



# THE INTERPLAY BETWEEN EMPLOYMENT AUTHORIZATION, TRAVEL AND H OR L STATUS

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As hundreds of thousands of would be immigrants filed adjustment of status applications during the window between July 17, 2007 and August 17, 2007, it is unlikely that cut-off dates in the Employment-based Second (EB-2) and Third Preferences (EB-3) will advance very rapidly.

For instance, the State Department Visa Bulletin for December 2007 indicates that the EB-2 cut-off dates for India retrogressed to January 1, 2002 and to January 1, 2003 for mainland born China. In the November 2007 Visa Bulletin, the EB-2 cut-off date was April 1, 2004 and January 1, 2006 for India and China respectively.

This implies that people will have their adjustment of status applications pending for long periods of time.

We will address some of the common questions that are being asked by adjustment applicants.

## **What is the benefit of maintaining H-1B status while I still have an adjustment of status application pending?**

It is a good idea to continue to maintain the underlying H-1B status. The "dual intent" nature of the H and L visas permits one to still have the underlying nonimmigrant status while an adjustment of status application to permanent residency is pending. If for any reason the adjustment of status application is denied, the H-1B status will hold you in good stead in such a worst case scenario. Moreover, Immigration and Customs Enforcement (ICE) has taken the

position that a pending adjustment of status application will still render a noncitizen amenable to removal proceedings. Most important, having an underlying H1B status will ensure that you can continue to work in an uninterrupted manner. If you were only to rely on the employment authorization document (EAD), arising as a result of the adjustment application, it would only have a validity period of one year. The extension would have to be filed over three months in advance, and then too, there would be no guarantee that it would be approved prior to the expiration of the prior EAD. One is not permitted to continue working if the prior EAD has expired, and the application for the new EAD has been filed but not yet approved.

On the other hand, the timely filing of an H-1B extension with the same employer, even though not approved, allows the noncitizen to continue working for a period of 240 days.

### **Does the same logic apply to someone who wishes to exercise portability under the adjustment of status application?**

Yes. 180 days after filing the adjustment application, an applicant is able to "port" to a same or similar job and still be able to process the application towards permanent residency. In the event that the USCIS does not approve portability, especially where the new employment is not considered similar to the old employment, you can still rely on the underlying H-1B status rather than be completely stranded with a denied adjustment application.

### **Can I maintain my H-1B status for my current employer and work part-time on my EAD for another employer?**

According to a legacy INS Memo from Michael D. Cronin, dated May 25, 2000 ([Cronin Memo](#)), you can only maintain H-1B status if you work for the employer who filed the H-1B petition on your behalf. If you work for another employer, even part-time, you would not be maintaining your H-1B status. You would then have to rely on your EAD for both of your jobs. If you wish to maintain H-1B status, it may be possible to have the part-time employer also concurrently file an H-1B extension petition on your behalf.

### **Can my spouse on an H-4 status work on the EAD?**

It is only possible to maintain H-4 status if one does not work in the US. If your spouse chooses to work on an EAD, he or she will no longer be considered to be maintaining H-4 status. However, the spouse can still be in the US pursuant

to the pending adjustment of status application.

### **Does the same hold true for an L-2 spouse?**

No. An L-2 spouse has an independent basis to apply for an EAD and thus is allowed to seek employment. Hence, an L-2 spouse who works pursuant to an EAD obtained as a result of that status will still maintain L-2 status.

### **If my H-4 spouse works on an EAD, can I still maintain H-1B status.**

Yes.

### **If I choose to work on an EAD, can my spouse maintain H4 status?**

No. The H-4 status is dependent upon the principal H-1B's status. If the H-1B ceases to maintain status, the spouse also loses the H4 status.

### **Can my spouse and I obtain an EAD and still maintain our respective H statuses?**

Obtaining an EAD in itself, without working pursuant to the EAD, will still allow you to preserve your H statuses. One can obtain an EAD for non-work related benefits such as to apply for a social security number or to use as a fall back in case one falls out of H-1B status.

### **If my spouse chooses to work on an EAD, can she get back into H-4 status if she ceases to work on her EAD in the future?**

If your spouse wishes to regain H-4 status, she will have to leave the US and enter on an H-4 visa in order to restore her H-4 status. You would need to be maintaining H-1B status.

### **If I am on H or L status do I need an advance parole to enter the US?**

Although advance parole is always required if an adjustment of status applicant needs to travel overseas, those maintaining H or L status are not required to travel under advance parole. However, under these circumstances, it is important that you have a valid H or L visa stamped on your passport for re-entry into the US. Under a new rule, it is no longer necessary to submit proof of the adjustment filing when being admitted on an H or L visa back into the US.

### **Under what circumstances can I travel on advance parole and still be able to maintain H or L status?**

The Cronin Memo states, "an alien who was an H-1 or L-1 nonimmigrant, but

who was paroled pursuant to a grant of advance parole, may apply for an extension of H-1 or L-1 status, if there is a valid and approved petition. If the Service approves the alien's application for an extension of nonimmigrant status, the decision granting such an extension will have the effect of terminating the grant of parole and admitting the alien in the relevant nonimmigrant classification." This strategy is advantageous for those who do not wish to spend time overseas applying for an H or L visa at a US consulate, but still wish to maintain H or L status. The Cronin Memo goes on to state that a person paroled in who previously maintained H or L status need not obtain an EAD. There is an implicit assumption that such a person is still maintaining H or L status.

### **Can the spouse of a person in the above situation apply for an H-4 visa at the US consulate?**

Although the Cronin Memo does not explicitly state so, it can be argued that since the principal spouse is still maintaining H-1B status even though admitted under advance parole, the dependent spouse should be able to obtain an H-4 visa at the US consulate. At this time, the State Department has not opined on this issue.

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