

CHANGE OF NONIMMIGRANT STATUS

updated by Matthew I. Hirsch and Shino Komine Milby*

INTRODUCTION

When a person present in the United States in one nonimmigrant (temporary) status wishes to engage in a primary activity permitted only under a different nonimmigrant status—for example, a B-2 tourist decides to attend school—that person has two options: visa processing at a U.S. consulate abroad or change of status in the United States.

Under the first option, the person leaves the United States, applies for the appropriate visa at a U.S. consulate abroad (which may require an approved nonimmigrant petition depending on the visa category), and then re-enters the United States in the correct nonimmigrant classification. This option, often referred to as “consular processing,” is discussed in depth in another article in this volume.

The second option entails an application to U.S. Citizenship and Immigration Services (USCIS) to request a change of status (COS) to a different nonimmigrant classification. This article discusses the considerations involved when choosing this option.

Some of the critical factors in determining whether an alien is eligible to change status include: (1) whether the status the alien currently holds permits a change of status; (2) whether the alien is maintaining a valid status; (3) the timing of the application; and (4) the status to which the alien wishes to change. Each of these factors, among others, may render an alien ineligible for a change of

status, and may require the alien to pursue consular processing to obtain a new nonimmigrant visa.

AUTHORITIES

Immigration and Nationality Act (INA)¹

INA §248 is the primary statutory authority for change of nonimmigrant classification. Other relevant authorities are portions of INA §§101(a)(15), 212, and 214.

Code of Federal Regulations (CFR)

8 CFR §248 is the primary regulatory reference. Also relevant are portions of 8 CFR §§212.1, 214, and 217.

GENERAL ELIGIBILITY

In most cases, USCIS may authorize an alien to change his or her status from one nonimmigrant classification to another, provided that he or she was lawfully admitted to the United States as a nonimmigrant, continues to maintain his or her status, and is not inadmissible under INA §212(a)(9)(B)(i) (unlawful presence) or whose inadmissibility under such section is waived.² In all cases, of course, the applicant for COS must meet the classification-specific eligibility requirements for the requested status under INA §214 and 8 CFR §§214, *et seq.*

Timing of Application

The application for COS must be properly filed *before* the alien’s authorized stay expires. Otherwise, USCIS would deem the alien unlawfully present in the United States, and statutorily ineligible for change of status. However, under the regulations, USCIS has the discretionary power to excuse the untimely filing of an application for COS, if the applicant demonstrates to the Service’s satisfaction *all* of the following:

Updated from *Navigating the Fundamentals of Immigration Law* 251 (2008–09 ed.). Copyright © 2008, American Immigration Lawyers Association (AILA), available from AILA Publications, 1-800-982-2839, www.ailapubs.org.

Articles do not necessarily reflect the views of the American Immigration Lawyers Association.

* **Matthew I. Hirsch** practices immigration law in Wayne, Pennsylvania. Mr. Hirsch is a former chair of the Philadelphia chapter of AILA and currently serves as a member of the Board of Trustees for the American Immigration Law Foundation. Mr. Hirsch has just completed his 17th year as an adjunct professor of immigration law at Widener University School of Law.

Shino Komine Milby practices immigration law at Stone & Grzegorek LLP in Los Angeles. Her practice focuses on business and investment immigration and includes representation of academics and researchers.

¹ Immigration and Nationality Act (INA) of 1952 (codified as amended at 8 U.S. Code (USC) §§1101 *et seq.*).

² INA §248(a); *see also* 8 Code of Federal Regulations (CFR) §§248.1(a) and (b).

- The failure to file a timely application was due to extraordinary circumstances beyond the control of the applicant and that the delay was commensurate with the circumstances;
- The alien has not otherwise violated the nonimmigrant status;
- The alien is a bona fide nonimmigrant; and
- The alien is not the subject of removal proceedings under 8 CFR §§240, 1240.³

An applicant who timely files for COS is normally permitted to remain in the United States during the pendency of the adjudication, even if the adjudication extends beyond the alien's authorized period of stay.⁴ Nevertheless, one USCIS memorandum suggests that while a properly filed extension of stay is pending, USCIS might not consider a subsequent COS application "timely filed" if it is filed after the expiration of the applicant's original I-94.⁵ Specifically, the memorandum states:

[A]n [extension of stay] (EOS) or [change of status] (COS) application must be filed within the period during which the alien is in an "authorized status" *i.e.*, within an authorized period of admission as contemplated by parts 214.1 and 248.1 The period during which a *timely* filed EOS or COS application is pending continues the alien's period of authorized stay in the United States (allowing the alien to avoid accruing

unlawful presence) but *does not extend the alien's period of authorized status*.⁶

Although this memorandum primarily addresses the issue of unlawful presence in the context of extension and change of status, some USCIS service centers have interpreted this language to preclude "bridge" applications in which USCIS would typically hold the second application (for COS) in abeyance until the first application (for extension) is adjudicated. An example would be a situation in which an application to extend B-1 status was timely filed, but where, after expiration of the I-94 but before a decision on the extension, a COS application from B-1 to H-1B was filed. As this issue has not been conclusively resolved, practitioners need to be cautious when advising clients.

USCIS takes the position that a person within the time limits of a grant of voluntary departure is not eligible for COS, even if that person has never been in removal proceedings.⁷ However, if a motion to reopen is filed and granted, and the alien's previous nonimmigrant status is reinstated, the alien would be eligible for COS.

Aliens admitted to the United States despite their inadmissibility under INA §212(a)(9)(B) (unlawfully present during a previous stay) are not eligible for COS. This situation may occur, for example, when an alien who is inadmissible under §212(a)(9)(B) is admitted to the United States in a status where that ground of inadmissibility does not apply (*e.g.*, A or G status), and then seeks to change to another status.

