



August 8, 2007

Hello,

IMMIGRATION LAW UPDATE:

Filing An Adjustment of Status

Many foreign nationals around the US have finally been able to file their employment based I-485 Adjustment of Status cases, the third stage of the green card process, given the brief priority date availability. For a summary of [priority dates](#), and the issues that have arisen with the [Visa Bulletin](#), please visit our [previous Immigration Updates](#).

The Adjustment of Status is one of two options, in the final step in the employment based green card process. For more on the process, [please visit the Clark Hill website](#).

There are several issues that arise when a foreign national has an Adjustment pending. The questions and answers below are designed to address some of the more common issues.

USCIS will continue to process Adjustment of Status cases under the old fee schedule (in spite of a new fee increase which took effect on Monday, July 30th) until August 17th. Confirmation of this reduced fee has been posted in the [Federal Register](#).

1. Can an Adjustment applicant remain inside the US without a temporary Visa status?

Filing an Adjustment of Status does not confer any "legal" status to the applicant. Technically, [US Immigration and Customs Enforcement \(ICE\)](#) can still apprehend and detain foreign nationals who do not maintain non-immigrant status. Maintaining temporary status ([H-1B or L-1 status](#) for example) is a good idea, but in many cases is not possible (see Question 3 below). As a practical matter, ICE officials do not have the resources or a current focus to go after foreign nationals who are in the US and will have their cases adjudicated by USCIS. We have been told that the top priority for almost all ICE offices is "[fugitive operations](#)" - foreign nationals who have been ordered removed from the US, but they did not leave. This ICE practice of not investigating foreign nationals who have an Adjustment pending also makes sense because the applicants can receive interim work and international travel authorization (see Questions 4 and 6).

2. Does filing the Adjustment automatically allow an applicant to work in the US?

No. All persons working in the US must be able to complete an [I-9 Employment Verification Form](#) within 3 days of being hired, to prove that he/she is eligible to work. As documents expire, this form needs to be updated. Employers can be subject to significant fines and penalties if they violate the [employment verification rules](#).

In addition, foreign nationals applying for Adjustment of Status must be able to prove they continue to meet the requirements for Adjustment of Status. One of the many provisions under the Immigration and Nationality Act is section 245(k), which permits a foreign national to remain eligible for Adjustment of Status as long as he/she does not work without authorization in the US for more than 180 days. There are currently no regulations on this section of law, but USCIS has interpreted this to mean a cumulative of 180 days, and includes any time working without authorization in the US while the Adjustment is pending.

3. Should Adjustment applicants also maintain their temporary visa status (H-1B or L-1)?

Maintaining temporary [H-1B or L-1 status](#) is a good idea, but in many cases is not possible. For example, a person who applied for Adjustment while in [TN status](#) may not be able to maintain status after the Adjustment is filed, because the TN does not allow the person the intent to work temporarily in the US and apply for a green card. The same would be true for a spouse in H-4 status, who secures a work card and begins working, because a condition of H-4 status is that the spouse cannot work in the US. The cost of extending status can also be an issue.

Maintaining status is also a good idea because if the Adjustment is denied, a person without [temporary Visa status](#) can be put into removal proceedings (deportation), and he/she would have to appear before an immigration judge. Maintaining temporary Visa status means that if the Adjustment is denied, the foreign national can usually continue working in the US, and is not normally put into removal proceedings.

4. Can Adjustment applicants travel internationally while the case is pending?

This is evaluated on a case-by-case basis, and Adjustment applicants should be sure to discuss this with their immigration counsel before traveling outside the US. If a foreign national does not have the proper documentation for his/her situation, entry to the US can be denied.

When a foreign national applies for Adjustment, the applicant, and concurrently filed immediate family members, can also apply for an [Advance Parole](#) document (and can apply/extend while the Adjustment is pending). This document is somewhat similar to a Consular Visa, allowing the foreign national to return to the US. However, the application is filed with USCIS, not with the US Consulate outside the US.

