

## § 1.07 Obtaining Nonimmigrant Status

As discussed, nonimmigrant visas (when needed) are issued by United States consulates abroad. After a nonimmigrant visa is issued, the foreign national may then apply for admission to the U.S. at a port of entry.

The process may not be simple. For example, prior to applying for an employment-authorizing nonimmigrant visa, many foreign nationals must first apply for approval of the desired status. The grant of H-1B, H-4, L, O, and TN statuses must first be approved by the INS. J status must be approved by the designated J program that wishes to arrange for the exchange visitor's stay in the U.S. E status can be approved either by the INS or by the DOS through a consulate.

### [1]—Petitioning the INS

With a few exceptions, before a foreign national can obtain a nonimmigrant work visa at a U.S. consulate abroad, the sponsoring U.S. employer must file a petition on behalf of the foreign national with the Immigration and Naturalization Service (INS).<sup>1</sup> The employer is referred to as the “*petitioner*” or “*sponsor*,” and the foreign national is referred to as the “*beneficiary*” of the petition. In the petition, the employer demonstrates the foreign national's eligibility for the visa classification sought in the job position available in accordance with applicable regulations. The INS reviews the petition to determine whether the foreign national is eligible for the visa classification, and then issues a Notice of Approval.

### [a]—Contents, Structure, and Purpose of Petitions

The petition is almost always printed on a specialized form for the classification sought. The petition for most nonimmigrant employment visas, for example, is the Form I-129.<sup>2</sup> The forms are revised occasionally, and a “Y” or an “N” after the date of revision printed in the lower left corner indicates “Yes” or “No” as to whether prior editions of the form can be used.

The petition is designed to elicit relevant facts about the petitioning employer, the beneficiary, and the proposed employment. The questions must be answered carefully. A simple mistake in completing the form could be costly. For example, an error in the number of years of the desired employment could require another petition a year or two earlier than planned, in effect doubling the work necessary to keep the foreign national employed for the maximum period authorized by law.

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<sup>1</sup> INA § 214(c); 8 U.S.C. § 1184(c).

<sup>2</sup> See INS Form I-129 in Appendix C *infra*.

### **[b]—Importance of Avoiding Misrepresentation**

Any temptation to misrepresent the facts on any document filed with the INS or a U.S. consulate must be resisted. Material misrepresentations result in a permanent bar to entering the U.S.<sup>3</sup> Such misrepresentations constitute fraud, and asking the INS for a waiver of fraud is a difficult process with uncertain results. Even failing to answer a question by leaving it blank can be construed as a misrepresentation. Materiality is determined by assessing whether telling the truth would have made the foreign national inadmissible to the U.S. or whether the failure to disclose would have shut off a line of inquiry that might have resulted in a finding of inadmissibility.

Obtaining a waiver of fraud for a nonimmigrant visa requires a document-intensive application to the INS that can take months to process, and which may result in denial. Obtaining such a waiver for an immigrant visa requires that the foreign national have a U.S. citizen or permanent resident spouse or parent and prove that there would be extreme hardship to that relative should the foreign national be denied the visa or other benefit.<sup>4</sup> Removal (deportation) for a misrepresentation is also possible, as well as federal prosecution under the federal criminal code, with possible imprisonment of up to five years.<sup>5</sup>

### **[c]—Filing the Petition**

The petition is filed with the INS regional service center having jurisdiction over the area of intended employment. The four regional service centers in the U.S. are in California, Nebraska, Texas, and Vermont.<sup>6</sup> It is wise to send the petition and any other communication to the INS by certified mail, return receipt requested, or by an express mail service. These centers handle hundreds of thousands of applications per year and sometimes lose petitions, applications, or other correspondence. Courier proof of service is not acceptable proof of receipt.

Once a petition or application is received, the service center will issue a rather elaborate receipt with a file number. The receipt also includes an estimate of the number of days anticipated to process the petition. However, service center processing times fluctuate greatly, and often the service centers issue revised processing times according to the type of filing. Unfortunately, petitioners do not receive individual notices of revised processing times, and

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<sup>3</sup> INA § 212(a)(6)(C); 8 U.S.C. § 1182(a)(6)(C).