Maintenance of Status

In determining whether the applicant is maintaining status, USCIS will consider the applicant's conduct.⁸ For example, engaging in unauthorized employment is a *per se* failure to maintain status.⁹

For purposes of a COS application under INA §248, an alien who has been granted temporary protected status (TPS) pursuant to INA §244 is "considered as being in, and maintaining, lawful status as a nonimmigrant" during the period of TPS.¹⁰

³ 8 CFR §248.1(b).

⁴ See INS Memorandum, "No Unlawful Presence While EOS/COS Pending" (Mar. 3, 2000), published on AILA InfoNet at Doc. No. 00030773 (posted Mar. 7, 2000) (hereinafter "Pearson Memo") (providing that aliens who have filed applications for a change of status or extension of stay are in a period of stay authorized by the attorney general, and therefore, do not accrue unlawful presence, even after the 120-day tolling period of INA §212(a)(9)(B) elapses, under the following circumstances: (1) the application for change of status or extension of stay was filed timely; (2) the alien did not work without authorization before the application was filed or while it was pending; and (3) the application has been pending with the INS for more than 120 days after the date the I-94 expired. This tolling provision terminates once a decision has been made on the application, however.).

⁵ See INS Memorandum, "Interpretation of 'Period of Stay Authorized by the Attorney General' in Determining 'Unlawful Presence' Under INA Section 212(a)(9)(B)(ii)" (Mar. 27, 2003), published on AILA InfoNet at Doc. No. 03042140 (posted Apr. 21, 2003).

⁶ *Id.* (emphasis added).

⁷ See *INS Examinations Handbook* at 126.

⁸ 8 CFR §248.1(b).

⁹ 8 CFR §214.1(e).

¹⁰ INA §244 (f)(4).

STATUTORY INELIGIBILITY

INA §248 precludes individuals to change status from certain nonimmigrant classifications, even if the applicant has maintained lawful status. The statutory ineligibility applies to the following classes of nonimmigrants:

- An alien in immediate and continuous transit through the United States without a visa;¹¹
- An alien classified as a nonimmigrant under subparagraphs C (transit), D (crewman), or S (witness/informant) of INA §101(a)(15);¹²
- An alien classified as a nonimmigrant fiancé(e) under INA §101(a)(15)(K).¹³ Further, no alien may change his or her status to the fiancé(e) classification;
- An alien admitted as a nonimmigrant without a visa under the visa waiver program (VWP);¹⁴
- A citizen of a country listed in 8 CFR §§212.1(e)(3) who is admitted to Guam as a nonimmigrant visitor pursuant to INA §212(I);¹⁵
- Under INA §248(a)(3), any J-1 nonimmigrant subject to the two-year foreign residence requirement of INA §212(e) who has not fulfilled that requirement or obtained a waiver. The J-1 nonimmigrant faces the INA §248 bar, except as to COS pursuant to §101(a)(15)(A) (foreign diplomats) or (G) (international organization representative) without benefit of a waiver;¹⁶ and
- A J-1 exchange-visitor who came to the United States to receive graduate medical education or training, regardless of the applicability of the

two-year foreign residence requirement.¹⁷ However, a J-1 physician who has been granted an INA §212(e) waiver under INA §214(I) is permitted change status to H-1B.

Although this rule does not apply for J-1 physicians, §212(e) subject J-1 visitors are ineligible to obtain H or L nonimmigrant status or permanent resident status *even through consular processing* until and unless they obtain a waiver or spend a total of two years in their home country. This prohibition continues to apply to individuals who have previously held J-1 classification subject to the §212(e) requirement. A careful practitioner will routinely backtrack through an alien's historical presence in the United States to confirm that the alien has never held a §212(e)-subject J-1 status that would render the alien ineligible for H or L nonimmigrant status.

Practice Pointer: J visa holders who are subject to §212(e) may still be eligible for nonimmigrant categories other than H or L, such as O or TN classification. They are simply barred from seeking a *change of status*. They must therefore depart the United States and obtain the new visa at a U.S. consulate abroad or, if visa exempt, apply for admission in the new nonimmigrant classification at the port of entry.

Although not a matter of statutory ineligibility, Department of State (DOS) has informed USCIS that it considers COS from F-1 to J-1 merely to enable the principal alien's spouse to work to be a misuse of the exchange visitor program.¹⁸ Such an application will be denied unless the COS will make the alien subject to the foreign residence requirement of INA §212(e).¹⁹

The prohibition against a change of COS for the categories of aliens described in 8 CFR §248.2(a)(1)–(6) is inapplicable to aliens applying for COS to U nonimmigrant status under INA §101(a)(15)(U) (victims of certain criminal activities such as trafficking and violence).²⁰

¹¹ INA §233(c); 8 CFR §248.2(a)(1).

¹² INA §248(a)(1); 8 CFR §248.2(a)(2).

¹³ *Id.*

¹⁴ INA §§217 and 248(a)(8); 8 CFR §§217 *et seq.* and 248.2(a)(6). The VWP is currently available to citizens of the following countries: Andorra, Australia, Austria, Belgium, Brunei, Czech Republic, Denmark, Estonia, Finland, France, Germany, Hungary, Iceland, Ireland, Italy, Japan, Latvia, Liechtenstein, Lithuania, Luxembourg, Malta, Monaco, Netherlands, New Zealand, Norway, Portugal, San Marino, Singapore, South Korea, Slovakia, Slovenia, Spain, Sweden, Switzerland, and the United Kingdom (for citizens with the unrestricted right of permanent abode in England, Scotland, Wales, Northern Ireland, the Channel Islands and the Isle of Man).

¹⁵ 8 CFR §248.2(a)(5).

