

# Adjudicator's Field Manual

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## 30.1 Maintaining Status.

### (a) General.

Section 101(a)(15) of the INA specifies various classes of persons admissible to the U.S. as nonimmigrants. Requirements for admission in each category are discussed 8 CFR 214 and in Chapter 15.4 of the *Inspector's Field Manual*. This chapter will discuss general requirements for maintaining status, changing status, and obtaining extensions of stay. Requirements for maintaining and changing status which apply only to specific nonimmigrant classes are discussed in Chapters 31 through 37 and Chapter 15 of the *Inspector's Field Manual*. Matters relating to parole of aliens are contained in Chapter 16 of the *Inspector's Field Manual*, and matters relating to Temporary Protected Status are contained in Chapter 38 of this manual.

### (b) Activities Consistent with Status.

A nonimmigrant may engage only in activities consistent with his or her status. In general, the filing of an application for a different status or even the approval of a petition (for example an I-129 petition to accord H, L, O or P status), does not constitute authorization to engage in the activities permitted in the new status. (However, under certain conditions, an alien who is already in H-1B status may commence working for a new employer upon the filing of a new petition by that new employer.) With regards to a change of status applicant, it is only the formal approval of the change of status application by USCIS that constitutes authorization to engage in activities consistent with that new status. An alien who, prior to approval of a change of status, engages in activities not consistent with his or her present status is at risk of being found to be in violation of status in the event the application is denied, although approval is often retroactive to the date of the original application [See *Matter of Teberan*, 15 I&N Dec. 689 (BIA 1976), and *Matter of Dacanay*, 16 I&N Dec. 238 (BIA 1977)]. However, in accordance with 8 CFR 248.1(c), an alien may be granted a change of status to that of F-1 or M-1 student even though he or she may have begun attending the school even before the application was submitted.

There is a significant body of information available concerning what activities are or are not appropriate for particular visa classifications. The B-1 and B-2 classifications have historically been the object of many such interpretative discussions. If you have any questions concerning particular activities, you should consult available resources including: 8 CFR 214.2; Chapter 15.2 of the *Inspector's Field Manual*; the Department of State's Foreign Affairs Manual (FAM), and precedent decisions.

### (c) Voluntary Departure vs. Nonimmigrant Status.

Voluntary departure is not a nonimmigrant status. It is, however, regarded as an authorized period of time for purposes of section 212(a)(9). Accordingly, time spent in voluntary departure does not add to an alien's unlawful presence. For example, a B-2 nonimmigrant files for an extension after his stay expires. The extension is denied and the alien is granted 15 days of voluntary departure. In calculating unlawful presence, count as unlawful the days between the expiration of the B-2 status and the issuance date of the Form I-210 granting voluntary departure, as well as any time after the voluntary departure expired, but do not count the 15 day voluntary departure period itself. Voluntary departure is discussed in 8 CFR 240.25 .

Although voluntary departure time is not counted when calculating unlawful presence, an alien who has been given a period of voluntary departure is not considered to be maintaining status for purposes of receiving an extension or status change [See *Matter of Lennon* , 15 I&N Dec. 9 (BIA 1974).].

(d) Contents Deleted and Moved to Chapter 40.9.2 [05-09-2009].

## **30.2 Extension of Stay for Nonimmigrants.**

### (a) General.

Except as stated below, a nonimmigrant admitted for a specified period of time may request an extension of his or her admission period in order to continue to engage in those activities permitted under the visa category in which he or she was admitted. General requirements (such as those relating to passport validity, waivers of inadmissibility, and posting of a bond) for an extension of stay are discussed in 8 CFR 214.1(a). An application for an extension of stay is filed on Form I-129, Petition for a Nonimmigrant Worker, or Form I-539, Application to Extend/Change Nonimmigrant Status, as specified in 8 CFR 214.1(c), depending upon the nonimmigrant classification of the applicant. Form I-539 is used primarily for B-1/B-2, A-3/G-5, and M-1/M-2 extensions, as well as for student reinstatements and extensions of some dependents not included on the I-129 extension for a principal alien. Form I-129 is used to extend nonimmigrants working for a specific employer.

### (b) Limitations.

Aliens in classes C, D, K, WT, WB, and TWOV are ineligible for an extension of stay.

### (c) Use of Form I-539 for Extension of Stay.

#### (1) Initial receipting.

The applicant must file Form I-539 with the service center having jurisdiction over his or her residence, except student (F or M) reinstatement requests, which are filed at local offices. Editions of Form I-539 prior to the most current edition should not be accepted for purposes of extension of stay. A single application may be filed by a family group, provided all family members hold the same status or derivative status.

#### (2) Preliminary Review.

Preliminary review, in addition to general items discussed in Chapter 10.2, includes the following:

(A) The application must be filed with the office having jurisdiction. All I-539 extension requests must be filed at the appropriate service center except those relating to F/M student reinstatements.

(B) Aliens in B-1 or B-2 status must provide a statement explaining the purpose of the requested extension, departure arrangements and what, if any, effect the proposed extensions would have on his or her permanent residence.

(C) A-3 and G-5 aliens must submit an executed Form I-566, a letter from their employer detailing their job duties and evidence of the employee's status (usually an I-94 copy). [See also Chapter 30.6.]

(D) J nonimmigrants must submit a current IAP-66 covering the requested period of extension.

(E) Dependents of various temporary workers must submit evidence of the principal alien's status (or evidence of a pending petition for such status).

(F) Students seeking reinstatement must submit evidence of eligibility, including financial information and a current I-20.

(G) (Chapter 30.2(c)(2)(G), revised 07-27-2005) .The application must contain the original or copy of the arrival portion of the applicant's Form I-94, if any. Original I-94 forms are required in cases which are adjudicated at district offices. Copies may be submitted in cases which are adjudicated at service centers.

Note 1:

If I-94 copies are submitted even though originals were required, or vice versa, and the application will be adjudicated in CLAIMS, continue processing unless there is some apparent need to examine an original form. The CLAIMS-generated approval notice, Form I-797A includes a replacement I-94, which

is to be attached to the original. Upon approval, return any original I-94 which was improperly submitted.

Note 2:

If an extension applicant claims to have lost his or her I-94 , a separate Form I-102 , Application for Replacement/Initial Arrival/Departure Record should be filed. Although a CLAIMS-generated I-94 is issued in the course of adjudicating the extension application, the instructions indicate that it is to be attached to the original I-94 (or the replacement original). Verify arrival from TECS or, if no record can be found, obtain a copy of the applicant's passport page containing the admission stamp. Please consult TECS manual for current instructions.

(H) Dependents .

When an application for an extension of a dependent is not filed concurrently with the principal alien, evidence of the principal's status must accompany the application. This information may be verifiable in CLAIMS. There is no dependent status for Q-1 or TN nonimmigrants; however such dependents may separately qualify for nonimmigrant status, usually B-2.

Note:

(The Q-3 nonimmigrant category pertains only to dependents of Q-2 nonimmigrants.)

(3) Adjudication .

Nonimmigrant extensions are generally simple to adjudicate. Because the benefit sought is short-lived, these applications should be processed as quickly as possible, to ensure the request is acted upon while it is still relevant. Timely adjudication is also important because an applicant is not considered to be maintaining status simply because an extension application is pending [See *Matter of Teberan* , 15 I&N Dec. 689 (BIA 1976)]. The following actions, in addition to the general steps described in Chapter 10.3 , are ordinarily required during the I-539 adjudication process:

(A) Determine If the Application Was Timely Filed .

Although an application for extension of stay is ordinarily required to be submitted before the expiration of

the applicant's previously authorized period of stay, the adjudicator has discretion to grant an extension based on an untimely application. In deciding such a case, determine the reasons for late filing and whether the reasons were beyond the applicant's control, the degree of lateness, whether there is any indication that the applicant may have violated status in some other way, whether the applicant is otherwise a *bona fide* nonimmigrant, and whether the applicant has been apprehended and placed in proceedings by the Service.

#### Note 1

Issues surrounding the alien's original entitlement to nonimmigrant status were explored by INS or CBP and Department of State officials at the time of initial admission and visa issuance (or, in the case of visa exempt aliens, by INS or CBP alone). Absent gross error, changed circumstances or new information, these should not be revisited in extension proceedings. However, if the adjudicator has strong reason to believe that the alien was not entitled to a nonimmigrant status in the first place, he or she may seek clarification from the applicant through correspondence or by requiring an interview at the appropriate local office. If it is established that the applicant was not entitled to the status initially, the application should be denied and (if appropriate) the information provided to the visa issuing post or port-of-entry through normal intelligence and liaison procedures. Additionally, the information may form the basis of an additional charge (under section 237(a)(1)) on the Notice to Appear initiating removal proceedings. In extreme cases, where employee misconduct is suspected, the Office of Professional Responsibility should be advised.

#### Note 2

Inadmissibility Issues. At times, you may encounter an applicant for change of status and/or extension of stay who is inadmissible to the U.S., but who never obtained a waiver of such inadmissibility. Likewise, you may encounter an alien who had previously received a limited duration waiver of inadmissibility which has expired, or will expire before the end of the extension he/she is seeking. In either case, you may not grant such alien a change of status or an extension of stay unless and until he or she has applied for and been granted a waiver of his or her inadmissibility which covers the entire period of his or her proposed stay in the U.S. [See AFM Chapter 42 regarding adjudication of nonimmigrant waivers of inadmissibility] In addition to the general factors discussed in Chapter 42, in the case of an alien who was inadmissible at the time of his or her original admission as a nonimmigrant but was not in possession of waiver, you must also determine the reason(s) a waiver was not obtained at that time or when the alien applied for a nonimmigrant visa. If the alien willfully concealed his or her inadmissibility from the consular officer or the inspecting officer, the alien may be inadmissible under section 212(a)(6)(C) of the Act in addition to the original grounds of inadmissibility. If the waiver was not obtained due to an honest misunderstanding on the part of the alien, or an error on the part of the consular or immigration officer, then only the merits of waiving the original ground of inadmissibility need be taken under consideration. If appropriate, the waiver request may be granted *nunc pro tunc* to cover the original admission as well as the proposed extension.

