CYRUS D. MEHTA & PARTNERS PLLC
US IMMIGRATION & NATIONALITY LAW

RESUSCITATING NONIMMIGRANT VISA STATUS IN THE UNITED STATES

Posted on March 17, 2007 by Cyrus Mehta

The general rule is that one can only apply for a change or extension of nonimmigrant visa status while the applicant is still in status. For example, if an individual is admitted into the US in business (B-1) visa status, which is valid till March 30, 2007, and his or her business purpose will not be accomplished prior to March 30, the extension application must be filed on or before that date. As a result of an emergency hospitalization, he or she might not be able to file the application before the B-1 status expires. Fortunately, a little known regulation allows those whose nonimmigrant visa statuses have lapsed to still file for an extension due to extraordinary circumstances beyond their control.

Section 214.1(c) (4)

8 Code of Federal Regulations Section 214.1(c)(4) provides:

An extension of stay may not be approved for an applicant who failed to maintain the previously accorded status or where such status expired before the application or petition was filed, except that failure to file before the period of previously authorized status expired may be excused in the discretion of the Service and without separate application, with any extension granted from the date the previously authorized stay expired, where it is demonstrated at the time of filing that: (i) The delay was due to extraordinary circumstances beyond the control of the applicant or petitioner, and the Service finds the delay commensurate with the circumstances; (ii) The alien has not otherwise violated his or her nonimmigrant status; (iii) The alien remains a bona fide nonimmigrant; and (iv) The alien is not the subject of deportation proceedings under section 242 of the Act (prior to April 1, 1997) or removal proceedings under section 240 of the Act.

A parallel provision, 8 CFR Section 248.1(b), excuses individuals who are filing untimely applications for change of status. Thus, if the individual in the earlier example was applying for a change to student or F-1 status, he or she would invoke Section 248.1(b) instead of 214.1(c) (4).

Example of the H-4 Status Who Failed to Timely File an Extension

There are many situations when individuals unwittingly find themselves out of status. The reasons could be less extenuating than an emergency. Take the example of the "after acquired" spouse on the H-4 visa. I have termed this spouse "after acquired" because the principal H-1B visa holder marries her after he has already entered the US in H-1B status, and the spouse enters subsequently in H-4 status after the marriage. At the time of applying for the H-1B status extension, the employer has no record of this spouse on the H-4 visa and does not include the H-4 extension request along with the H-1B extension request. Seven months after the expiration of the H-4 status, it is belatedly discovered that the extension request was not timely filed with the principal H-1B employee's extension request.

Realizing that she is out of status, the H-4 will intuitively ask whether it is possible to depart the US and apply for a new H-4 visa stamp at the US Consulate in the home country. Upon successfully obtaining the new H-4 visa in the passport, would it not be possible to re-enter the US and be admitted in H-4 status? This might have been the case if the failure to file timely was discovered before 180 days from the expiration of the H-4 status. In our example, unfortunately, the lapse was discovered after 180 days from the expiration, and this individual has been snared by Section 212(a)(9)(B) of the Immigration and Nationality Act (Act).

Section 212(a)(9)(B)(i)(I) bars any individual from reentering the US for a period of three years if he or she has been "unlawfully present" in the US for a period of more than 180 days but less than 1 year. The companion provision, Section 212(a)(9)(B)(i)(II), bars an individual from reentering the US for a period of ten years if he or she has been "unlawfully present" for 1 year or more.

The H-4 spouse, in our example, began to accrue unlawful presence from the date of the expiration of the H-4 status, as reflected in the Form I-94 document. Since the lapse was discovered after seven months from the expiration of the H-4 status, more than 180 days but less than 1 year of unlawful presence has accrued in the US. Thus, upon departure, this person will not be able to reenter

for a period of three years even if the US consul is inclined to issue the H-4 visa stamp.

This individual may still attempt to file the H-4 extension within the US and to invoke the favorable discretion of the United States Citizenship and Immigration Service (USCIS) under 8 CFR Section 214.1(c)(4). There are four prongs to satisfy under this rule. First and most important, the applicant must establish that the delay was due to extraordinary circumstances beyond the control of the applicant. The USCIS might disagree that the failure to file the extension timely was due to extraordinary circumstances beyond the control of the H-4 spouse. It is different from the situation where someone is hospitalized under emergency circumstances. Here, the H-1B employee may have inadvertently not notified the employer about the existence of his spouse, and could have also assumed that the filing of the H-1B extension would automatically extend the H-4 spouse's status too. Or the employer may have inadvertently failed to inquire, at the time of filing the extension, whether the H-1B employee had a dependant spouse. Essentially, this is a classic case of the H-4 spouse falling through the cracks! Thus, the USCIS might argue that the lapse was due to the negligence of the H-4 applicant or the spouse's employer, or both, and was not due to a dire extraordinary circumstance beyond the control of the spouse.