¹⁶ 8 CFR §248.2(a)(4).

¹⁷ 8 CFR §248.2(a)(3). *But see* INA §214(I), popularly known as the Conrad State 30 Program, which permits change of status under specific conditions; 8 CFR §§212.7(c)(9), 1212.7(c)(9).

¹⁸ *INS Operations Instructions* (OI) 248.5.

¹⁹ *Id.*

²⁰ 8 CFR §248.2(b). *See also* 8 CFR §214.14.

SPECIAL CATEGORIES AND CONSIDERATIONS

Students

Generally, a nonimmigrant alien who did not enter as a student and who applies for COS pursuant to INA §101(a)(15)(F) or (M) is not considered ineligible for this classification *solely* because he or she may have started classes prior to submitting the application.²¹

However, a nonimmigrant who is admitted in, changes status to, or extends B-1 or B-2 nonimmigrant status on or after April 12, 2002, may not pursue a course of study at an approved school unless and until USCIS has approved the COS application to F-1 or M-1.²² The regulations instruct USCIS to deny the COS application if the B-1 or B-2 nonimmigrant enrolled in a course of study before filing for COS or while the application is pending.

A COS application to M-1 vocational student classification will not be granted if USCIS determines that the applicant intends to pursue the vocational study *solely* to qualify later for H temporary worker status.²³ Further, a COS application from M-1 student to F-1 student will not be granted.²⁴ Similarly, USCIS will deny a COS application from M-1 student to H temporary worker status if the education or training which the applicant received while in M-1 status enables the applicant to meet the qualifications for classification under §101(a)(15)(H).²⁵

Practice Pointer: Duration of status (abbreviated as D/S on Form I-94 and Form I-20) for F-1 students is defined to include “pursuing a full course of studies ... or engaging in authorized practical training following completion of studies, plus 60 days to prepare for departure from the United States.”²⁶ With some exceptions, eligible F-1 students may apply for 12 months of optional practical training (OPT) to work for a U.S. employer in a job directly related to the student's

major area of study after the completion of studies.²⁷ Thus, an F-1 student who properly maintains status is eligible to apply for COS anytime before or during the 60 days that follow the completion of the alien's studies or practical training so long as he or she does not engage in unauthorized employment.²⁸

The interim rule published on April 8, 2008 affords further benefits to F-1 students who are beneficiaries of a properly-filed H-1B petition which are selected under the cap for the next fiscal year.²⁹ The rule ameliorates the so-called “cap-gap” problem—*i.e.*, the gap in status between the expiration of the students' authorized period of stay and the October 1 employment start date rendering COS impermissible. Under the new rule, an F-1 student may request COS to H-1B, and the USCIS may extend the student's authorized stay (and any attendant employment authorization pursuant to OPT), until the requested start date of the H-1B status.

Parents and Children of Certain “Special Immigrants”: NATO Aliens and G Diplomats

An application for COS pursuant to INA §101(a)(15)(N) (relating to parents and children of certain “special immigrants” who are members of specified foreign government organizations) will be approved notwithstanding the fact that the alien may be an intending immigrant. The status may be granted for up to three years and employment authorization may be granted incident to status.³⁰

Witnesses and Informants

State and federal law enforcement agencies (LEA), including state and federal courts and U.S. attorneys, may request change of status for an alien to S status (witness/informant).³¹ The application is made on Form I-854 (inter-agency alien witness and informant record) with attachments establishing eli-

²¹ 8 CFR §248.1(c)(1).

²² 8 CFR §248.1(c)(3). *See also* INS Memo, J. Williams, “Requiring Change of Status from B to F-1 or M-1 Nonimmigrant Prior to Pursuing a Course of Study” (Apr. 12, 2002) published on AILA InfoNet at Doc. No. 02041532 (posted Apr. 15, 2002).

²³ 8 CFR §248.1(c).

²⁴ *Id.*; OI 248.7(e).

²⁵ 8 CFR §248.1(d).

²⁶ 8 CFR §214.2(f)(5)(iv).

²⁷ Certain graduates with science and/or related degrees may be eligible for a longer period of optional practice training. *See* “Extending Period of Optional Practical Training by 17 Months for F-1 Nonimmigrant Students With STEM Degrees and Expanding Cap-Gap Relief for All F-1 Students With Pending H-1B Petitions,” 73 Fed. Reg. 18944 (Apr. 8, 2008), published on AILA InfoNet at Doc. No. 08040471 (posted Apr. 8, 2008).

²⁸ Similarly, J-1 exchange visitors are admitted for “the period specified on Form DS-2019, plus a period of 30 days for the purpose of travel ...” 8 CFR §214.2(j)(1)(iv).

²⁹ 73 Fed. Reg. at 18949.

³⁰ 8 CFR §248.1(e).

³¹ INA §101(a)(15)(S); 8 CFR §248.3(h).

gibility and is filed by the LEA with the Department of Justice, which will in turn certify the request upon review and forward the application to USCIS for change of status.³²

Health Care Workers

A COS application for a category covering certain health care workers must include a health care certification.³³ The health care certificate must be issued by a credentialing organization listed in the regulations as appropriate for the occupation, and must include verification of the alien's education, license, training and experience. It may also include specified examinations and English language testing.³⁴

Temporary Workers

When temporary workers in H or L status have reached certain time limits in the United States, they are precluded from changing their status to another H or L category.