(B) Verify Passport Validity.

An applicant need not submit a valid passport with his or her application since Part 4 of the application contains passport validity information. The applicant must hold a valid passport at the time of application and is required to maintain validity during the entire period of his or her stay in the United States. [See 8 CFR 214.1.] This does not preclude the adjudicating officer from requiring submission of evidence of the validity of the passport, if the officer has reason to believe that the alien has falsely claimed that it is valid.

(C) Decide If a Favorable Exercise of Discretion Is Warranted.

Applications for extensions of stay are matters solely within the administrative discretion of the director. Before approving an application for an extension, the adjudicator must be satisfied that the applicant will continue to engage only in activities specifically consistent with his or her nonimmigrant status. [See *Matter of Sourbis*, 11 I&N Dec. 335 (BIA 1965); *Matter of Spammann*, 11 I&N Dec. 285 (Acting District Director, 1965); *Matter of Rogalski*, 14 I&N Dec. 507 (District Director, 1973); *Matter of Healy and Goodchild*, 17 I&N Dec. 22 (BIA, 1979)]. In determining whether a favorable exercise of discretion is warranted consider, among other things:

- the applicant's age and condition (and how that relates to the specific reasons given for the requested extension). For example, a healthy, working or school age B-2 extension applicant staying in the home of a family with small children for a prolonged period could give rise to the suspicion that the applicant is actually providing child care or attending school.
- whether the applicant is likely to attempt to stay indefinitely. USCIS may terminate a nonimmigrant's authorized period of stay when it becomes aware the alien intends to remain indefinitely in the U.S. [See *Matter of Safadi*, 11 I&N Dec 446 (BIA 1965) ].

(D) Determine Whether Alien Is a Visas Mantis Case.

If so, follow the Visas Mantis reporting procedures discussed in Chapter 30.2(e).

Note:

The usual time allowed for an extension for a B-1 visitor is the length of time requested, or no more than six (6) months at one time, whichever is less. However, B-1 members of a religious denomination doing temporary missionary work may be granted extensions up to one year in length.

(4) Interview .

Requiring a personal appearance by an applicant or requesting a formal investigation for an extension should rarely be required. Likewise, requests for additional evidence should be relatively unusual. The application itself, supporting documentation required by the instructions on the form and existing INS or USCIS records will enable you to adjudicate virtually any extension of stay request.

(5) Revocation of Extensions .

USCIS has the authority to reopen and deny an extension which was granted without knowledge of the true facts material to the case [See *Matter of T - -*, 9 I&N Dec. 239 (BIA 1961).] Such actions require a "Motion to Reopen" written in letter format, followed by the actual decision written in formal order. Note: Even in those few cases where on fee is collected on a motion to reopen (I.e., when USCIS is the moving party), it is still counted as an application or petition (as appropriate) received and completed.

(6) Bonds .

A maintenance of status and departure bond, although seldom used, may be required as a condition for approval of an extension or change of status request. [See *Inspector's Field Manual* , Chapter 45, for procedures on posting bonds.]

(7) File Review .

In adjudicating an Form I-539 , a relating "A" file shall be obtained and reviewed prior to adjudication if a bond has been posted on the alien's behalf or if the alien has been granted a section 212(d)(3) waiver. In any other case, a relating "A" file can be obtained and reviewed if there is reason to believe it may contain relevant information needed to decide the case. In a section 212(d)(3) waiver case, if the applicant's Form I-94 is noted "ARL" the file should not be requested, but the Arlington, VA. District Office should be consulted before an extension of stay is granted. In all cases in which an "A" file exists, the adjudicated

application and all relating material shall be placed in the file. The file number shall be noted on the application and the Form I-94.

(8) (Chapter 30.2(c)(8)(A), revised 07-27-2005) .

(A) Approval .

Determine the appropriate amount of time for the extension. [See 8 CFR 214.1 for general requirements and 8 CFR 214.2 for the specific requirements relating to each nonimmigrant classification.] Endorse the action block on the application and indicate the actions taken in the "INS (or as updated forms are issued, USCIS) use only" section of the form. Upon approval, update CLAIMS, ordering approval notices. The Form I-530 forwarding the record of approval is automated at the service centers and the data is sent to TECS. Returning the receipt file to Records. The CLAIMS approval notice, Form I-797A , contains a tear-off section which serves as a replacement Form I-94 , indicating the extension date. If the application is not processed in CLAIMS, the original I-94 must be manually noted on the reverse with the approval date, office three-letter code, and officer stamp number. In addition, both CLAIMS and non-CLAIMS approvals require the preparation and forwarding of Form I-530 or the automated equivalent for each alien included on the application and (unless the I-94 is hand-delivered to the alien) completion of an approval notice on Form I-542.

(B) Denial .

Endorse the action block on the application and indicate the actions taken. Set a voluntary departure period, if the alien is no longer maintaining status. For denials processed in CLAIMS, select proper standard denial paragraphs from CLAIMS, adding special text if necessary. In non-CLAIMS cases, prepare Form I-541 to advise the applicant of the reasons for denial; and prepare Forms I-530 for the applicant and each dependent and forward to NIIS. Delivery of the decision may be accomplished by routine service, as described in 8 CFR 103.5a.

(C) Routing of Miscellaneous Documents .

In the case of a J-1 application for an extension of stay, always return the pink colored, USCIS annotated, IAP-66 with the I-94 to the applicant or attorney. The yellow copy of the IAP-66 is sent to the Department of State, Bureau of Educational and Cultural Affairs and the white copy stays in the file with the application.

In the case of the F-1 student the school copy of Form I-20AB is sent to the data facility in London, Kentucky and the student copy (Form I-20ID) is returned to the student or attorney, in accordance with Appendix 15-8 of the *Inspector's Field Manual* .

(9) Appeal .

There is no appeal from an adverse decision on Form I-539 . Decisions may be certified to the Administrative Appeals Unit in accordance with 8 CFR 103.4. An alien may seek review of an improper decision by filing a motion pursuant to 8 CFR 103.5.

(d) Use of Form I-129 for Extension of Stay .

(1) Initial Receipting .

General receipting procedures are discussed in Chapter 10 of this manual. The applicant's employer must file Form I-129 with the service center having jurisdiction over his or her (the alien's) place of employment. A single application may be filed by the employer on behalf of a family group, provided all family members hold the same status or derivative status. Family members may not be included in a petition for multiple principal beneficiaries. Although technically a readmission, NAFTA extensions for TN and L-1 nonimmigrants may also be adjudicated at ports-of-entry when the applicant seeks reentry. [See *Inspector's Field Manual* , Chapter 15.5.] Editions of Form I-129 prior to the most current edition may not be accepted for purposes of extension of stay for nonimmigrants.

(2) Preliminary Review .

In addition to the steps discussed in Chapter 10 of this field manual :

(A) Ensure the form is completed as required and the correct supplement is filled out for the applicable nonimmigrant category.

(B) Review supporting documents. If there has been no change in employment, only the appropriate I-129 supplement and a letter from the employer confirming continuing employment is required, except that the employer must also submit :

- a copy of the employer's labor condition application and Form I-129W for H-1B applicants.
- a valid labor certification for H-2B applicants.
- a valid labor certification for H-2A applicants, unless it is a request for an extension not to exceed two weeks (or less, if the original certification was for less than two weeks) for employment included in a prior certification.

Other special supporting documents required for nonimmigrant extensions where there is a change in the terms and conditions of employment are discussed in the Chapters 31-35, relating to specific categories.

Note 1:

Form I-94. If an original I-94 is attached, rather than a copy, it should be returned when action is completed on the application, since CLAIMS generates a new I-94, to be attached to the original, upon approval of the extension. Questions regarding original admission or previous status can usually be resolved by searching CLAIMS or NIIS data bases. NIIS records should contain arrival information, in the event an I-94 is not submitted.

Note 2:

Jurisdiction. Normally cases submitted in the wrong jurisdiction must be transferred to the appropriate office; however, in certain situations local management may choose to assume jurisdiction in a case. Consult with supervisory personnel before processing an application which does not appear to be submitted in the proper jurisdiction. Remember that jurisdiction is determined by the petitioner's address in cases involving temporary employment:

- for the same employer at more than one location;
- for more than one agricultural employer, where an association is petitioning for H-2A workers; or

· for one, or more than one, non-agricultural employer, where an established agent is serving as the petitioner.

Note 3:

Dependents. Dependents may be included on an I-129 extension request if the I-129 includes only one principal alien. In the event a multiple beneficiary I-129 is submitted which includes dependents for one or more principals, request that the dependents submit separate extension applications on Form I-539 . A separate I-539 is required for each family group of dependents.

(3) Adjudication .

Nonimmigrant extensions on Form I-129 are ordinarily fairly simple to adjudicate, unless there is a change in previously authorized employment. Because the benefit sought is short-lived, these applications should be processed as quickly as possible, to insure the request is acted upon while it is still relevant.

Extensions of stay filed on Form I-129 must be divided into two categories. Extensions involving aliens in E, R or TN status are single-step requests, although it is necessary to consider eligibility both in terms of requirements relating to the employer and those relating only to the alien. There is no separate adjudication of a petition extension, technically filed by an employer on the alien's behalf.

