CYRUS D. MEHTA & PARTNERS PLLC
US IMMIGRATION & NATIONALITY LAW

USCIS POLICY MANUAL RECOGNIZES DUAL INTENT FOR FOREIGN STUDENTS AS EXPRESSED IN MATTER OF HOSSEINPOUR

Posted on January 16, 2024 by Cyrus Mehta

By Cyrus D. Mehta and Kaitlyn Box*

On December 20, 2023, U.S. Citizenship and Immigration Services (USCIS) issued updated policy guidance in the USCIS Policy Manual pertaining to nonimmigrant students in F and M status. An F-1 visa allows a nonimmigrant student to enter the U.S. to student at a college or university, while nonimmigrants in M status pursue training at a vocational school or other nonacademic institution. Pursuant to INA 101(a)(15)(F) and INA 101(a)(15)(M), foreign students in F and M status must "intend to depart from the United States after their temporary period of stay … and have a foreign residence that they have no intention of abandoning".

The USCIS Policy Manual acknowledges that "The foreign residence requirement should be adjudicated differently for students than for other nonimmigrants. Typically, students lack the strong economic and social ties of more established applicants, and they plan longer stays in the United States. Considerations should include the student's present intent, not what they might do after a lengthy stay in the United States". Newly added language in the Policy Manual also makes clear that a foreign student who is the beneficiary of a labor certification or I-140 petition filed by a prospective employer can still demonstrate the requisite intent to depart the United States, stating: "A student may be the beneficiary of an approved or pending permanent labor certification application or immigrant petition and still be able to demonstrate their intention to depart after a temporary period of stay. USCIS officers generally view the fact that a student is the beneficiary of an approved or pending permanent labor certification or an immigrant visa petition as not

necessarily impacting their eligibility for the classification, so long as the student intends to depart at the end of their temporary period of stay." A further addition to the Policy Manual broadens the requirement that foreign students must maintain a residence abroad:

> *"If a student had a foreign residence immediately prior to traveling to the United States, even if such residence was with parents or guardians, they may be considered to be maintaining a residence abroad if they have the present intent to depart the United States at the conclusion of their studies. The fact that this intention may change is not a sufficient reason to deny them F classification. In addition, the present intent to depart does not imply the need to return to the country from which they hold a passport. It means only that they must intend to leave the United States upon completion of their studies. Given that most students are young, they are not expected to have a long-range plan and may not be able to fully explain their plans at the conclusion of their studies."*

This update to the Policy Manual is not only a welcome clarification for foreign students, but it also brings USCIS policy in line with consular guidance and established case law. Section 402.5-5(E)(1)(U) of the Foreign Affairs Manual, for example, instructs consular officers as follows:

> *If a student visa applicant is residing with parents or guardians, you may consider them to be maintaining a residence abroad if you are satisfied that the applicant has the present intent to depart the United States at the conclusion of their studies. The fact that this intention may change is not sufficient reason to deny a visa. In addition, the present intent to depart, does not imply the need to return to the country from which they hold a passport. It means only that they must intend to leave the United States upon completion of their studies. Given that most student visa applicants are young, they are not expected to have a long-range plan and may not be able to fully explain their plans at the conclusion of their studies. You must be satisfied at the time of the application for the visa that the applicant possesses the present intent to depart at the conclusion of their approved activities.*

9 FAM 402.5-5(E)(1)(U)(c)

The new guidance is also in line with the Board of Immigration Appeals' (BIA) decision in *Matter of Hosseinpour*, 15 I&N Dec. 191 (B.I.A. 1975), which recognized inherent dual intent in nonimmigrant visas. *Matter of Hosseinpour* involved an Iranian citizen who entered the U.S. as a nonimmigrant student and later applied for adjustment of status. After his adjustment of status application was denied, he was placed in deportation proceedings and found deportable by an immigration judge on the ground that he violated his nonimmigrant status by filing an adjustment of status application. The BIA disagreed with this interpretation of the nonimmigrant intent requirement for foreign students, noting the amendments to the Immigration and Nationality Act had expressly removed a provision stating that an individual's nonimmigrant status would automatically terminate if he filed an adjustment of status application. Thus, the BIA held that "filing of an application for adjustment of status is not necessarily inconsistent with the maintenance of lawful nonimmigrant status". The BIA also 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)).

USCIS' new guidance appears to reaffirm the BIA's holding in *Matter of Hosseinpour* and we refer readers to our prior blog, "Long Live Matter of Hosseinpour: Making the Case for Dual Intent in All Nonimmigrant Visas". These changes also reflect the reality of many nonimmigrant students' situations. A foreign student could intend to depart the United States at the end of their degree program, but simultaneously hope to stay in the country if an opportunity to do so arose. At the time of his entry into the U.S., the foreign student could hardly predict that he could later apply for adjustment of status based on marriage to a U.S. citizen spouse or a prospective employer would file an I-140 petition. The fact that a foreign student desires to pursue one of these paths to permanent residence if the opportunity arises should not mean that she cannot also possess the requisite nonimmigrant intent.

The flexibility afforded by *Matter of Hosseinpour* and USCIS' new policy guidance can be extended to other categories of nonimmigrants, as well. A few categories of nonimmigrant visas, such as H-1Bs and L-1s, expressly allow "dual intent" in INA 214(b), meaning that a visa holder may pursue permanent

residence while simultaneously maintaining his nonimmigrant status. Other nonimmigrant categories allow for quasi dual intent such as the O, E-1, E-2, and P categories. Nonimmigrants in these categories are not required to maintain a foreign residence but are still required to leave at the end of their authorized stay. Other categories of nonimmigrant visas, however, are explicitly not dual intent, including E-3 visas, which allow Australian nationals to come to the U.S. perform services in a specialty occupation. Although an E-3 is also a "specialty occupation" visa, E-3 workers are more restricted from seeking permanent residence in the U.S. than those in H-1B status. Expanding the flexibilities reflected in USCIS' additions to the policy manuals would greatly benefit nonimmigrants and better reflect the nuances inherent in today's immigration landscape.

The clarification in the USCIS Policy Manual will have the greatest impact on those filing for a change of status to F-1 or M-1 from another nonimmigrant visa status such as H-1B, and who may be beneficiaries of I-130 or I-140 petitions. It would also assist dependents in H-4 status who are changing to F-1 status because their parent's I-140 petition is stuck in the India EB-1, EB-2 or EB-3 backlogs and their age has not been protected under the Child Status Protection Act. They will not be held to the impossibly rigid standard of maintaining a foreign residence abroad they have not abandoned, especially if they left their home country at a young age many years ago. Under the new clarification they would be considered to be maintaining a foreign residence abroad so long as they had one prior to coming to the US even if it was with their parents or guardians and they have a present intent to depart at the end of their studies.

*Kaitlyn Box is a Senior Associate at Cyrus D. Mehta & Partners PLLC.