These time limits are as follows:

- H-1B specialty occupation worker or fashion model—six years.³⁵
- H-1B worker involved in a Department of Defense (DOD) research and development project—10 years (but limited to a change of status to perform services involving a DOD research and development project).³⁶
- H-1C registered nurses—three years. Note this category currently expires on December 20, 2009.³⁷
- H-2B temporary worker—three years.³⁸
- H-3 alien participant in a special education program—18 months.³⁹

- H-3 trainee—24 months.⁴⁰
- L-1B specialized knowledge worker—five years.⁴¹
- L-1A manager or executive—seven years.⁴²

There are some exemptions from the time limits for workers who do not work continuously in the United States. The time limits do not apply to temporary workers who did not reside continually in the United States *and* whose employment was seasonal or intermittent or for an aggregate of six months or less per year, or who reside abroad and regularly commute to engage in part-time employment.⁴³ In some circumstances, USCIS will permit a beneficiary who has reached the statutory time limit in H-1B, L-1, or R-1 status to extend their stay by “recapitulating” certain time spent abroad.⁴⁴

USCIS issued a memorandum providing guidelines to determine periods of admissions for aliens previously in H-4 or L-2 status, aliens applying for additional periods of admission beyond the H-1B six-year maximum, and aliens who have exhausted the six-year maximum, but have been absent from the United States for more than one year.⁴⁵ Based upon this memorandum, the time spent in H-4 or L-2 status will not count towards the maximum time period allowed for the specific visa category.

TN Classification

Pursuant to the North American Free Trade Agreement (NAFTA), INA §214(e) has been promulgated to provide for admission of Canadian and Mexican citizens in TN status to engage in certain business activities at a professional level for occupa-

³² 8 CFR §248.3(h).

³³ 8 CFR §248.3(i). The regulatory provision concerning the certification requirement for medical professionals is at 8 CFR §212.15.

³⁴ See 8 CFR §§212.15(f), (g), and (h).

³⁵ 8 CFR §214.2(h)(13)(iii)(A).

³⁶ 8 CFR §214.2(h)(13)(iii)(B).

³⁷ INA §101(a)(15)(H)(i)(c); Pub. L. No. 106-95, 113 Stat. 1312 (Nov. 12, 1999); 66 Fed. Reg. 31107, 31111 (June 11, 2001); USCIS Memorandum, M. Aytes, “Reauthorization of H-1C Program Under the Nursing Relief for Disadvantaged Areas Reauthorization Act of 2005,” (Dec. 26, 2006), published on AILA InfoNet at Doc. No. 07010866 (posted Jan. 8, 2007).

³⁸ 8 CFR §214.2(h)(13)(iv).

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ 8 CFR §214.2(l)(12)(i).

⁴² *Id.*

⁴³ 8 CFR §§214.2(h)(13)(v), 214.2(l)(12)(ii).

⁴⁴ The regulations express the limits for time spent in H-1B, L-1, and R-1 classification in terms of time spent in the United States. 8 CFR §§214.2(h)(13)(iii), 214.2(r)(7). USCIS Memorandum, M. Aytes, “Procedures for Calculating Maximum Period of Stay Regarding the Limitations on Admission for H-1B and L-1 Nonimmigrants,” (Oct. 21, 2005), published on AILA InfoNet at Doc. No. 05110363 (posted Nov. 3, 2005).

⁴⁵ USCIS Memorandum, M. Aytes, “Revisions to Adjudicator’s Field Manual Chapters 31.2(d), 31.3(g) and 32.6,” (Dec. 5, 2006), published on AILA InfoNet at Doc. No. 06122063 (posted Dec. 20, 2006).

tions listed in Appendix 1603.D.1 to Annex 1603 of NAFTA.⁴⁶

Under the current regulation, TN nonimmigrants may be admitted for an initial period of up to 3 years.⁴⁷ USCIS has not articulated a maximum limit of authorized stay in TN status. Therefore, H-1 or L-1 temporary workers who have reached the limit of extensions may still be able to change their status to TN, provided that they meet the nationality and occupational eligibility criteria, among others.

Practice Pointer: Keep in mind that TN status (unlike H or L status) requires the alien to have non-immigrant intent. Such intent is often questioned in cases where the alien has resided for a number of years in the United States. Practitioners should bear this in mind especially if a labor certification or immigrant petition has been filed on behalf of the alien.

Certain Spouses and Children of Lawful Permanent Residents

In limited situations, changing status to V non-immigrant is available to beneficiaries (including derivative beneficiaries) of family-based immigrant petitions filed by lawful permanent residents on or before December 21, 2000,⁴⁸ provided:

- The petition has been pending for three years or more, or
- The petition has been approved and three years have passed since its filing, and
 - The priority date is not current, or
 - The application for immigrant visa or the application for adjustment of status remains pending.⁴⁹

Applicants are eligible for COS to V regardless of their failure to maintain status and regardless of their manner of entry.⁵⁰ A person could be eligible for V status, but be ineligible for adjustment of status to lawful permanent resident because of prior failures to maintain lawful nonimmigrant status.

⁴⁶ INA §214(e); 8 CFR §214.6(c); OI 214.6(g).

⁴⁷ “Period of Admission and Extension of Stay for Canadian and Mexican Citizens Engaged in Professional Business Activities—TN Nonimmigrants,” 73 Fed. Reg. 201 (Oct. 16, 2008), published on AILA InfoNet at Doc. No. 08101560 (posted Oct. 16, 2008).

⁴⁸ 8 CFR §214.15(c).

⁴⁹ INA §101(a)(15)(V); 8 CFR §214.15(a), (c)–(d).

⁵⁰ INA §§212(a)(6)(A), (a)(7), (a)(9)(B); 8 CFR §248.1(b).