Generally, 8 C.F.R. sect. 245.2(a)(4) requires that all persons, who have an Adjustment pending, travel internationally only after receiving an approved Advance Parole (not while it is pending). However, this same provision allows persons who are in valid H-1B, H-4, L-1, L-2, K-3 or K-4 status to continue to travel internationally, without an Advance Parole, as long as:

- the foreign national remains eligible for the status (i.e., H-1B still employed by the sponsoring company, or the H-4 spouse has not begun working or divorced his/her H-1B spouse);
- is in possession of a valid H or L visa (if required) and the original I-797 receipt notice for the application for adjustment of status;
- is not under deportation or removal proceedings.

If a foreign national does have a Consular Visa to accompany the H or L status, the decision whether to apply for a Visa should be discussed with his/her counsel. The [immigration regulations no longer require](#) that the H or L foreign national carry

the Adjustment of Status filing receipt when entering the US. As a practical matter, while the Regulations clearly require the original receipt notice for the Adjustment filing, our office has never had a client denied entry for failure to produce the receipt notice.

This flexibility in travel DOES NOT change the requirement that all applicants for Adjustment MUST BE physically present in the US when the Adjustment is filed and received by USCIS.

5. What happens if an Adjustment applicant travels on an Advance Parole?

Persons who enter the US on an [Advance Parole](#) are admitted, but only for the purpose of awaiting a decision on the Adjustment of Status. Foreign nationals, who may have let their H-1B or L-1 lapse should be able, in most situations, to reinstate that status at a later date if necessary.

There are some situations, if the Adjustment is denied, where traveling on the Advance Parole can put the foreign national at a disadvantage. As a practical matter, these situations are complex, and for the vast majority of applicants, this may not be an issue.

Persons who apply for Adjustment of Status, who have an I-94 card that has been expired for more than 180 days, and who then travel outside the US, can be subject to the [3 and 10 year bars](#). However, 180 day "clock" for the 3 and 10 year bar stops advancing once the Adjustment is filed.

Advance Parole documents can take several months for approval. Extensions should be filed far enough in advance to ensure no disruptions to international travel.

6. Can spouses and children, who filed an Adjustment, work in the US?

A person who applied for an Adjustment of Status can apply for a work authorization card (EAD) while the Adjustment is pending. EAD cards can take 90 days or longer for approval. Extensions should be filed far enough in advance to ensure no disruptions to work status.

7. How long will an Adjustment applicant wait for a decision?

The opening of the [employment based priority dates](#) was not due to the US government having more green card visas available. Rather, this was due to the government trying to ensure no visas went unused for this fiscal year.

We continue to have a shortage of employment based green card numbers. At this time, no one knows where the priority dates will be when the numbers for 2008 open up on October 1st 2007 (the [Visa Bulletin](#) will be issued in the middle of September). We do expect the priority dates will continue to move very slowly. Most applicants should be prepared for a several year process, if their priority date was not current for most of 2007.

8. What happens if the Adjustment applicant loses his/her job?

Traditionally, employment based green card applications require that the employer, the employee, the job duties and job location all remained the same until the case is approved. However, under a provision called Adjustment Portability, there can be some flexibility for foreign nationals who have an Adjustment pending for 6 months or more. For an overview of this provision, please [visit the Clark Hill website](#). Applicants should consult their own counsel prior to utilizing this provision.