<sup>4</sup> INA § 212(i); 8 U.S.C. § 1182(i).

<sup>5</sup> 18 U.S.C. § 1015.

<sup>6</sup> To determine which regional service center has jurisdiction, one may contact the INS at 425 Eye Street, N.W., Washington, D.C. 50236, (202) 514-2000, or at [www.ins.usdoj.gov/graphics/index.htm](http://www.ins.usdoj.gov/graphics/index.htm).

petitioners may think that the INS has exceeded the processing time when in fact that type of case has simply become further backlogged. The receipt and the cancelled check should be retained as proof of filing and for future correspondence with the service center (INS procedure is to place the receipt number on the back of the check).

#### **[d]—Delays in Processing**

Because so many petitions are filed with the INS, each service center now publishes periodic reports on how long each type of application will normally take to be adjudicated. These are called *processing times*, *processing dates*, or *just-in-time reports*. Some nonimmigrant petitions take up to eight months for processing, but most are completed within two or three months. The published processing times are not always accurate. They may become longer or even shorter. Only after the published processing times indicate that a decision is overdue may the petitioner make a status inquiry.

Petitioners and beneficiaries can make status inquiries by telephone, but busy signals and long holds are the norm. Status inquiries by facsimile are sometimes also possible (depending on the service center in question), but responses can be slow by this method also.

The American Immigration Lawyers Association (AILA) has created a system for its members to use for checking on clearly overdue, lost, or mistaken petitions at the service centers. This is accomplished by faxing one or two designated lawyer members of the association with the details of the problem case. The lawyers then communicate with the service center at designated times, and fax back the response to the requesting lawyer once the INS provides an explanation for the delay. The system is fairly recent and subject to change. The lawyers, designated as *liaisons*, rotate, usually quarterly. They generally field hundreds of inquiries per month.

#### **[e]—Employment During Pendency of Petitions**

A foreign national generally may not work for the petitioning employer until the petition is approved.<sup>7</sup> The only common exception is for students who might be authorized for practical training while the employer petitions for a change of their status, typically to H-1B.<sup>8</sup>

If the petitioner is seeking to *extend* the nonimmigrant status of a

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<sup>7</sup> The one exception to this arises pursuant to Section 106 of the American Competitiveness in the Twenty-First Century Act, which authorizes H-1B status holders to begin working for new employers as soon as the petition is filed. See § 4.08[1][c] *infra*.

<sup>8</sup> See § 2.07[2] *infra*.

foreign national employee in the *same* classification, the employee may usually remain employed by the petitioner while the extension petition is pending with the INS. This automatic extension is permitted pursuant to federal regulations that provide for an automatic extension of employment authorization for 240 days while a petition for most nonimmigrant work classifications is pending if the extension petition has been timely filed.<sup>9</sup> This extension does not apply when the petitioner is a new employer of the foreign national.

### **[f]—Approval or Denial**

Approval of the nonimmigrant petition is sent to the petitioning employer on INS Form I-797B, also called a Notice of Action. If the foreign national is abroad, the service center will sometimes notify the U.S. consulate about the petition approval, but such notifications are increasingly rare. The Notice of Action will indicate which consulate should receive this notification. The foreign national should then apply for the visa stamp at a U.S. consulate.<sup>10</sup>

If the foreign national is already in the U.S., and the petitioning employer filed to change his or her status to that of a work classification, the INS will attach the foreign national's new I-94 to the I-797 Approval Notice, indicating the new status classification. Denials of work visas are generally preceded by a request from the INS for missing information or for a rebuttal of the proposed denial. Denial of a petition can be appealed to the Administrative Appeals Office (AAO) in Washington, D.C. Or, rather than appealing a denial, the petitioning employer may simply file a new petition after addressing the concerns set forth in the denial.

### **[g]—Premium Processing**

On June 1, 2001, INS established a “premium processing” program under which it will process certain petitions within fifteen calendar days for a \$1,000 fee paid by the petitioner (i.e., the employer).<sup>11</sup> Petitions for the following classifications are eligible: E-1, E-2, H-1B, H-2A, H-2B, H-3, L-1, O-1, O-2, P-1, P-2, P-3, Q-1, R-1, and TN.