STRATEGIC CONCERNS

Importance of Information on Form I-94

It is important to understand the difference between the expiration date on a nonimmigrant visa and the period of authorized stay indicated on the arrival/departure record, Form I-94. Many clients do not realize that it is the handwritten or stamped dates on the Form I-94 and not the expiration date of the visa that controls how long they may remain in the United States. Clients traveling to the United States should always check the I-94 at the time of their inspection and admission in order to make sure that the information on the I-94, including their first and last name, date of birth, class of admission and length of admission are correctly stated. It is not unusual for travelers to reverse their first and last names or to record a birth date incorrectly. It is also not unusual for Customs and Border Protection (CBP) to make unintentional errors that if not corrected, may lead to more challenging problems.⁵¹

Statutory Eligibility and USCIS Adjudicator’s Discretion

The approval of a COS application is a matter of discretion.⁵² An alien applying for COS bears the burden of proving eligibility for the requested classification. An applicant must meet the affirmative criteria for statutory eligibility and pinpoint any potential grounds of ineligibility. Moreover, in view of the underlying discretionary authority of the adjudicator, it is important for a lawyer to learn as much as possible about a client in order to anticipate and prevent adverse outcomes.

Preconceived Intent

An application for COS may be viewed by USCIS as an attempt by the alien to circumvent the normal visa issuing process abroad.⁵³ An area of particular concern to USCIS involves applications for COS from visitor (B-1/B-2) or exchange visitor (J-1) to student (F-1). At some consulates, it is easier to obtain a B-1 or B-2 visa than an F-1 visa. Therefore,

⁵¹ Information about the Arrival/Departure Record (Form I-94), including instructions for correcting errors on the I-94 can be found at www.cbp.gov/xp/cgov/travel/id/visa/i-94_instructions/arrival_departure_record.xml.

⁵² See *Bitar v. U.S. Dep’t of Justice*, 582 F. Supp. 417 (D. Colo. 1983); *Tsui v. Att’y Gen.*, 445 F. Supp. 832 (D.D.C. 1978); See also *USCIS Adjudicators Handbook*, chapter 30.3(c)(3)(D).

⁵³ *Matter of Hsu*, 14 I&N Dec. 344 (R.C. 1973).

when a person who enters in B-1/B-2 status soon thereafter files a COS to F-1, USCIS will normally examine the application closely, not only to determine eligibility, but also to determine whether the applicant had the preconceived intent to file for COS.⁵⁴

Practice Pointer: A student seeking to come to the United States to visit schools before making a final decision can apply for and be granted a B-2 visa, annotated to show that he or she is a “prospective student.”⁵⁵ This prevents a prospective student who has entered as a visitor from being denied a COS application based on USCIS charges of attempted circumvention and preconceived intent.

For aliens who do not enter as “prospective students,” attorneys who file for COS from B-2 visitor to F-1 student should advise the applicant about the possible denial of the application and the consequences this could have for the later filing of a visa application at a U.S. embassy or consulate. In preparing the application for COS, the attorney should consider whether the student had a preconceived intent to seek a status after arrival or whether the decision to apply for COS arose from circumstances arising after arrival in the United States.

In situations where there are changed circumstances, an application for COS should be accompanied by a statement or affidavit from the applicant explaining the circumstances leading to the change of plans. The affidavit should also address all other relevant questions, such as the applicant’s financial resources, ties to the home country and plans to return to the home country following the completion of studies. Facts such as the date when the applicant first contacted the school, when the applicant first visited the school, when he or she applied to the school or took entrance exams and when he or she met with admissions officers may be highly relevant to the question of whether the applicant entered with a preconceived intent to seek a change of status.

The alien’s conduct between the date of admission and the date of an application for COS may also bear on the issue of “preconceived intent.” In adjudicating the application, USCIS will look to the se-

quence of events and the nature of the alien’s activities as factors upon which to determine this issue.⁵⁶ In determining whether the alien misrepresented his or her original intentions, DOS has adopted a rule, referred to as the 30/60-day rule, where the time elapsed between the issuance of a visa or admission to the United States and the alien’s engagement in various activities (*e.g.*, unauthorized employment) determines both the burden of proof as well as the likelihood of finding misrepresentation.⁵⁷ Specifically, DOS has made it clear that, where a person enters the United States on a B-2 visa as a tourist and within 30 days following the visa issuance or admission actively begins seeking employment and/or begins to work, it is presumed that the person misrepresented his or her true intent at the time of visa application or admission.

If the inconsistent conduct occurs between 30 and 60 days following admission, then there is rebuttable presumption of misrepresentation which can be overcome with persuasive evidence to the contrary. If more than 60 days pass between the visa application or admission and the status violation, the government generally will not find misrepresentation or fraud under INA §212(a)(6)(C).⁵⁸ Of course, if an alien has engaged in conduct which is inconsistent with his or her status, then he or she is ineligible for COS on any account. However, the 30/60-day rule is a useful guideline in considering whether “preconceived intent” could lead to charges of misrepresentation.

Dual Intent Doctrine

All nonimmigrants, except those holding H-1 or L status, are presumed to be intending immigrants.⁵⁹ For this reason, USCIS will often view an applicant’s request for COS or extension of status as evidence of immigrant intent. Thus, in adjudicating the Form I-539, USCIS will consider whether the application is being filed to prolong the alien’s stay in the United States.⁶⁰ When filing such applications for persons in B, F, J or other status requiring non-immigrant intent, it is important to demonstrate the

⁵⁴ See *Bitar*, *supra* note 52 at 417 (B-2 to F-1); *Mahmood v. Morris*, 477 F. Supp. 702 (E.D. Pa. 1979) (same); *Tsui*, *supra* note 52 (same); *Seihoon v. Levy*, 408 F. Supp. 1208 (M.D. La. 1976) (same); *Patel v. Minnix*, 663 F.2d 1042 (11th Cir. 1981) (B-2 to E-2). See also *USCIS Adjudicators Handbook*, Chapter 30.3(c)(3)(D), n2.