Extensions involving H, L, O, P or Q aliens are, in reality, a two-step adjudication: consideration of the employer's request to extend the petition to classify the alien as a nonimmigrant worker and consideration of the alien's request for additional time as a nonimmigrant. This distinction is an important one, since a denial of the employer's petition extension may be appealed to the Administrative Appeals Office while a denial of the extension of stay may not be appealed. The issues relating to the petition extension are the same as those for an initial petition. These requirements are discussed separately in Chapters 31-33 and 35. The issues surrounding an alien worker's request to extend his or her nonimmigrant stay in the U.S. are generally the same as for any other nonimmigrant category.

Note:

The alien beneficiary of a Form I-129 being filed by his or her employer for an extension has previously been found eligible for nonimmigrant status, either by INS, USCIS or CBP at the time of admission or through an initial petition, or by the Department of State during the visa issuance process. Absent apparent gross error, a change in the circumstances surrounding the alien's stay, or discovery of new information not previously available, the adjudicator should not engage in an in-depth review of issues

relating to the initial status. In the event of adverse action on a reopened I-129 petition (or denial of a petition extension request), the petitioner has the same appeal rights available in the original petition proceedings (see chapter 10.17 of this *Field Manual* for additional discussion of motions to reopen and motions to reconsider).

In addition to the general procedures described in Chapter 10.3, the following actions are ordinarily required during the adjudicative process:

(A) For H, L, O, P or Q-1 aliens, determine if the petitioning employer's eligibility has changed in any way. It is generally not necessary to request new supporting documents (except any required labor certification or labor condition application), nor should the original file be routinely requested. If eligibility has changed or the original petition was improperly approved, follow the procedures in Chapters 31-35 for denial or for reopening based on a USCIS motion (see chapter 10.7(c) of this *Field Manual*). If the petition was properly approved and the employer's eligibility remains unchanged, consider the alien's eligibility for an extension, as outlined below.

(B) For E, Q-2, R and TN cases, consider the original eligibility requirements for the status, as discussed in Chapters 34 and 35. If eligibility has changed or the alien was not originally entitled to the status, deny the extension request, following the procedures below. If employment-related eligibility requirements continue to be met, consider other aspects of the extension request, as outlined below.

(C) Determine if the Form I-129 was timely filed.

Although timely filing is ordinarily required, the adjudicator has discretion to grant an extension based on an untimely application. In deciding such a case, determine the reasons for late filing and whether the reasons were beyond the alien's control, the degree of lateness, whether there is any indication that the applicant may have violated status in some other way, whether the applicant is otherwise a *bona fide* nonimmigrant and whether the applicant has been apprehended and placed in proceedings by the Service.

(D) Verify passport validity.

An alien need not submit a valid passport with his or her application, since Part 4 of the application contains a check-block requiring the applicant to indicate he or she has a valid travel document. The alien must hold a valid passport at the time of filing and must agree to maintain its validity during the entire period of his or her stay.

(E) Ensure that co-applicant dependents remain entitled to dependent status.

(F) Review the validity of any required labor certification or labor condition application. No extension may be granted beyond their validity.

(G) Determine whether alien is subject to the Visas Mantis reporting procedures discussed in Chapter 30.2(e) .

(4) Interview .

Requiring a personal appearance by an alien for an extension should rarely be required and requests for additional evidence should likewise be relatively unusual. The Form I-129 itself, supporting documentation required by the instructions on the form and existing USCIS records will enable you to adjudicate most extension of stay requests. In the event either action is required, follow local procedures for forwarding the application for interview or establishing a call-up for the returned case. The application itself, supporting documentation required by the instructions on the form and existing USCIS records will enable you to adjudicate virtually any extension of stay request. When an interview is conducted, a sworn statement (or a memorandum containing the results or notes summarizing the interview) should be included in the record. If the interview was conducted at the request of a service center or another field office, that office should be notified of the findings.

(5) Temporary vs. Permanent Intent: Effect on Nonimmigrant Status .

Although nonimmigrants, by definition, are in temporary status and should be able to demonstrate their intention to return to their home country, H-1 and L nonimmigrants need not maintain a residence in a foreign country and are considered to be maintaining status even after taking overt actions to remain permanently in the United States. Other classes of nonimmigrants may be required to provide evidence of their intent to depart from the United States when their authorization to remain expires.

(6) File Review .

In adjudicating an extension on Form I-129 , a relating "A" file shall be obtained and reviewed prior to adjudication if a bond has been posted on the alien's behalf or if the alien has been granted a section 212(d)(3) waiver. In any other case, a relating "A" file can be obtained and reviewed if there is reason to believe it may contain relevant information needed to decide the case. In a section 212(d)(3) waiver case, if the alien's Form I-94 is noted "ARL" the file should not be requested, but the Arlington, VA. District Office should be consulted before an extension of stay is granted. In all cases in which an "A" file exists, the adjudicated Form I-129 and all relating material shall be placed in the file. The file number shall be noted on the application and the Form I-94.

(7) Closing Actions.

In addition to the general procedures described in Chapter 10, the following closing actions are required:

(A) Approval.

Determine the appropriate amount of time for the extension. [See 8 CFR 214.1 for general requirements and 8 CFR 214.2 for the specific requirements relating to each nonimmigrant classification.] Endorse the action block on the Form I-129 and indicate the actions taken in the "INS use only" section of the form. Upon approval in CLAIMS, update the system, ordering approval notices and forwarding the record of approval to NIIS. The CLAIMS approval notice, Form I-797A , contains a tear-off section which serves as a replacement Form I-94, indicating the extension date. If the case is not processed in CLAIMS, the original I-94 must be manually noted on the reverse with the approval date, office three-letter code, and officer stamp number. In addition, both CLAIMS and non-CLAIMS approvals require the preparation and forwarding to NIIS of Form I-530 for each alien included on the application and completion of an approval notice on Form I-171C.

Note:

Approval of a timely-filed I-129 extension is always considered *nunc pro tunc* , effectively forgiving the status violation for overstaying or continuing employment (with the same employer) which may have occurred between the expiration of the original admission period and the approval date of the extension. [See *Matter of Dacanay* 16 I&N Dec. 238 (BIA 1977).]

(B) Denial

Endorse the action block on the Form I-129 and indicate the actions taken, including setting a voluntary departure period, if the alien is no longer maintaining status. For denials processed in CLAIMS, select proper standard denial paragraphs from CLAIMS, adding special text if necessary. In non-CLAIMS cases, prepare Form I-541 to advise the applicant of the reasons for denial, set a period of voluntary departure; and in both CLAIMS and non-CLAIMS denials, prepare Forms I-530 for each alien included on the application and forward to NIIS. Delivery of the decision should be by routine service, as described in 8 CFR 103.5a.

(8) Appeal.

There is no appeal from an adverse decision on Form I-129 filed for purposes of seeking an extension of stay, except in H, L, O, P and Q cases where the denial is based on petition-related issues. If the adjudicator reopens an original petition and denies a case on petition-related grounds, the matter may be appealed to the Administrative Appeals Unit.

(e) Visas Mantis Cases.

(1) Background.

Visas Mantis is a pre-issuance name-check procedure utilized by the Department of State (DOS) when an alien applies for a visa to enter the United States to engage in study or commerce in a field on the Technology Alert List (TAL). The TAL consists of two parts: a critical fields list of major fields of controlled good and technologies of technical transfer concern, including those subject to export controls for nonproliferation reasons, and the State Department's list of State Sponsors of Terrorism. DOS developed the Visas Mantis pre-issuance name-check procedure in response to concern from the United States law enforcement and intelligence community that U.S. produced goods and information are vulnerable to theft. The primary security objectives of the Visas Mantis program are to stem the proliferation of weapons of mass destruction and missile delivery systems, restrain the development of destabilizing conventional military capabilities in certain regions of the world, prevent the transfer of arms and sensitive dual-use items to terrorist states, and to maintain U.S. advantages in certain military critical technologies.

Prior to the implementation of the Visas Mantis, the DOS utilized designators such as SPLEX, CHINEX and VIETEX that focused on nationalities from finite geographical areas (i.e., the former Warsaw pact, China



Although Service Center and District Adjudications Officers are required to report such encountered aliens to Headquarters Office of Program and Regulatory Development, officers are not precluded from adjudicating the application or petition for extension of stay or change/adjustment of status. Decisions on such applications or petitions should in no way be prejudiced by the fact that the alien had a previous Visas Mantis, CHINEX, or SPLEX cable clearance.

### **30.3. Change of Nonimmigrant Status Under Section 248.**

(a) General.

Section 248 of the Act provides a nonimmigrant, lawfully admitted to the U.S., who is continuing to maintain the status in which he or she was admitted or previously changed, the opportunity to change from one classification under section 101(a)(15) of the Act to another, with certain restrictions. Its purpose is to allow such nonimmigrant, in meritorious situations, to avoid the delay and expense of departing from the U.S. and returning, in order to engage in activities other than those permitted in his or her original or current nonimmigrant visa category. The applicant must meet all eligibility criteria for the new category. An application for a change of status is filed on Form I-129 , Petition for a Nonimmigrant Worker or Form I-539 , Application to Extend/Change Nonimmigrant Status, as specified in 8 CFR 248.3, depending upon the nonimmigrant classification being sought. The I-539 is used for changes to A, B, F, G, I, J, M, N, S and NATO and for dependents of other classes when the principal has already been accorded another status. The I-129 is used for nonimmigrants seeking E, H, L, O, P, Q, R and TN status concurrently with approval of a petition to accord such status. Special requirements for each status are discussed in Chapters 31-35. No request or application is required to change status from B-1 to B-2. Other within-class changes, such as F-2 to F-1 or H-4 to H-1, require a formal application and fee even though they are not, strictly speaking, changes of status under section 248 of the Act.