Premium processing begins on the day the INS physically receives the petition and ends when it issues a decision or request for additional information. If the INS fails to meet the fifteen-day deadline, it will refund the \$1,000 but continue to process the

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<sup>9</sup> 8 C.F.R. § 274a.12(b)(20).

<sup>10</sup> See, e.g., 8 C.F.R. §§ 214.2(l)(7), 214.2(l)(13).

<sup>11</sup> “Establishing Premium Processing Service for Employment-Based Petitions and Applications,” 66 Fed. Reg. 29,682 (June 1, 2001), to be codified at 8 C.F.R. Parts 103, 299.

petition as quickly as possible. So far the program has been a success, with the norm being that the INS meets the deadline.

Premium processing applications are made on Form I-907, which lists the petitioner's telephone and fax numbers and e-mail address to facilitate communication from the INS. Communication to the INS is facilitated by special telephone numbers and e-mail addresses for each Service Center.<sup>12</sup>

## [2]—Obtaining a Visa

### [a]—United States Consulates Abroad

Once the petition has been approved by the Immigration and Naturalization Service, the foreign national takes the Form I-797 Notice of Action to a U.S. consulate and applies for the actual visa. Not only may the consulate not be in the same building as the U.S. embassy, but even though there may be a number of consulates in a particular country there may be only one U.S. embassy in that country.

Different consulates have different procedures depending on the volume of nonimmigrant visas they issue and the culture of the country where they are located.<sup>13</sup> Many consulates permit foreign nationals to apply either in person, by a drop-off system, or through an agent such as a designated travel agent. The application for the visa stamp is the same regardless of the means selected by the applicant to actually apply. A completed nonimmigrant visa stamp application Form DS-156<sup>14</sup> must be completed, signed, and submitted with the foreign national's passport, a copy of the visa petition filed on his or her behalf with the INS, the original Form I-797 Notice of Action approving the petition, photographs of the applicant,<sup>15</sup> and a filing fee. After the attacks of September 11,

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<sup>12</sup> California Service Center: 949.831.8550, CSC.Premium.Processing@usdoj.gov; Nebraska Service Center: 402.474.5012, NSC.Premium.Processing@usdoj.gov; Texas Service Center: 214.275.4415, TSC.Premium.Processing@usdoj.gov; Vermont Service Center: 802.527.4828, VSC.Premium.Processing@usdoj.gov.

<sup>13</sup> Consular procedures are now changing even more rapidly as the DOS and Congress react to the events of September 11, 2001. Applicants should contact the U.S. Consulate where they intend to apply to confirm current procedures prior to submitting the application.

<sup>14</sup> See Appendix C *infra*.

<sup>15</sup> On November 5, 2001, the DOS issued a cable reminding consulates of the importance of high-quality photographs in nonimmigrant visa stamp applications. Increasingly, the DOS and other government agencies are incorporating facial recognition technologies into their daily procedures, including the processing of machine-readable visas. Accordingly, consulates are likely to become more strict about enforcing the DOS standards for photographs

2001, many consulates have changed procedures to require all visa applicants to use a mail-in process, rather than file in person. Also, many consulates have reported longer delays in visa issuance.

Consulates may require foreign nationals to undergo a brief interview at a consulate conducted by a Foreign Service officer who may question the applicant about matters such as personal immigration history, the applicant's qualifications for the visa, the nature of the employment with the hiring company, and the applicant's intention to return to his or her home country. The officer may ask to see original documents and in some cases, the applicant may have to provide additional documentation. Most consulates permit lawyers to accompany applicants to such an interview.

If the U.S. consular officer reviewing the application and/or interviewing the applicant agrees that the proposed employee is entitled to the visa, the officer places a visa on a page of the foreign national's passport by either stamping it, or more commonly now, electronically affixing a photo-scanned, machine-readable visa to it. Also included on the visa are a Department of State seal, the foreign national's name, the classification of the visa, the date and place of issuance, an expiration date, and a bar code allowing the visa to be read by machine.<sup>16</sup>

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for visa stamp applicants. Photographs must: (1) be taken at least six months prior to the submission of the photograph to the consulate; (2) be at least 1 1/2 by 1 1/2 inches—up to a maximum of two inches—in either color or black and white; and (3) be clearly focused. Further, in the photograph the applicant: (1) must be facing directly into the photo so that his or her full face is seen; (2) must be seated against a light background; (3) must not be wearing sunglasses or other paraphernalia that would detract from the face, nor a traditional facemask or veil that conceals portions of the face and does not permit adequate identification; and (4) may be wearing a head covering if it is required because of religious beliefs and does not obscure any portion of the applicant's face (covering of the ears is currently permitted, however).