⁵⁵ See, 9 *Foreign Affairs Manual* (FAM) 41.61 N16.3.

⁵⁶ See, *e.g.*, *Patel and Mahmood*, *supra* note 54.

⁵⁷ 9 FAM 40.63 N4.7.

⁵⁸ DOS Cable No. 91 State 187392 (June 7, 1991), published on AILA InfoNet at Doc. No. 91060790 (posted June 7, 1991).

⁵⁹ INA §214(b).

⁶⁰ *Matter of Kalia*, 14 I&N Dec. 559 (R.C. 1974).

continued existence of ties to the home country and an intention to return.

Under INA §214(b), the fact that an applicant for change to H-1 or L nonimmigrant status is the beneficiary of an immigrant petition, or has otherwise sought permanent residence in the United States, will not result in the denial of the application. Adopted as part of the Immigration Act of 1990, this statutory section codified the concept of dual intent, under which an alien could enter the United States as a nonimmigrant while simultaneously seeking permanent residence. Thus, while an applicant for H-1 or L status must disclose the existence of an immigrant petition or immigrant intent, such a petition cannot, in and of itself, be the basis for denying an application for COS.

While §214(b) recognizes the existence of dual intent only for aliens holding or changing to H-1 or L status, in the past, legacy INS did not adopt such a narrow interpretation of the dual intent doctrine.⁶¹ The regulations do make clear that applications involving extensions for H-2A, H-2B, or H-3 aliens will be denied if an application for alien labor certification has been approved or a preference petition has been filed.⁶²

USCIS regulations state that the approval of an application for alien labor certification or the filing of a preference petition for an alien may not be a basis for denying a change of status to E,⁶³ O-1,⁶⁴ P-1, and P-2⁶⁵ status. Arguably, any alien can simultaneously hold nonimmigrant intent in the present and immigrant intent for the future, but establishing such a distinction to the satisfaction of a consular officer or USCIS adjudicator can be challenging, to say the least.

In contrast, while DOS acknowledges the existence of dual intent for persons in H-1⁶⁶ and L⁶⁷ status, it does not explicitly do so for persons in E,⁶⁸ O-1⁶⁹ or P-1⁷⁰ status. In practice however, nonimmigrant visa applications are rarely denied on this

basis. For R nonimmigrants, legacy INS has been inconsistent in its position on dual intent. The *Foreign Affairs Manual* (FAM) explicitly states that an officer cannot refuse an application for an R-1 visa on immigrant intent grounds based on the applicant's lack of compelling ties or stated intent to immigrate at some point in the future, as long as the consular officer is satisfied that the applicant intends to comply with all the requirements for maintaining R status.⁷¹

As to N nonimmigrants, for parents and children of certain special immigrants who are or were classified as NATO aliens or as G diplomats or their dependents, regulations state that the classification shall not be denied on the grounds that the applicant is an intending immigrant.⁷²

Employment Prior to Approval

An application for COS does not extend the alien's initial status beyond its expiration date, and the alien may not engage in the principal activities of the new status until the change of status application is approved. This affects the ability of an applicant to begin working before adjudication of the change of status.

This situation has arisen frequently when an F-1 student, working within the OPT portion of his or her studies, applies for a change of status to H-1B with the same employer. However, as discussed previously, F-1 students on OPT who are beneficiaries of certain H-1B petitions continued to be employment authorized until the start of the H-1B status (if approved) or adjudication of the H-1B petition (if denied).⁷³

If an H-1B alien is the beneficiary of a timely-filed petition by his or her new H-1B employer, then the "portability" provisions of the American Competitiveness in the 21st Century Act (AC21)⁷⁴ will allow him or her to start work upon the filing of the petition.

Note: However, by virtue of 8 CFR §274a.12(b)(20), a nonimmigrant in A-3, E, G-5, H, I, J, L, O, P, R, or TN status who filed an application for *extension of stay* before the expiration of his or her

⁶¹ 8 CFR §§214.2(h)(16)(i), 214.2(l)(16).

⁶² 8 CFR §214.2(h)(16)(ii).

⁶³ 8 CFR §214.2(e)(5).

⁶⁴ 8 CFR §214.2(o)(13).

⁶⁵ 8 CFR §214.2(p)(15).

⁶⁶ 9 FAM 41.53 N3.1.

⁶⁷ 9 FAM 41.54.

⁶⁸ 9 FAM 41.51, N15.

⁶⁹ 9 FAM 41.55, N5.1.

⁷⁰ 9 FAM 41.56, N9.2.

⁷¹ 9 FAM 41.58.

⁷² 8 CFR §248.1(e).

⁷³ 73 Fed. Reg. at 18949, published on AILA InfoNet at Doc. No. 08040471 (posted Apr. 8, 2008).

⁷⁴ Pub. L. No. 106-313, 114 Stat. 1251.

work-authorized status will remain authorized to work for the same employer for up to 240 days or until a decision is issued denying the application, whichever is earlier. Although the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRAIRA)⁷⁵ states that an alien whose nonfrivolous application to change or extend status remains pending for more than 120 days will accrue unlawful presence in the United States,⁷⁶ the agency's current interpretation is that an alien does not accrue days of unlawful presence in the United States during the pendency of a timely-filed application for extension or change of status, as long as he or she has not engaged in unauthorized employment.⁷⁷

Reinstatement of Status

A student or exchange visitor who has fallen out of status may seek reinstatement of status as a first step toward filing a COS application.⁷⁸ Under the regulation, a student must apply for reinstatement within five months of falling out of status.⁷⁹ If the application for reinstatement is made more than five months after the student fell out of status, the burden is on the student to provide a substantial reason for the delay and proof that the student filed the request for reinstatement as promptly as possible under the circumstances.⁸⁰ Reinstatement procedures for exchange visitors are set forth in DOS regulations.⁸¹

Once restored to valid status, an F-1 or M-1 student or J-1 exchange visitor can apply for change of status, again, assuming the requested classification allows for such a change.

