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Immigration and Naturalization Service

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MEMORANDUM FOR REGIONAL DIRECTORS
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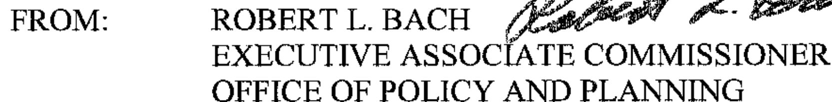

FROM: ROBERT L. BACH
EXECUTIVE ASSOCIATE COMMISSIONER
OFFICE OF POLICY AND PLANNING

SUBJECT: AFM Update: Dual Intent Follow-up Guidance: H-1 and L-1; Pending Applications for Adjustment of Status, validity of nonimmigrant status, and the elimination of the advance parole requirement.

This memorandum on dual intent for H-1 and L-1 nonimmigrants with pending applications for adjustment of status addresses changes to the *Adjudicator's Field Manual*, Chapter 23 and by adding a reference to the *Inspector's Field Manual*, Chapter 15.4. It is a follow up to the July 13, 1999, memorandum, subject *H-1 and L-1: Pending Applications for Adjustment of Status, validity of nonimmigrant status, and the elimination of the advance parole requirement.* The July 13 memorandum provided guidance for the interim rule, 64 FR 29208, which eliminates the advance parole requirement for aliens maintaining H-1 or L-1 nonimmigrant classification while their applications for adjustment of status are pending.

I. In Chapter 23 of the Adjudicator's Field Manual, the following questions and answers are added to the APPENDIX 23-4, entitled *FREQUENTLY ASKED QUESTIONS ABOUT TRAVEL OUTSIDE THE UNITED STATES BY AN H-1 OR L-1 NONIMMIGRANT WHO HAS APPLIED FOR ADJUSTMENT OF STATUS*:

1. If an H-1 or L-1 nonimmigrant has filed for adjustment of status under an employment-based preference category that requires an offer of employment in the United States, does the interim rule affect the applicant's responsibility to establish his/her intent to work for the petitioning entity?

No. If an H-1 or L-1 has filed for adjustment of status under an employment-based preference category that requires an offer of employment in the United States, the applicant still has the responsibility of establishing his/her intent to work for the petitioning entity after becoming a permanent resident. Neither the rule nor the guidance has modified this requirement or the corresponding requirement that the employer establish his/her intent to employ the applicant.

In the interim rule and initial guidance, the term "open-market employment" was used to mean unrestricted access to employment. Applicants with pending applications for adjustment of status are eligible to apply for an employment authorization document (EAD). With an EAD, an alien has access to unrestricted employment, the "open-market". However, if the applicant is adjusting status under an employment-based preference category that requires an offer of employment in the United States, the fact that an applicant is able to work in the open-market does not alter the applicant's responsibility to demonstrate an intent to work for the petitioning employer.

2. If an H-1 or L-1 nonimmigrant or H-4 or L-2 dependent family member obtains an EAD based on their application for adjustment of status but does not use it to obtain employment, is the alien still maintaining his/her nonimmigrant status?

Yes. The fact that an H or L nonimmigrant is *granted* an EAD does not cause the alien to violate his/her nonimmigrant status. There may be legitimate reasons for an H or L nonimmigrant to apply for an EAD on the basis of a pending application for adjustment of status. However, an H-1 or L-1 nonimmigrant will violate his/her nonimmigrant status if s/he uses the EAD to leave the employer listed on the approved I-129 petition and *engage* in employment for a separate employer.

3. If an H or L nonimmigrant has traveled abroad and reentered the United States via advance parole, the alien is accordingly in parole status. Does this interim rule allow him or her to now apply for an extension of nonimmigrant status?

No. The person was paroled into the United States and, therefore no longer has an H-1 or L-1 nonimmigrant status in the United States to extend or change. As a parolee, the alien must obtain an EAD in order to be employed, regardless of employer. Also parole may be terminated at any time, upon which the alien must demonstrate that he or she is admissible to the United States.

Nonetheless, there is no barrier to the employer requesting an extension of the nonimmigrant visa petition. If the worker-beneficiary's activities have otherwise been consistent with those of

an H-1 or L-1 nonimmigrant, s/he may use an existent nonimmigrant visa or secure another overseas and then reenter the United States as an H or L nonimmigrant. The fact that the worker-beneficiary is an applicant for adjustment will have no effect on admissibility if the traveler is otherwise admissible.

If the worker was seeking readmission as an H-1 or L-1 nonimmigrant but was erroneously paroled, the admission may be corrected if appropriate [See Inspectors Field Manual 15.12 "Correction of Erroneous Admissions"].

4. Should an alien returning to the United States from travel abroad who has a valid I-512 and a valid H-1 or L-1 nonimmigrant visa be paroled in or readmitted in H or L status?

If an H-1 or L-1 nonimmigrant has not violated his/her nonimmigrant status, including restrictions on period of stay, change of employer and engaging in unauthorized employment, s/he may be readmitted into H or L status or be paroled into the United States; it is the alien's choice. However, such nonimmigrants no longer need to use advance parole to preserve pending applications for adjustment of status, and the fact that they have applied for and received Form I-512 does not compel the alien to use that advance parole.

If the H-1 or L-1 nonimmigrant has violated his/her H or L nonimmigrant classification, including restrictions on periods of stay, change of employer and engaging in unauthorized employment, then s/he cannot be readmitted as an H or L nonimmigrant. Instead, such an alien may be paroled into the United States.

5. Is an alien who has a multiple entry I-512 and who has previously been paroled into the United States now eligible for admission as an H-1 or L-1 if he or she is still in possession of a valid H-1 or L-1 visa?

Yes, the alien may be admitted as an H-1 or L-1. However, aliens returning from abroad may only be admitted as an H-1 or L-1 when they have a valid H-1 or L-1 visa (unless visa exempt), remain eligible for H-1 or L-1 classification, and, where there has been a recent change of employer or extension of stay, have evidence of an approved I-129 petition in the form of a notation on the nonimmigrant visa indicating the petition number and the employer's name, or a notice of action, Form I-797, indicating approval. If they do not meet these criteria, then they use their I-512.

II. In Chapter 15.4 of the *Inspector's Field Manual*, the Special Note A for nonimmigrant classification H-1B should be revised to read as follows:

(A) Foreign residence requirement. H-1B does not have to establish he or she has a foreign residence. For information pertaining to dual intent, see AFM Appendix 23-4.

III. In Chapter 15.4 of the *Inspector's Field Manual*, add Special Note E for nonimmigrant classification L-1 to read as follows:

(B) Dual intent. For discussion of applicability of dual intent, see AFM Appendix 23-4.

Field Inquiries

All operational regional program units should familiarize themselves with this memorandum and related procedures in order to be responsive to any inquiry from the field. Questions regarding this memorandum may be directed, through appropriate supervisory channels to HQADN. For issues concerning H or L status, contact John Brown or Irene Hoffman, respectively, at 202-353-8177. For issues concerning advance parole, contact Michael Valverde at 202-514-4754.