(b) Limitations.

(1) Changes from a Specified Class (Chapter 30.3(b)(1), Revised 07-13-2005) .

An alien in classes C, D, K, S, WT, WB, or TWOV is ineligible for a change of nonimmigrant status. An alien admitted as an exchange visitor (J) who is subject to the two-year foreign residence requirement of section 212(e) of the Act and who has not received a waiver of that requirement, can change only to A or G status. See Matter of Kim , 13 I&N Dec. 316 (R.C. 1968). Any J nonimmigrant who was admitted (or acquired such status) to pursue graduate medical education or training is ineligible to change status, even if he or she obtains a waiver of section 212(e) . An alien who has been admitted as an Irish Peace Process Cultural and Training Program visitor (Q-2 alien) is subject to the two-year foreign residence requirement of section 212(t) of the Act. Such an alien cannot apply for another nonimmigrant status, an immigrant visa, or permanent residence until the residency requirement has been met or a waiver has been granted. However, 212(t) only applies to those Q-2 aliens who initially entered the United States on or after December 10, 2004.

(2) Changes to a Specified Class.

Although an application and fee are required, changing from J-1 to J-2 is not regarded as a change of status, therefore, it is not prohibited. An M-1 nonimmigrant cannot change to F-1 status or to H status if the M-1 training helped him or her qualify for H status. No nonimmigrant can be granted M-1 status in order to gain training necessary to qualify for H status. [See also 8 CFR 248.2 and §248 of the INA.]

(c) Form I-539.

(1) Initial Receipting.

The applicant must file Form I-539 with the service center having jurisdiction over his or her place of residence. A single application may be filed by a family group. The basic procedures for receiving such applications are discussed in Chapter 10.

Note:

On April 12, 2002, the INS amended 8 CFR 248.1(c) to add a provision prohibiting most B-1 or B-2 nonimmigrants from changing status to that of F or M full-time student if that B-1 or B-2 nonimmigrant has already begun taking classes at the school. USCIS must deny the requested change if there is evidence that the alien has begun course work prior to the adjudication (approval) of the I-539 application. The rule applies to any B-1 or B-2 nonimmigrant who:

- Last entered the United States as a B-1 or B-2 nonimmigrant on or after April 12, 2002; or
- Although admitted to the United States as a B-1 or B-2 nonimmigrant prior to April 12, 2002, filed an application for an extension of his or her nonimmigrant status on or after April 12, 2002; or
- Although admitted in any nonimmigrant category either before, on, or after April 12, 2002, filed an application for a change of nonimmigrant status to that of B-1 or B-2 on or after April 12, 2002; or
- Although granted a change of status to that of B-1 or B-2 nonimmigrant prior to April 12, 2002, filed an application for an extension of his or her B-1 or B-2 nonimmigrant status on or after April 12, 2002.

An applicant who does not meet ANY of these four provisions is “grandfathered in” under the old (pre-April 12, 2002) regulations and is NOT subject to the bar.

(2) Preliminary Screening .

In addition to the steps described in Chapter 10 , preliminary review includes the following:

(A) Determine Jurisdiction .

Jurisdiction is generally based on the alien’s location in the United States. Consult with supervisory personnel before accepting an application which does not appear to be submitted in the proper jurisdiction.

Note:

Normally cases submitted in the wrong jurisdiction must be transferred to the appropriate office; however, in certain situations local management may choose to assume jurisdiction in a case. Consult with supervisory personnel before processing an application which does not appear to be submitted in the proper jurisdiction.

However, the Washington District Office and the New York District Office have jurisdiction over certain adjudications concerning A, G, NATO nonimmigrants.

· Changes into or within an A, G, or NATO Classification . Requests for change of status into or within an A, G, or NATO nonimmigrant classification are adjudicated exclusively by USCIS personnel from the Washington District Office, who meet weekly with personnel in the Department of State (DOS) Visa Office in Washington, DC, or by New York District Office personnel who work closely with the U.S. Mission to the United Nations (USUN) in New York. This was a long-standing arrangement between DOS and the former Immigration and Naturalization Service, which continues with USCIS. These two USCIS offices have assigned adjudicators to this function. Change of status requests into or within any of these classifications should not be adjudicated at any other district office or at a service center.

When an alien in the United States requests a change of nonimmigrant status into or within an A, G, or

NATO classification, that request must first be considered by the DOS Office of Protocol, USUN for aliens assigned to the United Nations or to a foreign mission to the United Nations, or by the North Atlantic Treaty Organization/Headquarters, Supreme Allied Commander Transformation (NATO/HQ SACT) for aliens assigned to a NATO command. A change within a classification would include instances in which aliens receive promotions or otherwise change their responsibilities and may require a change within the existing classification, for example, from A-2 to A-1.

How to Handle Requests for Change of Status into or within an A, G, or NATO Classification Filed at Other District Offices or Service Centers. Should another district office or service center receive a request for a change of status into or within an A, G, or NATO classification, the request should be returned to the alien, using the following recommended language:

“Your application was filed incorrectly. Please resubmit your application along with any required supporting documents to your embassy, international organization or permanent mission thereto, or NATO command. Your employing organization must first review this application and then forward it on to one of these certifying organizations: Department of State, U.S. Mission to the United Nations, or North Atlantic Treaty Organization/Headquarters, Supreme Allied Commander Transformation. Following certification by one of these organizations, your application will then be submitted to the USCIS by one of them. You do not submit this type of application directly to USCIS.”

· Extension of Stay for A-3, G-5, or NATO-7 Classifications. Requests for an extension of stay for an A-3, G-5, or NATO-7 nonimmigrant are adjudicated exclusively by the Washington District Office or New York District Office, following a thorough review of the circumstances of such requests by DOS, USUN, or NATO officials. These officials are able to verify that the sponsoring employer continues to hold the qualifying position and to review updated employment contracts to ensure that the terms of employment are consistent with current requirements. Such requests for an extension should not be adjudicated at other district offices or service centers.

How to Handle Extension of Stay Requests for A-3, G-5, or NATO-7 Nonimmigrants Filed at Other District Offices or Service Centers. Should another district office or service center receive any such request, the request should be returned to the alien, using the following recommended language:

“Your application was filed incorrectly. Please contact your employer’s embassy, international organization, or NATO command for proper filing procedures.”

· Change from an A, G, or NATO Classification. When A, G, or NATO aliens wish to change to another

nonimmigrant classification, such requests are adjudicated at service centers, provided there is an endorsement by a DOS Visa Office or a USUN official at Part 7 on Form I-566 (Interagency Record of Request), accompanying Form I-539 (Application to Extend/Change Nonimmigrant Status) or Form I-129 (Petition for a Nonimmigrant Worker). Please note that the DOS Visa Office, not NATO/HQ SACT, endorses this form on behalf of NATO nonimmigrants.

Should questions arise during the adjudication, USCIS personnel may wish to consult with one of the following:

Diplomatic Liaison Division of the DOS Visa Office at telephone (202) 663-1743<sup>(S)</sup> or fax (202) 663-1608<sup>(S)</sup> -- for aliens in A classification and for aliens in G classification except those who are assigned to the United Nations, for example a G nonimmigrant working at the World Bank in Washington, DC;

Advisor for Host Country Affairs at USUN at (212) 415-4167<sup>(S)</sup> or fax (212) 415-4162<sup>(S)</sup> -- for aliens in G classification and assigned to the United Nations Secretariat or an individual mission to the United Nations;

Legal Affairs Office at NATO/HQ SACT at (757) 747-3640<sup>(S)</sup> or fax (757) 747-3310<sup>(S)</sup> -- for aliens in NATO classification.

· After the adjudication of a change of status from these classifications: USCIS officers must complete Part 8 of the revised Form I-566 by documenting action taken and returning a copy of that form to the appropriate office:

For the Department of State, Office of Protocol, use the following address:

Office of Foreign Missions

3507 International Place, NW

Washington, DC 20522-3302

For the U. S. Mission to the United Nations, use the following address:

U.S. Mission to the United Nations

799 United Nations Plaza

New York, NY 10017

For the North Atlantic Treaty Organization/Headquarters, Supreme Allied Commander Transformation, use the following address:

NATO/HQ SACT

Legal Affairs Office

7857 Blandy Road, Suite 100

Norfolk, VA 23551

DOS, USUN, and NATO/HQ SACT update their records based upon information USCIS personnel provide on this form. Thus, it is important that a complete copy of the Form I-566 be forwarded promptly to the appropriate agency or organization, noting what action was taken and the date it was taken, as well as the name and telephone number of the adjudicating office for use in the event that should DOS, USUN, or NATO/HQ SACT have questions regarding the adjudication.

(B) Ensure Form I-94, either original or a copy, is submitted. If there are multiple applicants on a single application, insure a copy of each I-94 is attached.

Note 1:

Form instructions on Form I-539 indicate that aliens seeking B, F, J or M status are required to submit their original Form I-94. Others should submit only a copy of their I-94. If I-94 copies are submitted even though originals were required, or vice versa, and the application will be adjudicated in CLAIMS, continue processing unless there is some apparent need to examine an original form. The CLAIMS-generated approval notice, Form I-797A, includes a replacement I-94, which is to be attached to the original I-94. Return to the applicant any original I-94 which was improperly submitted.