<sup>16</sup> It is likely that, in the near future, certain biometric identifiers (such as fingerprints) will be incorporated into each machine-readable visa stamp. Section 414 of the USA PATRIOT Act (see § 1.12 *infra*) mandates the use of biometric technology in establishing the integrated entry and exit data system required by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (INA § 295; 8 U.S.C. § 1365). Further, Section 1008 of the USA PATRIOT Act requires that the Attorney General issue a feasibility report on the use of fingerprints by consular posts and at ports of entry into the U.S.; the fingerprint data would be linked to the Federal Bureau of Investigation's Integrated Automated Fingerprint Identification System. The intent is to enable consular and INS officers to identify foreign nationals with criminal or terrorist backgrounds prior to issuance of visa stamps or entry into the U.S.

## **[b]—Mexican or Canadian Border Consulates**

Some U.S. consulates in Mexico and Canada are near the U.S. border, and nonimmigrant visas are available at all of these Consulates.<sup>17</sup> Generally a foreign national must seek a visa at the consulate that has jurisdiction over the area in which he or she resides.<sup>18</sup> For example, the foreign national cannot ask the consulate in Ciudad Juarez, Mexico to issue a nonimmigrant visa if he or she lives in Tijuana, Mexico.

If a foreign national from a country other than Canada or Mexico (often referred to as a “*third country national*,” or “TCN”) is already in the U.S., it is often much more convenient for that person to travel from the U.S. to Mexico or Canada for a visa rather than to travel all the way home. Third-country nationals must arrange in advance for a visa appointment at a border post. They must arrange the appointment by telephone.<sup>19</sup>

Canadians need not have actual visas in their passports for most visa classifications and can go directly to the border or certain airports in Canada and seek entry with only an approved petition. In some cases, such as when Canadians seek TN or L-1 status under the North American Free Trade Agreement (NAFTA), an approved petition is not even needed for admission.<sup>20</sup> The Canadian foreign national may have the application for the TN or L-1 status adjudicated at the time he or she seeks to enter the U.S.,<sup>21</sup> although it is sometimes necessary to file the application at a particular port of entry a few days before the actual date of admission to the U.S.

## **[c]—Anti-Terrorism Procedures after September 11, 2001**

The Department of State responded to the terrorism of September 11, 2001 with tightened security at consulates and border posts.<sup>22</sup> Consular security procedures are subject to rapid change, however, so anyone contemplating a trip to a consulate or border post should inquire about the latest procedures prior to departing the U.S.

### *[i]—New DS-157 Visa Application Form*

Effective January 11, 2002, the DOS requires all male nonimmigrant visa applicants between the ages of sixteen and forty-five, regardless of nationality, to complete Form DS-157,

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<sup>17</sup> 9 FAM § 41.101 n.2.

<sup>18</sup> 22 C.F.R. § 41.101.

<sup>19</sup> The toll number is (900) 443-3131.

<sup>20</sup> See §§ 7.03, 7.05 *infra*.

<sup>21</sup> 8 C.F.R. § 214.2(1)(17).

<sup>22</sup> See also § 1.12 *infra* for a discussion of the USA PATRIOT Act, which was enacted October 2001.

Supplemental Nonimmigrant Visa Application, in addition to DS-156 (the usual Nonimmigrant Visa Application).<sup>23</sup> Consular posts may also require female applicants, or applicants of ages other than between sixteen and forty-five, to complete the new form.

