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US IMMIGRATION & NATIONALITY LAW

RECORDING DEPARTURE FROM THE US AFTER THE FACT

Posted on January 21, 2008 by Cyrus Mehta

by
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It is important that when a nonimmigrant departs the United States, his or her departure be recorded in the system. This is done when the person hands over the white-colored I-94 card to the airline counter upon departure. The I-94 card was initially issued at the point the nonimmigrant was previously admitted into the US at the port of entry. Those who entered under the Visa Waiver program were issued the green-colored I-94W card, which must also be handed in at the time of departure.

Since the US does not yet have official exit inspection checkpoints, a departing traveler is left to the mercy of the airline official, who might not ask him or her to hand over the I-94 card. Even if the airline official collects the I-94 cards, there is some chance that they might not all be submitted to Customs and Border Control (CBP)- the office within Department of Homeland Security which is responsible for admitting non-citizens into the United States. If the I-94 card is not recorded in the system, it will lead to an inference that this person never departed the United States.

Under Section 222(g) of the Immigration and Nationality Act (INA), as soon as the nonimmigrant overstays beyond the date stated on the I-94, the visa stamp on the passport is automatically voided. For example, Jane Patel, an Indian citizen, has a ten year multiple entry B-2 visa in her passport valid from October 1, 2005 till September 30, 2015. She was admitted into the United States on July 15, 2007, and the I-94 card that was issued to her indicated that she could stay in the United States until January 14, 2008. If Jane Patel has stayed in the US beyond January 14, 2008, her 10-year visa is automatically voided. If she tries to

enter in the US on this multiple entry visa at a future date, she will not be admitted and will either be asked to withdraw her admission or could also be subject to a summary removal order barring her for a period of five years. Thus, Jane Patel would need to apply for a new B-2 visa at the US Consulate in India, which is her country of nationality. Under 222(g), she will be precluded from even applying for a new B-2 visa in another country outside her country of nationality, such as Canada, unless she can demonstrate extraordinary circumstances. When she applies for the new visa at the US Consulate, she will have a lot of explaining to do in order to convince the consul that she is still a nonimmigrant who has no intention of abandoning her residence in the foreign country.

Moreover, overstaying the B-2 visa beyond January 14, 2008 would also subject Jane Patel to unlawful presence. Thus, if Jane Patel was unlawfully present in the US 180 days beyond her authorized stay, Janauary 14, 2008, and then departed the US, not only would her visa have been voided but she is now barred for 3 years from entering the US. If she stayed 1 year beyond January 14, 2008 and left the United States, Jane Patel will be barred for 10 years from reentering the US.

Take another example of Mary Schwank, an Austrian citizen, who also entered the US on July 15, 2007 under the Visa Waiver program. Her I-94W indicated that she could stay until October 14, 2007. Heidi Schwank too did not leave timely and is still in the US presently. If she leaves the US on January 31, 2008, the automatic visa voidance under Section 222(g) will not apply to her because she was admitted without a visa as an Austrian national. Nevertheless, she will still be subjected to the 3 year bar if she attempts to reenter the US under the Visa Waiver program available to Austrian nationals as she overstayed her welcome by more than 180 days. Even if Heidi Schwank left the US prior to the 180th day of unlawful presence (say December 31, 2007), she will have a tough time getting admitted into the US as the CBP inspector will be skeptical whether she is truly going to abide by the terms of her new admission under the Visa Waiver program.

The CBP has issued an important *Advisory* on how a nonimmigrant can still submit his or her I-94 or I-94W card if it was not handed over at the time of departure. The individual who departs without handing over the I-94 must mail it to the following address:

ASC – CBP SBU
1084 South Laurel Road
London, KY 40744

CBP also instructs that the individual must send proof of the timely departure, in addition to the I-94, such as original boarding passes, copies of entry or departure stamps of other countries in the passport after the individual departed the US, pay slips or vouchers from employers demonstrating that this individual commenced employment upon departure from the US in a foreign country, bank records showing transactions after departure from the US, school records showing attendance after departure, and credit card receipts showing post-departure purchases outside the US. Moreover, CBP also asks that a letter of explanation in English accompany the submission of all of the evidence.

Interestingly, the advisory indicates that delays beyond the traveler's control such as cancelled or delayed flights, or medical emergencies, will not be considered unauthorized overstays. However, the traveler would need to bring proof of the cause of the overstay the next time he or she visits the US. It should be noted that Section 222(g) provides for the automatic voidance of the visa notwithstanding any excuse for overstay. Thus, even if the visa is voided, the CBP presumably still has the ability to admit the traveler without a visa (if not a Visa Waiver country national) by waiving him or her under INA Section 212(d)(4).

If the nonimmigrant visitor on a B visa is able to anticipate a delay in advance of the last date on the I-94, it is best that he or she submit an application for an extension of status by filing Form I-539 with the United States Citizenship and Immigration Services (USCIS) on or before the date stated on the I-94. Visa Waiver applicants with I-94Ws are not eligible for such extensions of their status. On March 3, 2000, the predecessor agency, Immigration and Naturalization Service, issued a memorandum stating that if a traveler filed a timely and nonfrivolous I-539 application to extend status, and departed before a decision was made on this request, Section 222(g) would not apply. This policy is good even today.

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