Note 2:

If a change of status applicant claims to have lost his or her I-94, a separate Form I-102, Application for Replacement/Initial Arrival/Departure Record should be filed since the I-94 issued in the course of adjudicating the application indicates that it is to be attached to the original I-94. Verify arrival from NIIS or, if no record can be found, obtain a copy of the applicant's passport page containing the admission stamp.

Note 3:

Inadmissibility Issues. At times, you may encounter an applicant for change of status and/or extension of stay who is inadmissible to the U.S., but who never obtained a waiver of such inadmissibility. Likewise, you may encounter an alien who had previously received a limited duration waiver of inadmissibility which has expired, or will expire before the end of the extension he/she is seeking. In either case, you may not grant such alien a change of status or an extension of stay unless and until he or she has applied for and been granted a waiver of his or her inadmissibility which covers the entire period of his or her proposed stay in the U.S. [See AFM Chapter 42 regarding adjudication of nonimmigrant waivers of inadmissibility] In addition to the general factors discussed in Chapter 42, in the case of an alien who was inadmissible at the time of his or her original admission as a nonimmigrant but was not in possession of waiver, you must also determine the reason(s) a waiver was not obtained at that time or when the alien applied for a nonimmigrant visa. If the alien willfully concealed his or her inadmissibility from the consular officer or the inspecting officer, the alien may be inadmissible under section 212(a)(6)(C) of the Act in addition to the original grounds of inadmissibility. If the waiver was not obtained due to an honest misunderstanding on the part of the alien, or an error on the part of the consular or immigration officer, then only the merits of waiving the original ground of inadmissibility need be taken under consideration. If appropriate, the waiver request may be granted nunc pro tunc to cover the original admission as well as the proposed extension.

(C) Ensure the applicant has attached supporting documentation for the classification sought:

· Aliens seeking F-1 or M-1 status must submit the appropriate Form I-20 and evidence of financial ability to maintain the new status. Aliens seeking J-1 status must submit Form IAP-66.

- Aliens seeking A-3 or G-5 status must submit an executed Form I-566, a letter from their employer detailing their job duties and evidence of the employer's status (usually an I-94).

- Dependents of various temporary workers must submit evidence of the principal alien's status (or evidence of a pending request for such status).

Note:

Information relating to a principal alien's status, if missing or questionable, may be verified in CLAIMS or NIIS. There is no dependent status for Q-1 or TN nonimmigrants; however, such dependents may separately qualify for nonimmigrant status, usually B-2.

Detailed discussions of supporting documents for each status are contained in Chapters 34 through 37.

(3) Adjudication.

Applications for a change of status on Form I-539 are relatively simple to adjudicate. Because the benefit sought is generally short-lived or time-sensitive, these applications should be processed as quickly as possible, to insure the request is acted upon while it is still relevant. The following actions, in addition to the steps described in Chapter 10.3, are ordinarily required during the adjudicative process:

(A) Determine if the application was timely filed.

Although ordinarily required, the adjudicator has discretion to grant a change of status based on an untimely application. In deciding such a case, determine the reasons for late filing and whether the reasons were beyond the applicant's control, the degree of lateness, whether there is any indication that the applicant may have violated status in some other way, whether the applicant is otherwise a *bona fide* nonimmigrant and whether the applicant has been apprehended and placed in proceedings. If the alien is guilty of more than excusable tardiness (e.g., if he/she has worked without authorization or has committed a crime), the adjudicator has no discretion to excuse the tardiness.

(B) Verify passport validity.

An applicant need not submit a valid passport with his or her application, but must complete Part 4 of the application which contains passport validity information. The applicant must hold a valid passport at the

time of application and is required to maintain validity during the entire period of his or her stay in the U.S.

(C) Determine if any and all required supporting forms, such as Form I-20, DS-2019, or I-566 are attached, properly completed, and endorsed. [See also Chapters 34-37 discussions of supporting documentation.]

(D) Determine if a Favorable Exercise of Discretion Is Warranted.

Change of status applications are discretionary in nature. In deciding whether a favorable exercise of discretion is warranted, consider such things as the alien's financial ability to maintain the status sought, whether there was possible deception when the original visa or admission was sought, what the applicant's ultimate intentions may be, veracity of documentation submitted, and the overall effects of a positive or negative decision. It is important to keep in mind that discretionary does not mean arbitrary. Given similar fact patterns, discretionary decisions should yield similar results regardless of where such cases are adjudicated or by whom. There is a significant body of precedent decisions which discuss the appropriate exercise of discretion under a variety of situations. Familiarity and conformity with these precedents are critical to achieving consistent and fair results in such cases.

Note 1:

Ability to Maintain Status. Maintenance of status is discussed generally in Chapter 30.1. In order to change status, an applicant must be a bona fide nonimmigrant, maintaining his or her current status [ *Matter of Haddad* , 10 I&N Dec 785 (R.C. 1964)]. *Matter of Lee* , 11 I&N Dec. 601 (R.C. 1966) found that an H-1 nonimmigrant's failure to continue the temporary employment for which he was admitted constituted a failure to maintain status.

With the exception of H-1 or L nonimmigrants who are covered by section 212(h) of the Act, because an alien who is seeking a change of status and/or an extension of stay bears the burden of establishing eligibility for the benefit sought, if he or she has filed an application for adjustment of status or an application for asylum (or even if he or she is the beneficiary of a permanent or temporary visa petition, unless the applicant can establish that he or she is the unwilling or unknowing beneficiary) he or she cannot meet this burden and the application for change of status or extension of stay should be denied. Contrast this issue with the discussion in Chapter 23 on whether an alien automatically violates his or her nonimmigrant status by merely applying for adjustment of status or asylum. However, under certain very limited circumstances, extension or change of status may be granted to an alien who (1) had previously been denied adjustment or asylum or whose previously approved visa petition has been withdrawn or revoked, (2) who met the criteria discussed in Chapter 23 for being considered as having maintained his or her status throughout the pendency of the asylum/adjustment application, and (3) is able to satisfy the

officer adjudicating the application for change or extension that he or she has completely abandoned his or her intent to remain in the United States beyond the period which can be authorized under the change or extension being sought.

In addition, the applicant must demonstrate he or she is able to maintain him or herself in the status sought, particularly financially. This issue needs particular examination when the applicant seeks a prolonged stay in any status where employment is not a routine part of the status, for example student status. Maintenance of status is discussed in AFM Chapter 30.1 ; the accrual and the effects of unlawful presence pursuant to section 212(a)(9) of the Act are discussed in AFM Chapter 40.9.2 .

Note 2:

Preconceived Intent. The adjudicator will encounter applications where it appears, either from the statements made on the application or from the sequence of events (from initial visa application and issuance, admission, obtaining supporting documents for a new status, until the date of filing) that the applicant concealed his or her true purpose for entering the U.S., either on the visa application or to the inspector at the time of admission. Most frequently, this situation occurs in requests to change status from B-2 to F- 1. The issuance dates of Forms I-20, affidavits of support , etc. are often helpful in determining whether preconceived intent or actual fraud exists.

USCIS policy discourages such deliberate actions. In cases where the new status is one which requires substantial financial assets by the applicant or an overseas sponsor, the consular officer in the applicant's home country is in a better position to assess the situation than a USCIS adjudicator. Similarly, where an applicant's overseas employment or ties to his or her home country are at issue, again the consular officer on the scene can most easily assess eligibility.

Although the facts in such situations could be indicative of actual visa fraud, more often the appropriate course of action may be to deny the application as a matter of discretion. A denial would not be warranted simply because an applicant entered as a visitor, for example, and was later offered an opportunity to attend school, receive specialized training or accept employment. It is necessary to look closely at the facts of the particular case, examining such facts as dates on supporting documents. If necessary, seek additional information from the applicant concerning all facts leading to his or her request.

A series of precedent decisions and court cases uphold USCIS's decision to deny a change of status in such a situation. *Matter of Hsu*, 14 I&N Dec. 344 (R.C. 1973), denied a change of status to an applicant who obtained a visa under the pretext of a visit for business when the actual purpose was to seek acceptance at a school. In *Matter of Le Floch*, 13 I&N Dec. 251 (BIA 1969), the Board ruled that even the applicant's claim that she was misinformed by a consular officer regarding the need for a student visa was insufficient to justify entry as a visitor. In *Seihoon v. Levy*, 408 F. Supp. 1208 (D. La. 1976), the court upheld the decision to deny

an application to change status based on a finding that a rapid sequence of events leading to enrollment in a school is sufficient for a finding that the applicant had a preconceived intent to change nonimmigrant status and circumvent the normal visa issuance process.

Assuming other eligibility requirements are met, favorable consideration should be given to the cohabitating partner or other household member of a principal nonimmigrant visa holder when the cohabitating partner or other household member is applying for change to B-2 status for the duration of the principal nonimmigrant's stay. A "household member" of a principal nonimmigrant is an alien who regularly resides in the same dwelling as the principal nonimmigrant and with whom the principal nonimmigrant maintains the type of relationship and care as one normally would expect between nuclear family members.

Note 3:

Applicant Is an Intending Immigrant. *Matter of Gutierrez*, 15 I&N Dec. 727 (R.C. 1976), denied a change of status to an alien who was determined to be an intending immigrant. However, it should be noted that not all nonimmigrants are required to maintain a foreign residence and that in some categories even overt evidence of intent to remain permanently in the United States is not a ground for denial of a change of status request. However, in the most commonly filed requests, those seeking F, J or M classification, before approving a case the adjudicator should be satisfied that the alien is not an intending immigrant.

Note 4:

Visas Mantis Cases. In adjudicating an application for change of status on behalf of an alien who was admitted under the Visas Mantis program, follow the same procedures as are set out for extension of stay applicants in Chapter 30.2(e).

