are required to adjust legal strategy to combat these delays. One of the most affected is the processing of work authorization. Earlier this year, the USCIS updated its expedite request policy. Unfortunately, notwithstanding the broadening of the criteria, the requests seem to be met with high scrutiny and are successful in limited cases. Nonetheless, we recommend filing the request if one meets the criteria. Absent a successful expedite request, **EADs based on pending AOS applications are taking 9+ months to process**. As explained above, individuals therefore find themselves relying on their nonimmigrant status for work authorization while their AOS EADs are pending in the USCIS limbo.

For many nonimmigrant categories, the beneficiary must not have the **intent**

to permanently immigrate to the U.S. As such, an important requirement for most nonimmigrant visas is having "a residence in a foreign country which he has no intention of abandoning and who is visiting the United States temporarily for business or temporarily for pleasure." (INA 101(a)(15)(B)). Although the H-1B visa is a nonimmigrant visa, it allows for dual intent. This means that the H-1B visa holder can have the intention of immigrating to the U.S. while still maintaining his/her H-1B nonimmigrant status. The Immigration and Nationality Act carves out the dual intent doctrine by explicitly excluding H-1B visa beneficiaries from the requirement that "every alien shall be presumed to be an immigrant until he establishes to the satisfaction of the consular officer, at the time of application for a visa, and the immigration officers, at the time of application for admission, that he is entitled to a nonimmigrant status." (*See* INA 214(b)). Therefore, when an H-1B visa holder applies for adjustment of status, he/she is able to maintain both the nonimmigrant status and have the immigrant intent. Other visas permitted to have dual intent also include the L and V visa, under the carve out in INA 214(b). The O, P, and E visas are quasi dual intent visas established by regulations. While they allow the nonimmigrant to be in the U.S. in that status without needing to have a foreign residence, they still do not permit them to intend to seek permanent residence in the U.S. As an illustration of quasi dual intent, under 8 CFR 214.2(o)(13), *an* intent to remain *temporarily* in the United States is a requirement for O-1 classification. However, an applicant for an O-1 visa does not have to have a residence abroad which he or she does not intend to abandon.

As visa holders enjoy the benefits of dual intent, we honor the memory of Dale Schwartz, the late immigration attorney who was highly respected in the field and was a former President of the American Immigration Lawyers' Association. Mr. Schwartz had faced criminal charges in the 1980s in the wake of federal officials investigating applications submitted on behalf of a British businessman who came to the United States in 1980 to work for an American aerospace company. The government charged Mr. Schwartz with eight counts of mail fraud and false statements and asserted that the British businessman intended to live in the U.S. permanently even though he was seeking a temporary visa. The officials ultimately dropped the criminal charges, and we remember him here as a zealous advocate for nonimmigrant dual intent. It is because Mr. Schwartz took the fall for everyone that Congress enacted the dual intent carve

out in INA 214(b) in 1990.

Even before dual intent got recognized in the INA, the Board of Immigration Appeals in *Matter of Hosseinpour* recognized way back in 1975 that the filing of an application for adjustment of status is not necessarily inconsistent with the maintenance of lawful nonimmigrant status. There, the BIA was tasked with reviewing an F-1 visa holder's eligibility for nonimmigrant status after filing an adjustment of status application. In that case, the BIA explicitly held that the filing of an adjustment of status application "is not necessarily inconsistent with the maintenance of lawful nonimmigrant status," although F-1 visas are not dual intent visas. In its reasoning, the BIA referred to legal precedent which states that "a desire to remain in this country permanently in accordance with the law, should the opportunity to do so present itself, is not necessarily inconsistent with lawful nonimmigrant status." (*See Brownell v. Carija*, 254 F.2d 78, 80 (D.C. Cir. 1957); *Bong Youn Choy v. Barker*, 279 F.2d 642, 646 (C.A. 9, 1960). See also *Matter of H-R-*, 7 I & N Dec. 651 (R.C. 1958)). Further, the BIA reasoned that the F-1 student who applied for adjustment of status kept his intention to remain a nonimmigrant student even though he had applied for adjustment of status. In that case, the student was willing to return home when his studies were completed if ordered to do so. However, the BIA ultimately dismissed the F-1 visa holder's appeal because the individual did not timely extend his nonimmigrant stay and remained beyond the authorized length of his stay.

In instances where the beneficiary does not hold a dual intent nonimmigrant visa such as a TN or H-1B1 and applies for AOS, they must wait long months for their work authorization to be processed by the USCIS in order to work. If they apply for an extension of the underlying nonimmigrant status while the adjustment application is pending, they will likely receive push back from the USCIS on the ground that the nonimmigrant visa status does not allow for dual intent notwithstanding *Matter of Hosseinpour*. These nonimmigrants who face this sort of push back from the USCIS when extending their status should invoke the holding in *Hosseinpour*, which is still good law, that they should be entitled to the extension of nonimmigrant status even if they have expressed an intention to apply for permanent residence. Indeed, as in *Hosseinpour*, these nonimmigrants would be willing to depart the U.S. at the end of their nonimmigrant status in the event that their adjustment of status application gets denied.

Moreover, when nonimmigrants enter the U.S. in a B-2 visitor status, they are

required to maintain an intention to return home to a foreign residence, although *Hosseinpour* also allows them to have a desire immigrate to the US. Thus, one who is the beneficiary of an I-130 petition can still legitimately enter the U.S. as a visitor if the objective is to process for the immigrant visa at the U.S. consulate. Furthermore, one with a desire to immigrate is also allowed to change one's mind after being admitted and apply for adjustment of status in the US. During Covid-19, many nonimmigrants who came with the intention of returning home decided to stay in the U.S. and apply for adjustment of status as immediate relatives of U.S. citizen spouses or children when the Covid situation got exacerbated in their home countries.

The project to carve out dual intent in the INA for H-1B, L, and V visa holders is only half completed. Enshrining dual intent in the law will ensure that noncitizens will not be denied a visa or admission if they are able to extend, change or adjust status legally. They will also be able to maintain nonimmigrant status while their adjustment applications are pending. INA 214(b) should be amended to remove the presumption that every noncitizen is an immigrant unless proven otherwise. The relevant concern to ensure compliance with a temporary visa should solely be focused on whether the noncitizen will violate status by overstaying or working in an unauthorized capacity, and not whether they will pursue other lawful visa options, including adjustment of status, once they enter the U.S. It is important to enact dual intent for all nonimmigrant visa categories to remove needless contradictions and complications in U.S. immigration law.

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

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