Temporary Visa Applications Through US Consulates In Canada/Mexico

In May 2007, the US Department of State reinforced its commitment, as required under the [Foreign Affairs Manual](#) as posted at [9 FAM 41.121 PN 1.2-13](#), to update a foreign national's status in the CCD electronic system, if a Consular Visa application is received, but rejected or denied. The Consular Visa is generally required for a person on a [temporary Visa](#) who travels internationally. Foreign nationals apply for temporary Visas at a US Consulate located outside the US. For many applicants, the denial of a Visa application is the end of the process (foreign nationals applying for [Visitor Visas](#) for example can only reapply, but cannot generally challenge the denial). However, for many temporary workers in the US on an H-1B or L-1 Visa, they frequently have their I-94 cards extended in the US, and then a Consular Visa application is made through a US Consulate in Mexico or Canada, as these locations are closer to the US, and have less expensive travel arrangements than a trip to the foreign national's home country.

Most temporary workers in the US can travel briefly to Canada or Mexico, without securing a temporary US Visa, provided they meet certain requirements, as detailed in [the Foreign Affairs Manual](#), and commonly referred to as an "automatic Visa revalidation". This had provided an additional benefit, because if the Consular Visa application was denied or rejected (the US Consulates in Canada and Mexico have wide discretion to reject an application for any reason for a person who is not a Citizen of the country in which the Consulate is located), the foreign national could still return to the US.

On April 1, 2002, the procedures were changed and applicants whose Visa request is denied or rejected have to return to their country of citizenship to apply for a Visa, and cannot use the automatic Visa revalidation procedure. The US Consulates in Canada and Mexico have recently been reminded that they need to continue to enforce this provision.

H-1B LCA Violations Being Reported By Consulates

The US Department of State, through an addition in its Foreign Affairs Manual, is now requiring US Consular officials to report Labor Condition Application (LCA) violations to a central office in the US, for reporting to the US Department of Labor (DOL). The LCA is confirmation that an applicant will be paid the same as a US worker, for the same position in a geographic area, and is required for every H-1B application. The new procedures include:

- reporting violations that occurred in the last 12 months;
- reviewing tax returns, and a violation may be reported where there is a underpayment of wages without an explanation (illness, vacation, etc.);
- reviewing violations with the current or previous employer;
- reviewing the paperwork for other violations including "benching" the employee without payment, failure to pay the employee within the required time after the H is approved, or if having the employee working outside of the area of intended employment.

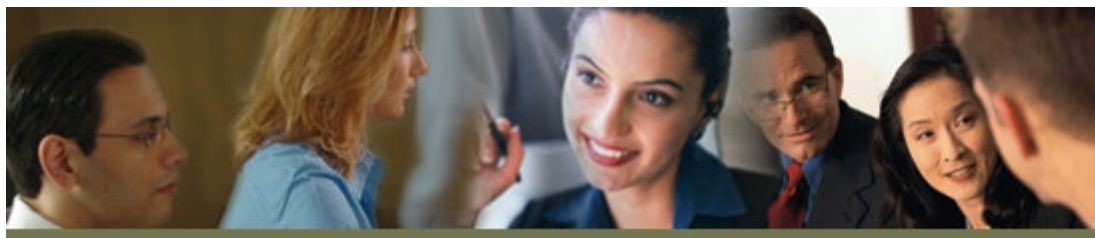
The note confirms that while the violation should be reported, the Consulates will "likely" still issue a Visa. However, at this time we believe that foreign nationals should be cautious in applying for an H-1B Consular Visa, where they have spent significant time in a non-paid status.

Drinking and Driving Violations - New Consular Procedures

The US Department of State (DOS) has implemented new procedures for foreign nationals who are applying for an Immigrant or Nonimmigrant Visa, who have a [drinking and driving arrest or conviction](#). The procedures will delay Visa issuance, as foreign nationals must be referred to panel physicians in the home country for an evaluation. This applies to all applicants who have an arrest or conviction in the past 3 years, or if the applicant has multiple convictions. The Foreign Affairs Manual has been updated at [9 FAM 40.11 N8.3](#).

New US Consulate in Hyderabad, India to Open

Clark Hill has learned that a new US Consulate is scheduled to be opened in Hyderabad, India by the end of 2008. That would be the fourth US Consulate that would issue US Visas in India.



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