Note 5:

Inadmissibility Issues. At times, you may encounter an applicant for change of status and/or extension of stay who is inadmissible to the U.S., but who never obtained a waiver of such inadmissibility. Likewise, you may encounter an alien who had previously received a limited duration waiver of inadmissibility which has expired, or will expire before the end of the extension he/she is seeking. In either case, you may not grant such alien a change of status or an extension of stay unless and until he or she has applied for and been granted a waiver of his or her inadmissibility which covers the entire period of his or her proposed stay in the U.S. [See AFM Chapter 42 regarding adjudication of nonimmigrant waivers of inadmissibility] In addition to the general factors discussed in Chapter 42, in the case of an alien who was inadmissible at the time of his or her original admission as a nonimmigrant but was not in possession of waiver, you must also determine the reason(s) a waiver was not obtained at that time or when the alien applied for a nonimmigrant visa. If the alien willfully concealed his or her inadmissibility from the consular officer or the inspecting officer, the alien may be inadmissible under section 212(a)(6)(C) of the Act in addition to the original grounds of inadmissibility. If the waiver was

not obtained due to an honest misunderstanding on the part of the alien, or an error on the part of the consular or immigration officer, then only the merits of waiving the original ground of inadmissibility need be taken under consideration. If appropriate, the waiver request may be granted nunc pro tunc to cover the original admission as well as the proposed extension.

(4) Personal Interview.

Requiring a personal appearance by an applicant for a change of status should rarely be required and requests for additional evidence should likewise be relatively unusual. In the event either action is required, follow local procedures for forwarding the application for interview or establishing a call-up for the returned case. (If the case is being referred for an interview, prepare a memorandum explaining the reasons for the referral.) The application itself, supporting documentation required by the instructions on the form, and existing records will enable you to adjudicate virtually any extension of stay request. When an interview is conducted, a memorandum containing the results or notes summarizing the interview should be included in the record. If the interview was conducted at the request of a service center or another field office, that office should be notified of the findings.

(5) Indirect Attainment of a Prohibited Change of Status.

Chapter 30.3(b) describes limitations on certain nonimmigrant status changes. An applicant may not evade these restrictions by virtue of having attained an intermediate status. *Matter of Kim*, 13 I&N Dec. 316 (R.C. 1968), denied a change of status from A-2 to F-1 because the applicant was originally admitted as a J-1. Such a change would be an indirect change from exchange visitor to student, a prohibited action.

(6) Changes of Nonimmigrant Classification Formerly Permitted Without Application or Fee.

Prior to January 11, 1994, 8 CFR 248.3(c) specifically allowed certain changes without fee or application. Those changes included:

(A) A change to classification under section 101(a)(15)(A) or (G) of the Act;

(B) A change to classification under sections 101(a)(15)(A) or (G) of the Act for an immediate family

member, as defined in 22 CFR 41.1, of a principal alien whose status has been changed to such a classification;

(C) A change to the appropriate classification for the nonimmigrant spouse or child of an alien whose status has been changed to a classification under sections 101(a)(15)(E), (F), (H), (I), (J), (L), or (M) of the Act;

(D) A change of classification from that of a visitor for pleasure under section 101(a)(15)(B) of the Act to that of a visitor for business under the same section;

(E) A change of classification from that of a student under section 101(a)(15)(F)(I) of the Act to that of an accompanying spouse or minor child under section 101(a)(15)(F)(ii) of the Act or vice versa;

(F) A change from any classification within section 101(a)(15)(H) of the Act to any other classification within section 101(a)(15)(H) of the Act provided that the requisite visa petition has been filed and approved;

(G) A change of classification from that of a participant under section 101(a)(15)(J) of the Act to classification as an accompanying spouse or minor child under that section or vice versa;

(H) A change of classification as an intra-company transferee under section 101(a)(15)(L) of the Act to classification as an accompanying spouse or minor child under that section or vice versa; and

(I) A change of classification from that of a student under section 101(a)(15)(M)(I) of the Act to that of an accompanying spouse or minor child under section 101(a)(15)(M)(ii) of the Act or vice versa.

The reason for discontinuing these provisions related to the need to eliminate circumstances whereby persons could change status without paying a fee (in effect transferring the USCIS' cost of doing business onto someone else), not with proscribing any of these actions. The types of changes for status listed above remain equally available to persons in such classifications today, provided that the person(s) involved file

the application, pay the requisite fee, and are otherwise eligible. After Jan. 11, 1994, only those aliens described in (A) remain exempt fee.

Note:

It has been determined that 8 CFR 248.3(b) applies to the B-2 spouse or children of B-1 nonimmigrants. Therefore, if a B-1 nonimmigrant applies for and is granted an extension of temporary stay, the status of the spouse and children will be changed without fee or application. Upon this change of status, Forms I-94 must be endorsed "B-1 spouse" or "B-1 child".

(7) Change of Status within the J Classification .

8 CFR 248.2 prohibits a change from the J nonimmigrant classification for any individual who became a J in order to receive graduate medical training or who is subject to the 2-year residency requirement. However, this prohibition does not prevent someone (who is otherwise eligible) from seeking a change within the J category from J-1 to J-2, or vice versa. However, three important items should be noted regarding this type of change:

(A) Any alien(s) subject to the 2-year residency requirement retains that obligation despite the change from J-1 to J-2 or vice versa;

(B) The alien(s) involved may acquire a 2-year residency requirement which they did not have previously [e.g., a J-1 not subject to the requirement who becomes a J-2 accompanying spouse of someone who is subject acquires the same obligation as the (new) J-1 principal]; and

(C) Before approving any such change, the adjudicator should be satisfied that it is being requested for legitimate exchange visitor purposes and not merely to extend the stay in the United States by "flip-flopping" the roles of the principal alien and the accompanying spouse.

(8) Bonds .

A maintenance of status and departure bond, although seldom used, may be required as a condition for

approval of an extension or change of status request. See *Inspector's Field Manual* , Chapter 45, for procedures on posting bonds.

(9) Affidavits of Support .

See Chapter 30.8 of this manual.

(10) File Review .

When adjudicating an application for change of status, obtain and review any relating "A" file prior to adjudication if a bond has been posted on the alien's behalf or if the alien has been granted a section 212(d)(3) waiver. In any other case, a relating "A" file may be obtained and reviewed if there is reason to believe it may contain relevant information needed to decide the case. In a section 212(d)(3) waiver case, if the applicant's Form I-94 is noted "WAS" the file should not be requested, but the Washington, D.C. District Office should be consulted before an extension of stay is granted. In all cases in which an "A" file exists, the adjudicated application and all relating material shall be placed in the file. The file number shall be noted on the application and the Form I-94.

(11) Case Closing Actions .

(A) Approval .

Complete the following steps when approving an application for change of status:

- Determine the appropriate amount of time for the extension of stay in the new visa classification. [See 8 CFR 214.1 for general requirements and 8 CFR 214.2 for the specific requirements relating to each nonimmigrant classification.]

- Endorse the action block on the application and indicate the actions taken in the section of the form designated "for Government Use Only".
- For CLAIMS-processed cases, upon approval, update CLAIMS and order approval notices. The system will forward the record of approval to NIIS. The CLAIMS approval notice, Form I-797A , contains a tear-off section which serves as a replacement Form I-94 indicating the new status and extension date.
- If the application is not processed in CLAIMS, the original I-94 must be manually noted on the reverse with the action taken (e.g. "c/s to F-1"), approval date, office three-letter code, and officer stamp number. Also, endorse the I-94 manually or using a rubber stamp, with the notation: "You must obtain a new visa to reenter this country in your present status." In addition, both CLAIMS and non-CLAIMS approvals require the preparation and forwarding to NIIS of Form I-530 for each alien included on the application and completion of an approval notice on Form I-542.

(B) Denial.

If denying the application for change of nonimmigrant status, complete the following steps:

- Endorse the action block on the application and indicate the actions taken in the section of the form designated "for Government Use Only".
- Using Form I-210, set a period of voluntary departure if the applicant is no longer maintaining status and he or she has agreed to accept voluntary departure.
- For denials processed in CLAIMS, select the proper standard denial paragraphs from CLAIMS, adding special text if necessary.
- In non-CLAIMS cases, prepare Form I-541 to advise the applicant of the reasons for denial.

· In both CLAIMS and non-CLAIMS cases, prepare Form(s) I-530 and forward to NIIS -- Service Centers do not prepare I-530s on denials of I-129s or I-539s.

(C) Routing of Miscellaneous Documents .

Returning the pink colored, USCIS annotated, IAP-66 with the I-94 is no longer the process. IAP-66 has been replaced by SEVIS generated DS-2019s. This is no longer a multiple copy form. Annotated original DS-2019 is returned to the applicant or attorney after approval of the COS. A photo copy of the annotated DS-2019 should go into the file. In the case of the F-1 form I-20, the original endorsed I-20 is returned to the student or attorney, a photocopy of the annotated I-20 goes into the case file and nothing is sent to London, KY. SEVIS has eliminated STSC which is where the data from the copies of the I-20s were entered previous to SEVIS.

The yellow copy of the IAP-66 is sent to the Department of State, Bureau of Educational and Cultural Affairs and the white copy stays in the file with the application. In the case of the F-1 student the school copy (Form I-20AB) is sent to the data facility in London, Kentucky and the student copy (Form I-20ID) is returned to the student or attorney, in accordance with Appendix 15-8 of the *Inspector's Field Manual* .

(12) Appeal .

There is no appeal from an adverse decision on Form I-539 filed for purposes of seeking a change of status.

(d) Form I-129 .