APPLICATION PROCEDURE

The application for change of nonimmigrant status is made on either Form I-129 or Form I-539, depending on the classification sought. Form I-129 is used when the alien wishes to change to E, H, I, L, O, P, Q, R, or TN status; the I-539 is used when changing to most other statuses. Form I-539 is also used to change the status of a beneficiary's dependent family members, such as from F-2 to H-4. The

application must be filed with the appropriate USCIS service center.⁸² The application must be submitted with the required fee, a photocopy of both sides of the applicant's I-94 arrival-departure record, and documentation to prove eligibility for the requested nonimmigrant classification. Evidence that the applicant has been maintaining nonimmigrant status should also be submitted.⁸³

A and G Nonimmigrants

Applicants wishing to change to A (diplomat) or G (representative of international organization) status, including immediate family members of a principal alien whose status already has been changed to A or G classification, must submit an application for COS on the I-539 (accompanied by a completed and endorsed Form I-566), but need not pay a filing fee. DOS must approve this change of status.⁸⁴

Where Classification Change Not Required

A nonimmigrant visitor for business (B-1) who intends to remain in the United States temporarily as a visitor for pleasure (B-2) during his or her period of authorized stay, need not submit a request for change of status.⁸⁵ However, according to the minutes of a liaison meeting between representatives of AILA and CBP, the reverse is not true. A nonimmigrant visitor for pleasure (B-2) cannot perform acts consistent with a visitor for business (B-1) without first obtaining reclassification to B-1 status.

An immediate family member of an A or G alien, and the spouse or child of an alien classified pursuant to INA §§101(a)(15)(E), (H), (I), (J), (L), (M), (O), (P), or (R), or as a TN, are not required to submit an application for COS in order to attend school in the United States, as long as the principal alien continues to maintain status, and the principal's spouse, or child continues to maintain their corresponding nonimmigrant status.⁸⁶ Conversely, a spouse of an F-1 student who plans to engage in full-time study must apply for and obtain a change status

⁷⁵ Pub. L. No. 104-208, 110 Stat. 3009.

⁷⁶ INA §212(a)(9)(B)(iv).

⁷⁷ See Pearson Memo, *supra* note 4.

⁷⁸ 8 CFR §214.2(f)(16).

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ 22 CFR §§62.45 and 77.

⁸² See "Direct Filing Addresses for Form I-129, Petition for Nonimmigrant Worker," published on AILA InfoNet at Doc. No. 07030964 (posted March 9, 2007); "Direct Filing Addresses for Form I-539, Application to Change/Extend Nonimmigrant Status," published on AILA InfoNet at Doc. No. 07030965 (posted Mar. 9, 2007).

⁸³ 8 CFR §248.3.

⁸⁴ 8 CFR §248.3(c); OI 248.2.

⁸⁵ 8 CFR §248.3(e)(1).

⁸⁶ 8 CFR §248.3(e)(2); OI 214.1.

from F-2 to F-1, J-1 or M-1 status; but the children of an F-1 student may engage in full-time study if they are in an elementary or secondary school.⁸⁷

DECISION AND TRAVEL ISSUES

Approval

If the application for COS is approved, USCIS issues an approval notice on Form I-797 that includes a new Form I-94 indicating the alien's new status in the United States and the period of authorized admission.

If the spouse or child of an alien whose status has been changed to E, F, H, I, J, L, M, O, P, R, or TN classification is abroad and will follow to join the principal alien, the spouse or child may file an application for nonimmigrant visa accompanied by the approval notice for the principal. The spouse or child also must present proof of relationship to the principal applicant, including such translations and certifications as may be necessary. It is also advisable to provide current verification of the principal's employment or student status. If the accompanying family member(s) are visa exempt, then they can apply for admission at the border or at a U.S. pre-clearance station.

If the applicant wishes to notify an additional or different consulate from the one designated on the Form I-129, the applicant may file the Form I-824, application for action on an approved application or petition, with the USCIS service center that originally approved the petition, requesting USCIS to cable notice of the approved petition to that U.S. consular post or port of entry. This is not necessary when the I-129 lists the correct consulate or port of entry, as USCIS notifies the designated consulate or port of entry automatically.⁸⁸

⁸⁷ 8 CFR §214.2(f)(15)(ii).

⁸⁸ In 2007, DOS introduced Petition Information Management Service (PIMS) which requires applicants to send most petitions/applications to USCIS accompanied by a duplicate copy for the Kentucky Consular Center (KCC). The KCC will make an electronic copy of the petition which can be referenced by consulates when making decisions on visa applications. For more information on PIMS, see "Update: New PIMS System," AILA InfoNet Doc. No. 07121072 (posted Dec. 10, 2007).

Once the application for COS has been granted, the alien is required to comply with all of the terms and conditions of the new visa status.⁸⁹

Travel During Pendency of Application for Change of Status

Attorneys should advise their clients that once a COS application is filed, travel outside the United States has the effect of abandoning the application.⁹⁰

Note, however, the abandonment does not impact approval of the visa itself. For example, if an applicant travels while the change of status to H-1B is pending, the approval of the H-1B will be valid and usable at a consulate abroad. On the other hand, the request for change of status from a prior nonimmigrant category to H-1B would be moot because the person is outside of the United States and is no longer in any status. The foreign national must then apply for the new visa classification at the U.S. consulate abroad or, if visa exempt, at the appropriate port of entry.