On the other hand, the attorney representing the H-4 spouse can forcefully argue that the employer's negligence (or that of the employer's attorney) should not be imputed to the spouse. Even if the H-1B employee was negligent, one can argue that it was still not the spouse's fault, and this ground constitutes an extraordinary circumstance beyond her control. This argument may be further bolstered if the employer and even the employer's attorney submit an affidavit explaining their inadvertent failure to file the spouse's H-4 status. Assuming that one can prevail under the first prong, it is important to also establish that the late filer satisfies the remaining three prongs.

The second and the third prongs are somewhat intertwined. Section 214.1(c)(4) further requires a showing that the applicant has not otherwise violated his or her nonimmigrant status and that he or she remains a bona fide nonimmigrant. Thus, if the H-4 applicant has violated her status in other ways besides the untimely filing, she may not be able to invoke the favorable discretion of the USCIS. A good example might be if she has also worked in an unauthorized capacity. The third prong, which requires that he or she remains

a bona fide nonimmigrant, generally requires demonstration that the individual continues to have a residence in the foreign country. It can be argued that this does not apply to an H visa holder, whether in H-1B or H-4 status, as Section 214(b) of the Act provides an exception of the foreign country residence requirement to such individuals. The fourth prong will be satisfied if the H-4 applicant is not the subject of deportation proceedings.

In the event that the H-4 applicant is successful in invoking the favorable discretion of the USCIS under Section 214.1(c)(4), she will once again be in H-4 status. Moreover, any departure after the reinstatement of H-4 status would not trigger the three and ten year bars to reentry into the US.

Erroneous Date of Status Expiration on Form I-94

Another common scenario occurs when an individual is issued a Form I-94 at the port of entry with a date of expiration that does not match the date of expiration of the actual visa. Take for example the beneficiary of an H-1B approval valid till March 30, 2007. However, when he last entered the US on February 26, 2006, the officer at the airport noted on the Form I-94 that the period of admission was valid only till March 30, 2006. He did not realize this discrepancy upon and admission and discovered it only a few days prior to March 30, 2007.

This individual too can file the H-1B extension request, through the employer's Form I-129, invoking the provisions of Section 214.1(c)(4). Unlike the example involving the H-4 spouse, this individual has not only been out of status but has also worked without status. Here, it can be argued that the individual being out of status is a mere technicality and was clearly the error of the official who admitted the individual at the port of entry. Moreover, it could also be argued that it is unclear whether the I-94 attached to the original Notice of Approval (Form I-797) indicating a validity date till March 30, 2007 controls or the last erroneous I-94 document issued by the inspecting official at the airport with a validity date of March 30, 2006.

Another way to resolve this problem is for the individual to schedule an appointment with the nearest Customs and Border Patrol (CBP) office to rectify the erroneous date on the I-94. This can either be done at the airport itself or by scheduling an Infopass appointment (www.uscis.gov) at the Department of Homeland Security office (Deferred Inspection Unit) nearest to where the individual resides. This approach is more effective if the individual discovers the

erroneous date on the I-94 within a short time of the admission. Thus, it is always important to check the date annotated on the I-94 each time one enters the US on a nonimmigrant visa.

Conclusion

In conclusion, being able to resuscitate one's nonimmigrant status in the US can alleviate some of the harsh effects of the immigration laws, such as being unable to reenter the US for three or ten years. Although an individual subject to the bars can still obtain a nonimmigrant visa waiver pursuant to Section 212(d)(3) of the Act, it is difficult and uncertain to obtain, and these grounds of inadmissibility can still raise their ugly heads when the individual applies for permanent residence. Thus, if the individual has not fulfilled the conditions of the bars at the time of permanent residence, he or she will have to again apply for a waiver under Section 212(a)(9)(B)(v) of the Act. Strategies to apply for waivers of the bars are beyond the scope of this article.

*** Cyrus D. Mehta, a graduate of Cambridge University and Columbia Law School, practices immigration law in New York City and is the managing member of Cyrus D. Mehta & Associates, P.L.L.C. He is the Past Chair of the Board of Trustees of the American Immigration Law Foundation and recipient of the 1997 Joseph Minsky Young Lawyers Award. He is also Secretary of the Association of the Bar of the City of New York and former Chair of the Committee on Immigration and Nationality Law of the same Association. He frequently lectures on various immigration subjects at legal seminars, workshops and universities.**