*[ii]—Waiting Period for Nonimmigrant Visas*

The DOS announced on November 12, 2001 that all men ages sixteen to forty-five from Afghanistan, Algeria, Bahrain, Bangladesh, Djibouti, Egypt, Eritrea, Indonesia, Iran, Iraq, Jordan, Kuwait, Lebanon, Libya, Malaysia, Morocco, Oman, Pakistan, Qatar, Saudi Arabia, Somalia, Sudan, Syria, Tunisia, the United Arab Emirates, and Yemen<sup>24</sup> will be subject to a waiting period on nonimmigrant visa applications as their applications are checked against FBI databases. The waiting period is expected to be about twenty days. These visa applicants must complete a detailed questionnaire about their military service, weapons training, previous travels, and other passports.

This increased security delay at consulates will prevent applicants from getting visas during a vacation of normal length. Moreover, these applicants must, it appears, now return to their home countries to obtain their visa stamps—a not inconsiderable inconvenience and expense.

*[iii]—Ineligibility for Border Post Processing of Visa Applications*

Visa stamp applicants from the above-listed countries are also, at present, ineligible to apply for their visa stamps from border posts operating in Canada and Mexico. This policy appears to apply to both men and women. The DOS has indicated that this policy might merely be temporary.

Moreover, effective September 17, 2001, the Mexican government stopped allowing people traveling with passports from certain countries to enter Mexico without a prior check conducted by the Gobernación (Mexican INS). The countries include, but are not limited to: Afghanistan, Azerbaijan, Bosnia, Cuba, India, Iran, Iraq, Libya, North Korea, Pakistan, Sri Lanka, Sudan, Syria, Taiwan, Turkey, Turkmenistan, Uzbekistan, and Vietnam. The processing of the clearance can take thirty days or more. This restriction applies to anyone traveling on passports from the previously mentioned countries, even if they hold lawful Permanent Resident (“green card”) status.

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<sup>23</sup> DOS Cable 120129Z, “Clarification on the Use of DS-157” (Jan. 11, 2002).

<sup>24</sup> In the immediate aftermath of the announcement there is uncertainty about whether men from Malaysia and Indonesia will be relieved of waiting period requirements.

These potential difficulties at consulates and border posts make visa revalidation by mail with the State Department more attractive. Visa revalidation, however, requires relinquishment of the applicant's passport for the processing time (which is usually six to eight weeks) and is available only for renewal of H-1B, O, and L visas, and not first-time visa applications or renewals of other visas.<sup>25</sup>

*[iv]—Notification of Address Change*

Foreign nationals must notify the INS in writing of a change of address within ten days of the change.<sup>26</sup> The INS has confirmed that this requirement applies to all non-citizens, including permanent residents, in the U.S. in a proposed rule issued on June 13, 2002.<sup>27</sup> If a nonimmigrant has an application pending with the Service, he or she should give notice of the address change to the Service Center where the application is pending. If no case is pending, the nonimmigrant should notify the INS of the address change by using Form AR-11.<sup>28</sup>

*[v]—Special Registration of Certain Foreign Nationals*

On June 5, 2002, Attorney General Ashcroft announced proposed regulations that would require certain foreign nationals to comply with special registration procedures. The proposed rule was published on June 13, 2002.<sup>29</sup>

Currently, nonimmigrant aliens from Iran, Iraq, Libya, and Sudan are subject to special fingerprinting requirements.<sup>30</sup> The proposed regulation requires the following classes of foreign nationals to undergo special registration procedures:

- (1) those who are natives or citizens of a country designated by the Attorney General, in consultation with the Secretary of State, by a notice in the Federal Register,
- (2) those whom a consular officer or an inspecting officer has reason to believe are natives or citizens of such a country, or
- (3) those whose presence in the U.S. warrants monitoring in

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<sup>25</sup> See § 1.07[3] *supra* for a discussion. The DOS also provides extensive information on its website at <http://travel.state.gov/hlop.html>.

<sup>26</sup> INA § 265, 8 U.S.C. § 1305.

<sup>27</sup> 67 Fed. Reg. 40,581, 40,585 (June 13, 2002). See also § 1.07[2][c][v] *supra*.

<sup>28</sup> The form is available at <http://www.ins.doj.gov/graphics/formfees/forms/ar-11.htm>. See also Appendix C *infra*.

<sup>29</sup> 67 Fed. Reg. 40,581 (June 13, 2002).

