



## CONVERSATION WITH AN OUT OF STATUS ALIEN

*Posted on July 27, 2007 by Cyrus Mehta*

by

**Cyrus D. Mehta\***

**Alien:** Am I being called an "alien" because I am out of status?

**Attorney:** No. All non-citizens are called aliens. Even green card holders.

**Alien:** My tourist visa is for 10 years. Why am I still out of status?

**Attorney:** Your status is governed by the date on your I-94 card. A visitor is usually admitted for six months. Unfortunately, you have overstayed your tourist (B-2) status by 183 days.

**Alien:** So?

**Attorney:** Upon departing the US, you will trigger the 3 year bar against re-entry into the country. Your visa stamp has also been automatically voided. And you cannot extend or change status in the US.

**Alien:** Are there any exceptions?

**Attorney:** The USCIS can exercise discretion to accept a late filing for change or extension of status due to extraordinary circumstances beyond one's control.

**Alien:** Well, I did not realize the ramifications. I thought that once I found a job, I would rectify my status.

**Attorney:** Unfortunately, that's not a good enough reason.

**Alien:** At least I managed to get a job offer as a columnist with an upcoming liberal newspaper in New York City. It also runs a cool blog. I am a prominent writer in my country. The newspaper is really keen to help me out and told me that it was easy to get started on an H-1B visa.

**Attorney:** I have read your books and articles. Unfortunately, the H-1B cap was reached on April 2, 2007, the first day of the filing period for the 2008 visa allotment. You may be able to qualify for an O visa as an alien of extraordinary ability.

**Alien:** But did you not say I was toast because I am out of status?

**Attorney:** Sure. You cannot change status as you are unable to show extraordinary circumstances beyond your control. Even if the newspaper successfully sponsors you, once you leave the US to apply for an O at the US consulate in your home country, it will not be possible to return for 3 years.

**Alien:** Any waivers to overcome the 3 year bar?

**Attorney:** Yes. You could request the consul to recommend a nonimmigrant visa waiver under section 212(d)(3) of the INA. If the consul does so, the USCIS may in its discretion approve such a waiver. It is not readily granted, though, especially if one asks for it after having recently departed the US. The consul may also suspect that you entered the US on a B-2 to look for a job.

**Alien:** That's not true. I initially came to have a blast in New York. I started interviewing with the newspaper toward the end of my B-2 status. I was only offered the job yesterday. In any event, does this 212(d)(3) waiver permanently waive the 3 year bar?

**Attorney:** Unfortunately not. If you later apply for permanent residency, you will again need to apply for the waiver, and this time, you will need to show extreme hardship towards a qualifying relative, such as a US or permanent resident spouse or parent.

**Alien:** I don't have such a qualifying relative. Can I not spend the 3 years in the US, once I enter on an O visa and the 212(d)(3) nonimmigrant waiver?

**Attorney:** I must say that this is a very creative argument. The 3 year bar provision in the INA, section 212(a)(9)(B)(i)(I), does not specifically state that the 3 years must be spent overseas. An argument could be made that the 3 years could also be spent in the US, although the USCIS may not agree with our interpretation of the statute.

**Alien:** I am really now kicking myself for having met you so late, especially after 180 days. I took advice earlier from a guy who claimed he was an "immigration expert" in a travel agency, and he did not tell me anything about what you are

telling me.

**Attorney:** It is unfortunate that you did not talk to an immigration attorney earlier. If you had, we could have sent you out of the US prior to the 180 days from the expiration of your B-2 status. If the O petition got approved, you could have applied for the O visa at the consulate and would not have faced the 3 year bar. Or we could have also filed an EB-1, Person of Extraordinary Ability Petition, and concurrently filed an adjustment of status application. Of course, it would have been important to file the EB-1 petition by July 31, 2007, and the adjustment of status application by August 17, 2007. There is a small window of time to file adjustment of status applications before the employment-based visas become unavailable. If the adjustment application was filed within 180 days of your B-2 status expiration, we could have invoked the protection of Section 245(k). Otherwise, out of status aliens are not eligible to apply for adjustment of status in the US unless an employer or qualifying relative filed a labor certification or immigrant visa petition on or before April 30, 2001. The filing of the adjustment application would also stop the accrual of unlawful presence.

**Alien:** It all sounds fascinatingly complicated, but completely academic as I am over the 180 day mark. What about marriage to a US citizen?

**Attorney:** Are you planning to marry someone for love, because you want to share the rest of your lives together?

**Alien:** I can immediately ask a friend to help me out.

**Attorney:** Don't you even think of doing such a thing. The consequences for someone who enters into a sham marriage are drastic. Apart from never being eligible to being sponsored again, you could also face criminal prosecution.

**Alien:** Sorry. I was only having an academic discussion.

**Attorney:** Our time is running out, and I suggest you do not further stray away from the straight path. You have already violated your B-2 status. If on the other hand, you do meet a US citizen (of the opposite sex since USCIS does not recognize same sex marriages) whom you decide to genuinely marry, then you would be eligible to adjust status despite being out of status.

**Alien:** I have begun meeting some interesting guys in New York. I'll let you know if anything happens, although they say that the chances of being run over

by a car in this city are greater than finding true love! Are there any other exceptions to the 3 year bar, even if they may be academic?

**Attorney:** I'll engage with you on this one. If you are able to leave the US voluntarily after the commencement of removal proceedings, you will be able to escape the 3 year bar. This means that you will have to surrender yourself to ICE in order to be put into a removal proceeding.

**Alien:** I'm kind of afraid to do that. What if they arrest me?

**Attorney:** That is a possibility, but we might be able to bond you out. But it is more likely that ICE may not know what to do with you when you brazenly walk into an immigration office and reveal that you are out of status. This would be outside ICE's standard operating procedures. They are more used to picking up undocumented aliens during well publicized and planned raids.

**Alien:** Perhaps, you might know some friendly and understanding ICE officers?

**Attorney:** That is an oxymoron. Remember that this loophole can only help you in avoiding the 3 year bar. If you accrued over 1 year of unlawful presence, being placed in removal proceedings and leaving under voluntary departure would still trigger the 10 year bar to re-entry into the US.

**Alien:** I have been hearing a lot about President Bush and the Senate proposing to legalize the status of undocumented aliens.

**Attorney:** So have I. The last proposal went down in flames in June. I think we will have to wait until the next Presidential elections for it to get back on the front burner.

**Alien:** I really want to take up this opportunity with the newspaper, and it appears that filing the O visa, leaving the US, triggering the 3 year bar and returning on the 212(d) (3) waiver seems to be an option.

**Attorney:** Yes, it is an option but also a risky one. The O may not be approved, and even if it is approved, there is a likelihood that the waiver might not be granted to you.

**Alien:** I am willing to take this risk as I truly love living in New York City, but I cannot continue to live here illegally. One last thing, though. I have written a lot of critical stuff recently against the Iraq war, Guantanamo and America's unsavory mandatory detention policies towards immigrants it characterizes as aggravated felons. Would that cause any problems in getting the O or the

waiver approved?

**Attorney:** Big deal. The officials reviewing your O visa or waiver might be very interested in reading your stuff. By the way, do you fear persecution if you return to your own country.

**Alien:** Not really. I have received sporadic hate mail like other writers receive, including the columnists for the New York Times. I know you are a fabulous lawyer and are trying to explore all options for me, including asylum. I do not have any fear returning home, apart from facing the prospect of being stuck there for 3 years. I would much rather try the O visa, unless I meet the love of my life who might also happen to be an American citizen.

**Attorney:** Let's talk about fees.

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