(1) Initial Receipting .

In order to receive a change of status to any category which requires an employer to submit a petition, the applicant must file Form I-129 with the service center having jurisdiction over his or her residence. The I-129 serves both as the employer's petition and the nonimmigrant's request for the new status. A single application may be filed by a family group, provided all family members hold the same status or derivative status and provided that there is no more than one principal alien on the petition. See general receipting instructions in Chapter 10. Editions of Form I-129 prior to the most current edition may not be accepted.

(2) Preliminary Screening.

Preliminary review of the application is performed by USCIS personnel. In addition to the general actions described in Chapter 10, preliminary review should include the following:

(A) Determine jurisdiction.

Jurisdiction is based on the location where the work is to be performed. Consult with supervisory personnel before accepting an application which does not appear to be submitted in the proper jurisdiction.

Note:

Normally cases submitted in the wrong jurisdiction must be transferred to the appropriate office; however, in certain situations local management may choose to assume jurisdiction in a case. Consult with supervisory personnel before processing an application which does not appear to be submitted in the proper jurisdiction. In cases involving temporary employment at more than one location, for more than one employer, or where there is an agent acting as a petitioner, jurisdiction is determined by the petitioner's address.

(B) Applicants must submit a copy of their I-94.

Since the CLAIMS-generated approval notice, Form I-797A includes a replacement I-94, return any original I-94 which was improperly submitted. If there are multiple applicants on a single application, insure a copy of each I-94 is attached.

(C) Ensure the petition or application and appropriate schedule supporting the change of status is completely filled out and documented in accordance with the instructions on the form.

Other special supporting documents required for nonimmigrant classes are discussed in Chapters 31-35, relating to specific categories. There is a wide variety of supporting documents, such as labor certifications,

advisory opinions and labor condition applications. An application for a change of status submitted without such required documentation is not considered properly filed, even if the fee was collected and a receipt issued.

(3) Adjudication .

Change of status applications are ordinarily fairly simple to adjudicate, once eligibility for any underlying petition has been established. Because the benefit sought is short-lived, these applications should be processed as quickly as possible, to insure the request is acted upon while it is still relevant. Although the petition and change of status are usually adjudicated simultaneously, they are actually two separate processes. This chapter will discuss only those requirements which relate to the change of status, not to the underlying petition. Petition requirements are discussed in Chapters 31-35. In addition to the steps described in Chapter 10.3 , the following actions are ordinarily required during the adjudicative process:

(A) First adjudicate the nonimmigrant petition .

If the petition is approvable, continue to the steps below. Once the underlying petition is denied and the denial is final (i.e., the appeal has been dismissed or the period for filing the appeal has expired with no appeal having been filed), the change of status application must also be denied.

(B) Determine if the application was timely filed .

Although ordinarily required, the adjudicator has discretion to grant a change of status based on an untimely application. In deciding such a case, determine the reasons for late filing and whether the reasons were beyond the applicant's control, the degree of lateness, whether there is any indication that the applicant may have violated status in some other way [such as by working in the U.S. for the petitioner – be especially alert for this if the alien has previously worked for the same employer in another capacity (e.g., as an F-1 student on practical training)], whether the applicant is otherwise a *bona fide* nonimmigrant and whether the applicant has been apprehended and placed in proceedings.

(C) Verify passport validity .

An applicant need not submit a valid passport with his or her application since Part 4 of the application contains passport validity information. The applicant must hold a valid passport at the time of application and is required to maintain validity during the entire period of his or her stay in the U.S.

(D) Ensure that co-applicant dependents remain entitled to dependent status.

However, a dependent's ineligibility for change of status does not preclude approval of the principal's application only.

(E) Because the alien applicant on Form I-129 will be gainfully employed once the new status is granted, it is generally not necessary to further explore an applicant's ability to maintain status financially (unless the rate of remuneration is so low that the principal would be unable to support him/herself and all dependents). A rapid sequence of events between arrival and filing for a change of status may be indicative of the applicant's attempt to avoid consular scrutiny of his or her prior employment. The credibility of evidence submitted to support prior employment experience should be explored as part of the petition adjudication, rather than in the context of the change of status request.

(F) Determine if a Favorable Exercise of Discretion Is Warranted.

Change of status applications are discretionary in nature. Many of the discretionary considerations present when considering a change of status to a student or visitor are either inapplicable or of considerably less weight when adjudicating a case where the alien is seeking an employment-related status. However, you should still consider whether there was possible deception when the original visa or admission was sought, what the applicant's ultimate intentions may be, veracity of documentation submitted, and the overall effects of a positive or negative decision. It is important to keep in mind that discretionary does not mean arbitrary. Given similar fact patterns, discretionary decisions should yield similar results regardless of where such cases are adjudicated or by whom. There is a significant body of precedent decisions which discuss the appropriate exercise of discretion under a variety of situations. Familiarity and conformity with these precedents is critical to achieving consistent and fair results in such cases.

Note:

Visas Mantis Cases . In adjudicating an application for change of status on behalf of an alien who was admitted under the Visas Mantis program, follow the same procedures as are set out for extension of stay applicants in Chapter 30.2(e) .

(4) Interview .

Requiring a personal appearance by an applicant for a change of status should rarely be required and requests for additional evidence should likewise be relatively unusual, once the underlying visa petition has been adjudicated. In the event either action is required, follow local procedures for forwarding the application for interview or establishing a call-up for the returned case. Care must be exercised when requesting additional evidence to support a petition that the request is complete enough to insu re the adjudicator's ability to complete action on both the petition and change of status request.

(5) Unauthorized Employment .

An alien who engages in employment which is inconsistent with his or her current status is ineligible to change status [ *Matter of Kyriakarakos* , 10 I&N Dec. 646 (R.C. 1963)]. Often, an alien seeking a change from a non-employment authorized classification to one which permits employment (e.g., H, L or E) will indicate that he or she intends to commence employment on a specific date. If that date has passed, and the alien has begun employment without the change of status having been approved, the alien is in violation of status,. Occasionally, such changes of status are granted without the adjudicating officer knowing that the alien commenced work prior to the approval. If such unauthorized employment comes to the attention of USCIS , USCIS may initiate a motion to reopen the case and deny the change of status decision. Likewise, if at some point in the future the alien applies for adjustment of status, he or she is subject to the provisions of [section 245\(c\)](#) of the Act.

(6) File Review .

In adjudicating a change of status request, a relating "A" file shall be obtained and reviewed prior to adjudication if a bond has been posted on the alien's behalf or if the alien has been granted a section 212(d)(3) waiver. In any other case, a relating "A" file may be obtained and reviewed if there is reason to believe it may contain relevant information needed to decide the case. In a section 212(d)(3) waiver case, if the applicant's Form I-94 is noted "ARL" the file should not be requested, but the Arlington, VA. District Office should be consulted before an extension of stay is granted. In all cases in which an "A" file exists, the adjudicated application and all relating material shall be placed in the file. The file number shall be noted on the application and the Form I-94.

(7) Case Closing Actions.

(A) Approval.

If the application for change of nonimmigrant status is being approved, complete the following steps:

- Determine the appropriate amount of time for the extension of stay in the new visa classification. [See 8 CFR 214.1 for general requirements and 8 CFR 214.2 for the specific requirements relating to each nonimmigrant classification.]
  
- Endorse the action block on the application and indicate the actions taken in the section of the form designated for "Government Use Only".
  
- For CLAIMS-processed cases, upon approval, update CLAIMS and order approval notices. The system will forward the record of approval to NIIS. The CLAIMS approval notice, Form I-797A , contains a tear-off section which serves as a replacement Form I-94 indicating the new status and extension date.
  
- If the application is not processed in CLAIMS, the original I-94 must be manually noted on the reverse with the action taken (e.g. "c/s to L-1"), approval date, office three-letter code, and officer stamp number. Also, endorse the I-94 manually or using a rubber stamp, with the notation: "You must obtain a new visa to reenter the U.S. in you present status." In addition, both CLAIMS and non-CLAIMS approvals require the preparation and forwarding to NIIS of Form I-530 for each alien included on the applicati on and completion of an approval notice on Form I-171C.

(B) Denial.

If the application for change of nonimmigrant status is being denied, complete the following steps:

- Endorse the action block on the application and indicate the actions taken in the section of the form designated for "Government Use Only".
- Using Form I-210, set a period of voluntary departure if the applicant is no longer maintaining status and he or she has agreed to accept voluntary departure.
- For denials processed in CLAIMS, select proper standard denial paragraphs from CLAIMS, adding special text if necessary.
- In non-CLAIMS cases prepare Form I-541 to advise the applicant of the reasons for denial.
- In both CLAIMS and non-CLAIMS cases, prepare Forms I-530 for each applicant and forward to NIIS -- Service Centers do not prepare I-530s on denials of I-129s or I-539s.

(8) Appeal.

There is no appeal from an adverse decision the nonimmigrant's request for change of status filed on Form I-129 . However, an adverse decision on the employer's petition may be appealed to the Administrative Appeals Office.

**30.4 Replacement of Arrival-Departure Records has been superseded by USCIS Policy Manual, Volume 11: Travel and Identity Documents as of May 20, 2021.**

### **30.5 Status as a Foreign Government Official or Employee of an International Organization.**

#### (a) General.

##### (1) The Effect of Recognition by the Secretary of State.

Section 101(a)(15)(A)(i), and (ii), of the Act and 8 CFR 214.2(a)(1) provide that an A-1 or A-2 is entitled to that classification as long as he/she is recognized by the President or Secretary of State. Section 101(a)(15)(G)(i), (ii), (iii) and (iv) of the Act and 8 CFR 214.2(g)(1) provide that a G-1, G-2, G-3 or G-4 is entitled to that classification as long as he/she is recognized by the Secretary of State. Section 102 of the Act provides that a G-1, G-2, G-3 or G-4 nonimmigrant is not subject to most grounds of inadmissibility and deportation. Because of this statutory protection, USCIS is precluded from taking action against a G-1, G-2, G-3 or G-4 who is or was violating status, unless the Department of State authorizes such adverse action by notifying USCIS in writing that the G-1, G-2, G-3 or G-4 is no longer entitled to such classification and that his/her visa is canceled.