<sup>30</sup> 63 Fed. Reg. 39,109 (1998).

the interests of national security, as determined by a consular officer or an INS inspecting officer.<sup>31</sup>

The proposed rule does not apply to nonimmigrant aliens who are applying for admission to the United States in A status (i.e., as ambassadors, public ministers, and career diplomats), or G status (i.e., as representatives or employees of an international organization).<sup>32</sup>

The special registration procedures include fingerprinting and photographing. Fingerprints and photographs will be compared to INS and other agency databases of “known terrorists or criminals.”<sup>33</sup> The foreign national will also be required to provide expanded information on a required form.<sup>34</sup> Such expanded information will likely include the foreign national’s:

- complete name,
- passport country of issuance and number,
- identification and description of a second form of positive identification (such as a driver's license),
- date of birth,
- country of birth,
- nationality and citizenship,
- height,
- weight,
- color of hair,
- color of eyes,
- address of residence in the United States and in his or her country of origin,
- telephone number(s) in the United States and in his or her country of origin,
- the names, addresses, and dates of birth for both parents,
- points of contact in the alien's country of origin,
- name and address of school or employer in the United States (if applicable),
- name and address of former school or employer in country of origin,
- intended activities in the United States, and
- any e-mail addresses.<sup>35</sup>

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<sup>31</sup> 67 Fed Reg. 40,581, 40,585 (June 13, 2002). The Attorney General has not yet specified which countries will be subject to the proposed rule. Iran, Iraq, Libya, and Sudan will definitely be included.

<sup>32</sup> 67 Fed Reg. 40, 581, 40,585 (June 13, 2002).

<sup>33</sup> *Id.*

<sup>34</sup> 67 Fed. Reg. 40,581, 48,582 (June 13, 2002).

<sup>35</sup> 67 Fed Reg. 40,582, 40,585 (June 13, 2002).

Foreign nationals who are subject to special registration will also be required to update the information provided to the INS at regular intervals. Such updated information will likely include proof of tenancy at the listed residential address (such as a rental contract or mortgage), proof of enrollment at a school or other authorized educational institution if applicable, and/or proof of employment if applicable.<sup>36</sup> In addition, these foreign nationals will be required to notify the INS Service Center of any change of residential address within ten days.<sup>37</sup>

Foreign nationals who are subject to special registration must also report their actual departures from the United States.<sup>38</sup> That is, any such foreign national must appear before an immigration inspector at the time he or she departs the United States in order to close his or her registration. The immigration inspector will have the authority to prohibit departure, but will merely complete certain paperwork and thereby close the foreign national's registration file with the INS.

Willful failure to register, or making a false statement on the registration, will be punishable by a fine of up to \$1,000 or by imprisonment for up to six months. Providing a false statement will also result in detention and removal.<sup>39</sup>

### **[3]—Visa Revalidation**

The Visa Office of the U.S. Department of State issues new visa stamps (“revalidates” visas) for foreign nationals holding H, L, O, P, E, and I nonimmigrant visa statuses.<sup>40</sup> The Visa Office will revalidate the visa only if the applicant's passport contains a previous visa of the same classification as the visa then being sought. Applications should be filed no more than sixty days before the current visa stamp's expiration date, or the Visa Office will reject the application. Applications must include the applicant's original passport. Processing of revalidation applications ranges between three and four months, during which the applicant will be without his or her passport and therefore unable to travel.

In May 2002, the State Department's Visa Revalidation Unit announced that certain visa applications will be returned if a “Visa Condor” check is triggered. The application is returned to the

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<sup>36</sup> 67 Fed. Reg. 40,582, 40,585 (June 13, 2002).

<sup>37</sup> 67 Fed. Reg. 40,585, 40,586 (June 13, 2002).

<sup>38</sup> 67 Fed. Reg. 40,583, 40,584 (June 13, 2002).

<sup>39</sup> 67 Fed. Reg. 40,584 (June 13, 2002).