Travel After Approval of Application for Change of Status

A nonimmigrant whose application for COS has been granted generally will need a visa issued by a U.S. consulate abroad to return to the United States after a trip abroad. There are two exceptions.

The 30-Day Rule (Automatic Visa Revalidation)

An alien with an approved change of status to F, J, M, or Q status is allowed to travel for 30 or fewer days to Canada, Mexico, or the adjacent islands (other than Cuba), and to re-apply for admission to the United States in the same nonimmigrant status without a newly-issued nonimmigrant visa. Instead, Forms I-94 and I-20, or DS-2019 (formerly IAP-66), are presented at the port of entry.⁹¹ The same applies to aliens who have changed status to any other nonimmigrant classification, except that re-entry is permitted only from contiguous territory.⁹²

Important Note: As of April 1, 2002, persons who travel to Mexico or Canada to apply for a non-

⁸⁹ 8 CFR §248.3(f).

⁹⁰ Memo, Cook, Acting Asst. Comm. Program, HQ 70/6.2.9 (June 18, 2001), reprinted in 78 *Interpreter Releases* 1378, 1395 (Aug. 27, 2001); Letter, Bednarz, Chief, NIV Branch, Adjudications, CO 248-C (Oct. 29, 1993), reprinted in 70 *Interpreter Releases* 1604, 1626 (Dec. 6, 1993).

⁹¹ 8 CFR §214.1(b); 22 CFR §41.112(d).

⁹² 22 CFR §41.112(d).

immigrant visa will no longer be able to avail themselves of the automatic revalidation rule.⁹³ In such cases, if the application for nonimmigrant visa is denied, the applicant can no longer return to the United States unless he or she is able to enter in another status. Also, as of April 1, 2002, applicants from certain foreign states designated as sponsoring terrorism were no longer able to use the automatic visa revalidation rule under any circumstances.

Canadian Citizens and Landed Immigrants

Except for persons seeking E-1/E-2⁹⁴ or K⁹⁵ status, Canadian citizens are exempt from visa requirements and can use the Form I-797 or Form I-94 to apply for admission to the United States.⁹⁶ Where Canadian citizens have received change of status to E-1 or E-2 classification, USCIS must notify them of the visa requirement for re-entry.⁹⁷

Practice Pointer: Even when USCIS has approved a petition for E-2 status, a Canadian applicant who travels abroad must still apply *de novo* for an E-2 visa at a United States consulate. Further, prior approval of the petition for E status by USCIS is not binding on the consular officer. Great care must be made in preparing a new E visa application in compliance with all rules in place at the consulate.

Denial

If USCIS denies the application for COS, the agency issues a written decision citing the basis for the denial.⁹⁸ Under 8 CFR §248, there is no right of appeal from a denial of an application for COS.⁹⁹ However, USCIS may review the decision upon receiving a motion to reopen or reconsider within 30 days of the decision.¹⁰⁰ The motion is made on Form

I-290B and must be accompanied by appropriate supporting documents.¹⁰¹ Note that there is no independent review by an immigration judge or the Board of Immigration Appeals of a USCIS decision denying a COS application.¹⁰²

It is important to note that the filing of a motion to reopen or reconsider does not extend the period of authorized stay. In other words, if the alien's I-94 card has expired, he or she will continue to accrue unlawful presence and may be subject to removal.

An alien who has been maintaining valid status will be allowed to continue in that status even if the application is denied, provided that the alien is otherwise entitled to retain the original status.¹⁰³ At the time of filing the application for change of status, an attorney should make a specific request to retain the alien's current status in the event the application is denied.

If the alien is no longer in a valid nonimmigrant status at the time the application is denied, the attorney may request that USCIS grant a period of voluntary departure, usually 15 to 30 days, during which the alien will be required to leave the United States.

An alien whose COS application is denied may also apply for a nonimmigrant visa at a U.S. consulate abroad if otherwise eligible. However, practitioners should keep in mind that some consular posts may make negative inference from any previous denial of COS applications by USCIS.

CONCLUSION

Change of status is a useful tool for aliens who are in the United States in one visa status and wish to alter the primary purpose of their stay. However, the practitioner must carefully assess an alien's eligibility for change of status and ask: Is the alien eligible for the requested status? Has the alien maintained nonimmigrant status? Is the alien precluded by statute from changing status? If the answer to these and other relevant questions are positive, and the alien's reasons for seeking the new status are thoroughly considered, a change of status may be an appropriate step. When a change of status is not available or USCIS has denied a COS request, obtaining a nonimmigrant visa at a U.S. consulate abroad may still be an available option.

⁹³ 67 Fed. Reg. 10322-24 (Mar. 7, 2002), published on AILA InfoNet at Doc. No. 02031172 (posted Mar. 11, 2002).

⁹⁴ 8 CFR §§212.1(l), 1212.1(l).

⁹⁵ 22 CFR §41.2(k).

⁹⁶ 8 CFR §§212.1(a), 1212.1(a); 22 CFR §41.2(a).

⁹⁷ See OI 248.8.

⁹⁸ 8 CFR §248.3(g).

⁹⁹ *Id.*

¹⁰⁰ 8 CFR §103.5. Alternatively, a motion to reopen or reconsider may be submitted to Administrative Appeals Office (AAO), which has jurisdiction to review a limited range of issues, such as an underlying petition for nonimmigrant worker. One could previously find the regulatory authority describing the AAO's jurisdiction in 8 CFR §103.1(f)(3)(iii). However, as of this writing, this provision appears to have been removed from the CFR.

¹⁰¹ 8 CFR §103.5(a)(1)(iii).

¹⁰² *Sadegh-Nobari v. INS*, 676 F.2d 1348 (10th Cir. 1982).

¹⁰³ OI 248.1(d).