USCIS RULE ON MAINTENANCE OF H-1B AND L-1 STATUS FOR CERTAIN ADJUSTMENT APPLICANTS | FREQUENTLY ASKED QUESTIONS

Based on the November 1, 2007 rule on travel for H and L Nonimmigrants, applicants for adjustment of status to permanent resident (AOS or Form I-485) who also hold H or L status may choose to travel using H/L visas or may choose to use advance parole documents issued as pending adjustment applicants. This FAQ is designed to address travel and nonimmigrant status issues of adjustment of status applicants.

The following questions and answers will hopefully address most issues in light of the change in regulations:

1. To which nonimmigrant classifications does this rule apply?

This rule applies to individuals who are maintaining H-1B, L-1A or L-1B employment in the United States and their derivative beneficiaries: H-4, L-2.

This rule does NOT apply to individuals working in the U.S. pursuant to TN, O-1, E-1, E-2, H-1B1 (Singaporean/Chilean), E-3 or any other visa category and its derivative family member classifications. Individuals not holding H-1B, L-1A, L-1B, H-4 or L-2 who have filed for adjustment of status MUST apply for and be issued an Advance Parole before they depart the U.S. If they do not, departure constitutes an abandonment of the AOS.

2. What is advance parole authorization?

AOS applicants may concurrently file an application for "advance parole" travel authorization as well as an employment authorization document (EAD). The advance parole is a one page document issued by the USCIS on Form I-512L, or is issued as a combination document as part of the EAD, for travel outside of the United States after an AOS is accepted for processing. The parole authorization is normally valid for one year for multiple entries to the United States. While new applications can be filed each year, it is important to note that you must enter the U.S. while the advance parole is valid. You cannot be outside the U.S. at the time that the application is filed, nor can an approved advance parole be mailed to you to then use to return to the U.S. If the advance parole is pending at the time of departure, you must have either an existing valid advance parole or H/L visa to return to the U.S.

Individuals who choose to use an advance parole for travel will not be required to apply for and be issued new visas in their passports. Please keep in mind, however, that individuals applying for entry to the U.S. based on an advance parole document should be prepared to be sent to "secondary inspections". This generally means that it can take slightly longer to be admitted to the U.S. and travelers should plan connecting flights accordingly.

3. Is advance parole still required for all applicants for permanent resident status?

No. If the applicant is in valid H or L status and continues to maintain that status, s/he can travel using H or L visa stamps in the passport. Please note that "maintaining nonimmigrant status" means that the H-1B/L-1 employee continues to work for the sponsoring employer and does not work for any other employer (by using an approved EAD). Derivative family members who hold H-4/L-2 status can also continue to use their H-4/L-2 visas for travel so long as (1) the principal beneficiary continues to use his/her H-1B/L-1 visa (or maintain that status) and (2) provided the H-4 spouse is not using an EAD. Since an L-2 spouse can use an EAD, the fact that an L-2 spouse is working based on an approved EAD, will not constitute a failure to maintain status. Current processing times for Forms I-131 can be found on our web site under USCIS processing times.

4. How does this affect employment authorization?

When an AOS application for permanent resident status is submitted, the principal applicant and any dependent family members (i.e. spouse and unmarried children under the age of 21) may also file applications for employment authorization. When the applications for work authorization are approved, the applicants will be issued Employment Authorization Document (EAD) cards valid for one year, and the cards give the applicants an unrestricted right to accept employment in the United States while the applications for adjustment of status are pending; i.e. the principal applicant may continue his/her employment with the sponsoring employer without the need to file applications to extend H or L work authorization, or may work for an employer other than the sponsoring employer, or may even be self-employed. However, the principal applicant must understand that at the time the adjustment application is filed he/she must intend to work for the sponsoring employer when permanent resident status is granted, and it must be the intention of the sponsoring employer to employ the adjustment applicant on a regular, full-time basis at that time. Under the American Competitiveness in the 21st Century Act (AC-21), if the AOS is pending for over 180 days, the "sponsoring employer" may in fact be a different employer than the original sponsor so long as the employment is in a same or similar occupation as that set forth in the I-140 petition. Please see our website under AC-21 for details on I-485 "portability". The EAD can be renewed each year while the application for adjustment of status remains pending. We recommend that EAD renewals be submitted at least 90 days before the current EAD expires to best avoid a gap in employment authorization.

5. What about EADs for dependent family members?

As noted above, spouses and minor, unmarried children of the principal applicant may also submit applications for employment authorization and will enjoy an unrestricted right to accept employment once the EAD cards are issued.

6. What impact does the rule have on EADs?

While this rule does not change the procedure for applying for EAD cards, it does add consequences for obtaining the cards and subsequently using them for employment outside of the scope of the previously authorized H/L employment. As an example, if the principal applicant received an EAD card and then works for a different employer (i.e. not the H/L sponsoring employer), he/she is no longer considered to be maintaining valid H or L status. Travel in this situation would require the individual to use an advance parole in order to continue to work for the new employer. If, however, the individual upon re-admittance intends and in fact does only work for the original H/L sponsoring employer and the H/L visa petition and visa are still valid, then it is possible that this individual may be able to enter using the visa. Furthermore, a new H-1B petition by a new employer could also be used.

If the intention upon returning to the U.S. is to continue to work pursuant to an approved EAD, then s/he must obtain an advance parole document before traveling abroad because of the failure to maintain H/L status.

In the situation where an AOS applicant is no longer maintaining H/L status, if the application for adjustment of status is ultimately denied by the USCIS, s/he would not be eligible for reinstatement to H/L nonimmigrant status and would be subject to removal proceedings.

Note: If the principal beneficiary (employee) is no longer maintaining H/L status, then all dependent family members must also apply for and be granted advance parole before departing the U.S.

Caution: There may well be situations where the principal applicant who is in H-1B/L-1 status chooses not to apply for an EAD card but his/her dependent family members do so and commence employment. The H-1B principal applicant can then reenter the United States by presenting a valid visa (or establishing exemption from the requirement), but the H-4 dependents and L-2 children must travel using advance parole documents. Likewise, if the principal H-1B/L-1 obtains an EAD card and uses it for employment apart from his/her sponsoring employer, s/he must obtain an advance parole authorization before traveling abroad, and his/her failure to maintain H-1B status means that any H-4/L-2 dependents must also obtain advance paroles, even if they are otherwise maintaining status.

7. What is the impact of this rule on dependent family members (i.e. those in H-4 dependent status)?

The rule has a similar impact on H-4 dependents. As an example, if a H-4 dependent spouse receives an EAD card and commences employment, he/she is no longer maintaining valid H-4 status and would need to obtain an advance parole authorization before traveling abroad. The same situation would apply to dependent children in either H-4 or L-2 status. Note however, that spouses who hold L-2 dependent status are now permitted to obtain employment authorization even before an application for adjustment of status is filed, and would therefore be able to depart and reenter by presenting valid L-2 visas, assuming that the principal applicant continued to maintain valid L-1 status.

8. What about those individuals who are considered exempt from normal visa requirements?

Canadian citizens are deemed to be visa exempt. Therefore, if they are maintaining valid H/L status, the same rule would apply to them (i.e., the ability to reenter the country by presenting the original I-797 approval notice) but they would not be required to obtain H/L visas in their passports.

Caution: *Given the complexity that can often arise, it is always advisable to check with your attorney before planning international travel after the filing of adjustment of status applications.*