<sup>40</sup> Detailed information about revalidation is on the DOS website at <http://travel.state.gov/revals.html>. The postal address for revalidation applications is U.S. Department of State/Visa, P.O. Box 952099, St. Louis, MO 63195-2099. The courier address for revalidation applications is U.S. Department of State/Visa (Box 2099), 1005 Convention Plaza, St. Louis, MO 63101-1200.

applicant with a statement that the person must return to his home country to apply for his visa. The State Department has not stated what triggers the Visa Condor check, only that it is based upon responses on the DS-157 form, which must be completed by all males age sixteen to forty-five from all countries who are seeking a visa. The DS-157 was developed by the Department of State as a response to the September 11, 2001 attacks.”<sup>41</sup>

#### **[4]—Avoiding Problems upon Admission to the United States**

If the visa application is approved, then the visa is placed in the foreign national’s passport, and the foreign national is free to travel to the U.S. He or she must be “inspected” upon arrival in the U.S. to be sure he or she is entitled to admission in the visa status requested.<sup>42</sup> If the INS port of entry officer believes that the applicant is not qualified for admission, the foreign national may be denied admission in spite of having a visa.<sup>43</sup> For example, the foreign national might inadvertently produce evidence indicating that he or she has previously been working illegally for the proposed hiring company, in which case he or she would be denied admission at that time and might be barred from any future admissions as well.

The circumstances of the admission can be important because certain rights and penalties differ depending on the time and manner of entry. For example, a person who enters the U.S. with “advance parole” is technically not admitted to the U.S.; advance parole is routinely used for leaving and returning to the U.S. while an application for adjustment of status is pending. Foreign nationals entering the U.S. for the first time with a given nonimmigrant status, or after brief departures abroad, must be careful that their immigration documentation is in order, that their passports are valid for the desired length of stay in the U.S., and that they have the appropriate visa stamp in their passport. In the aftermath of the tragic events of September 11, INS officers at ports of entry are unusually strict in their application of immigration laws and policies relating to admission. Absolute compliance with all applicable rules is recommended because leniency towards innocent or inadvertent infractions cannot reasonably be expected.

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<sup>41</sup> State Department Liaison Committee Update, AILA InfoNet Doc. No. 02050742 (posted May 7, 2002) at [www.aila.org/infonet](http://www.aila.org/infonet).

<sup>42</sup> INA § 235(a)(3); 8 U.S.C. § 1225(a)(3).

<sup>43</sup> INA § 221(h); 8 U.S.C. § 1201(h).

## **[5]—Change of Status from Within the United States**

### **[a]—Contents, Structure, and Purpose of Change of Status Petitions**

Frequently a foreign national enters the U.S. in one visa status and seeks to change to another without leaving the U.S. This can sometimes be accomplished by using a Form I-539 petition which is signed by the foreign national. If the desired status is one authorizing employment, however, the foreign national must have the prospective employer sign and file the Form I-129 petition instead.<sup>44</sup>

Petitions for changes of status are not automatically approved. The INS will deny such petitions when the adjudicating officer believes that the foreign national first obtained and entered the U.S. with an “easy” visa (such as a visitor or “B” visa) with the intention of coming to the U.S. and then changing to a harder to obtain visa status while already here. This is called “*preconceived intent*” to change status. This circumstance commonly arises when foreign nationals obtain B visas overseas and then try to change to F-1 student status once they arrive in the U.S. The prospective student in such cases must convince the INS that there was no preconceived intent—a difficult task, especially if the change is sought soon after arrival in the visitor status.

### **[b]—Filing Change of Status Petitions**

A change of status petition brought by the employer of a temporary employee is filed with the appropriate regional service center. Other change of status petitions are filed at the local INS office. To be timely filed, a change of status petition must be received by the INS on or before the expiration date of the status that the foreign national is seeking to change. That is, the foreign national must be in valid status at the time the change of status petition is filed with the INS.<sup>45</sup>

### **[c]—Late Filing for Change of Status**

If the foreign national’s status has already expired at the time the petition is filed, the request for a change of status will likely be denied. The foreign national will then have to leave the U.S. and re-enter on a valid visa in order to establish valid status in the U.S. The INS may, in its discretion, accept an extension that is filed late if the foreign national demonstrates that the delay was due to extraordinary circumstances beyond his or her control, and that he or she has not otherwise violated status, has remained a *bona fide*

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<sup>44</sup> INA § 248; 8 U.S.C. § 1258.

<sup>45</sup> 8 C.F.R. § 248.1(b).

nonimmigrant, and is not a respondent in removal proceedings.

#### **[d]—Employment During Pendency of Change of Status Petitions**

Employment is not permitted in the new status until the change is granted. However, the foreign national may continue employment under the terms of the prior work status if the authorized period of that status has not expired and the employment relationship is unchanged.<sup>46</sup>

#### **[e]—Denials**

There is no appeal from a denial of a request for a change of status. If the petition was denied by a regional service center, the applicant may file a motion to reconsider the denial with the director of that service center.<sup>47</sup>

#### **[6]—Procedure for Filing a Nonimmigrant Petition**

The procedures for preparing and filing a nonimmigrant petition for a foreign national are summarized as follows:

1. Determine the appropriate status to seek. Is the foreign national qualified, e.g., as a professional if an H-1B is to be sought? Is he or she inadmissible because of past misrepresentation, unlawful presence, commission of a crime, or other reason? Determine where to file the petition, and if the alien is overseas, determine which U.S. consulate to use. (If the foreign national is not overseas, a petition to change status may be necessary.)
2. File any preliminary documents or applications required for the particular designation of status desired.
3. Gather documents necessary to prove that the foreign national is qualified and entitled to the designation of status desired. These might include diplomas, résumés, a marriage license, children's birth certificates, a job description, company information, financial statements, translations of foreign documents, and tax returns. The passport must be current.
4. Prepare the forms and supporting documents such as a letter from the Chief Financial Officer regarding the company's ability to pay the offered wages, and a letter from the person signing the petition on behalf of the company explaining that the company, job offered, and alien all meet the requirements of the visa.
5. Gather the supporting documents, the appropriate forms,

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<sup>46</sup> 8 C.F.R. § 214.1(e).

<sup>47</sup> 8 C.F.R. § 248.3(h)(2).

and the filing fee. Obtain signatures in all the right places (the Form I-129 for an H-1B requires three signatures by the petitioner). Review a checklist or the form's instructions to be sure all papers are in order.

If emergency or other special circumstances exist, consider both cable and expedited processing requests. The expedited requests are processed only when there are compelling humanitarian needs such as medical problems, or potentially severe financial loss, public health, or even environmental concerns. They are not readily granted, and sometimes if granted do not result in any significant saving of time. The California service center has special forms for these requests.

6. Premium Processing may be requested if the petition is for the E, H, L, O, P, Q, R, and TN classifications. An applicant for Premium Processing must file an I-907 Form with the accompanying \$1,000 filing fee. After the form is submitted, the INS will respond to the application within fifteen days of receipt, or will refund the filing fee.

7. Make at least one extra file copy of the entire completed packet of materials and forms. This is important because the foreign consulate will need a complete copy if a visa is sought overseas.

8. File the petition when everything is ready. Send the original and a copy if the alien is overseas and a consulate is to be involved to the appropriate service center, preferably by express mail or certified or registered mail, return receipt requested, to the correct address. Send the petition to a post office box only with a return receipt requested.

9. Safeguard the express receipt or return receipt and, later, the receipt from the service center and the cancelled check for the filing fee. Calendar for follow-up the day the service center receipt indicates is the expected processing end date.

10. If the approval is to be sent to the overseas consulate, consider preparing the consular standard nonimmigrant visa application (Form DS-156) before the approval notice is received. This would include a complete copy of the application if the service center delays sending a copy to the consulate.

11. If the approval is late, make a status inquiry.

12. Safeguard the approval notice, and if the foreign national is overseas send him or her a copy and have the foreign national contact the consulate to obtain the visa stamp.

13. If a change of status is approved (i.e., the foreign national was in the U.S. and no visa was sought overseas at a consulate), be sure that the foreign national is prepared to obtain an actual visa overseas the next time he or she leaves the U.S. This generally requires producing no more than the approval notice and a copy of the entire petition packet, along with an updated letter from the petitioning employer attesting that the foreign national continues to be employed under the terms of the

approved petition.

14. For any approval, be sure the foreign national completes a Form I-9 before starting work.<sup>48</sup> Calendar the expiration of the visa status sufficiently in advance to prepare an application for extension if necessary.

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<sup>48</sup> See Chapter 8 *infra*.