##### (2) Termination of Official Assignment.

When employees of foreign missions (embassies, consulates, miscellaneous foreign government organizations, and missions to the OAS) terminate their employment status, the missions are required to submit to the Department of State (DOS), without delay, the Form DS-2008 (Notice of Termination of Diplomatic, Consular, or Foreign Government Employment). Other International Organizations must submit a written notification of termination of employment.

Diplomats and other foreign government officials who have completed a tour of duty are normally allowed a reasonable period of time to depart from the U.S., during which they continue to enjoy the same Privileges and Immunities (Ps&Is) extended to them during their tours of duty. As a general rule, the Office of Protocol interprets "reasonable time to depart" as 30 days following the termination of a tour. However, the Office of Protocol is prepared to concur on the extension of the "reasonable time to depart" to sixty (60) days, with the proviso that Ps&Is will not be extended beyond 30 days following the effective day of termination.

#### (b) Privileges and Immunities.

Section 102 of the Act defines the parameters of USCIS action regarding the admission, exclusion and deportation of G-1, G-2, G-3 and G-4 aliens. Its provisions are binding upon all USCIS personnel. Privileges and immunities are not only very sensitive issues, but also very complex ones. Officers should be aware that privileges and immunities can vary greatly. They can vary greatly within a nonimmigrant classification and between two positions which have the same official title, but which represent different foreign countries.

(c) Department of State Identity Cards .

The Office of Protocol issues identification cards to all diplomatic and consular personnel who are entitled to rights, privileges and immunities. The State Department considers these cards as the only authoritative identity document for identifying these individuals. Since 1987, three types of cards have been issued:

- diplomatic (blue border)
  
- official (green border)
  
- consular (red border)

Each card is 3¾ x 2½, and contains the bearer's photograph as well as name, title, mission, city and state, date of birth, identification number, expiration date and a Departmental seal. The reverse of the card includes a brief description of the bearer's immunity and a space for the bearer's signature.

(d) Sources of Additional Information .

Additional information regarding diplomatic rights, privileges and immunities is contained in Appendix 13-2 of the *Special Agent's Field Manual* . More detailed information is contained in the Department of State's Publication 9533, "Guidance for Law Enforcement Officers". [(b)(2) or (b)(7)(E)]

(e) Inquiries and Verifications by USCIS Personnel.

(1) A and G Visa Holders in Washington, DC and Diplomatic Missions Throughout the United States (Other Than Aliens Assigned to the United Nations).

Requests for information or verification may be transmitted either telephonically or in writing.

(A) Telephonic Requests.

The US CIS may request status information on As and Gs telephonically to the Department of State at: (202) 647-1405 . In most cases, the Department of State will respond to your telephone request within 5 business days, unless there is an emergent situation.

(B) Written requests.

If USCIS requires written confirmation of an individual in A or G status, the request must be submitted on Form I-566 , Inter-Agency Record of Individual Requesting Change/Adjustment to, or from, A or G status or Requesting A, G, or NATO Dependent Employment Authorization. The Form I-566 must be completed as follows:

- Complete Part A with information about the subject of the inquiry. If the subject is a dependent of an A-3 or G-5 employee or an A-3 or G-5 employee, you must also complete Part B with the information about the principal from whom the dependent derives status, or for whom the A-3 or G-5 works;

- Beside the sub-title "Part C: Type of Request" print in large capital letters, preferably in red ink, "VERIFY STATUS";

- For all cases except those involving individuals working at the United Nations, complete the "from"

block of Part G and check the Visa Office block, crossing out "subject has filed under Section 13. Please advise this office of your findings.";

- Place a photocopy of the form in the relating A-file or work folder; and
- Forward both copies by fax (202) 647-1560<sup>S</sup> or postal mail to:

Assistant Chief of Protocol

Office of Protocol - Room 1238

U. S. Department of State

2201 22nd Street, N. W.

Washington, D. C. 20520

The Department of State will provide responses to written requests within ten (10) business days of receipt. The Department of State will note its findings in Part F and return copy 1 of the form to the officer whose name appears in Part G.

(2) Aliens Working at the United Nations (G Visa Holders).

Requests regarding U.N. accredited personnel may be transmitted telephonically, in writing, or by e-mail.

(A) Telephonic Requests.

The USCIS may make telephonic requests on G status information to the Diplomatic Accreditation Officer.

(B) Written Requests.

If USCIS requires written confirmation of an individual's status, the request must be submitted in writing on Form I-566. You should complete the Form I-566 , following these steps:

- Complete Part A with information about the subject of the inquiry. If the subject is a dependent of an A-3 or G-5 employee or an A-3 or G-5 employee, you must also complete Part B with the information about the principal from whom the dependent derives status, or for whom the A-3 or G-5 works;
  
- Beside the sub-title "Part C: Type of Request" print in large capital letters, preferably in red ink, "VERIFY STATUS"; and
  
- Complete the "from" block of Part G and check the USUN block, crossing out "C/S to, Adjustment, Granted, Denied, on."
  
- Place a photocopy of the completed form in the relating A file or work folder; and
  
- Forward both copies by the fax number (202) 415-4162  or postal mail to the attention of the Diplomatic Accreditation Officer:

United States Mission to the United Nations

140 East 45 th Street

New York, NY 10017

The United States Mission to the United Nations (USUN) will note its findings in Part F and return copy 1 of the form to the officer whose name appears in Part G.

NOTE:

Written Requests may also be sent via e-mail to the USUN. Please make sure you put “Diplomatic Accreditation Officer” in the subject line of your message. The e-mail address is [usa@un.int](mailto:usa@un.int).

(f) Inquiries from Other Law Enforcement Agencies .

At times another agency may advise USCIS that an A-1, A-2, G-1, G-2, G-3 or G-4 was involved in an incident which brings him/her to police attention, and may ask for guidance. USCIS should advise the other agency that such personnel should hold an identity card as described in paragraph (c) above and that they should telephone the Department of State if there are any questions, including but not limited to questions about the treatment that should be accorded the individual.

(g) Requesting Reports from Other Agencies .

In addition to the procedure discussed in paragraph (f), the agency should be requested to provide USCIS with a copy of the report if it involves the commission of a felony offense, a crime involving moral turpitude or a drug-related crime, or is an otherwise reportable incident as described in Chapter 3.8 .

(h) Dependents of Permanent Residents Employed in A or G Status .

Occasionally, a lawful permanent resident may be employed in an occupation which would otherwise entitle him or her to A-1, A-2, G-1, G-2, G-3 or G-4 status provided he or she has executed Form I-508 (Form I-508F for French nationals) waiving diplomatic privileges. Family members of such a permanent resident alien are admissible as A or G nonimmigrants if the dependents hold valid passports and A or G visas. Attendants, servants or personal employees of such persons are not entitled to A-3 or G-5 status.

### **30.6 Extensions of Stay for Certain A-3 and G-5 Nonimmigrants.**

#### **(a) A-3 Extensions.**

An A-3 alien seeking to extend his/her temporary stay shall submit through his or her diplomatic mission a completed Form I-539 with fee, his/her Form I-94, and a signed statement as required by 8 CFR 214.2(a)(1). The statement shall identify the employing A-1 or A-2 by name, visa status and official title; it shall name the embassy, consulate, mission or office for which the A-1 or A-2 works; it shall state the period of time that the A-1 or A-2 intends to continue employing the A-3, and shall describe the duties the A-3 shall perform.

USCIS may consult with the Department of State (Visa Office, Diplomatic Liaison Division, CA/VO/P/D, Washington, D.C. 20522-0113) about the eligibility of an individual applying for extension of A-3 status, or an employer's eligibility to employ an A-3.

#### **(b) G-5 Extensions.**

A G-5 alien seeking to extend his/her temporary stay shall submit through his or her international organization a completed Form I-539 with fee, his/her Form I-94, and a signed statement as required by 8 CFR 214.2(g)(1). The statement shall identify the employing G-1, G-2, G-3 or G-4 by name, visa status and official title; it shall name the international organization or mission for which the G-1, G-2, G-3 or G-4 works; it shall state the period of time that the G-1, G-2, G-3 or G-4 intends to continue employing the G-5, and shall describe the duties the G-5 shall perform.

USCIS may consult with the Department of State about the eligibility of individuals applying for extension of G-5 status and about the eligibility of the employer to employ the G-5. Inquiries involving United Nations personnel should be directed to United States Mission to the United Nations [799 U.N. Plaza, New York 10017]; inquiries involving other G personnel should be directed to the Department of State [Visa Office, Diplomatic Liaison Division, CA/VO/P/D/, Washington, D.C. 20522-0113].

### **30.7 Unauthorized Employment and Other Incidents Involving A or G Nonimmigrants.**

#### (a) Unauthorized Employment.

##### (1) Reporting Requirement.

If it comes to USCIS's attention that an A-1, A-2, G-1, G-2, G-3, or G-4 nonimmigrant is engaged in unauthorized employment, USCIS shall notify the employer and the alien that the employment is unauthorized. An A-file shall be created, if one does not exist. The incident shall be reported in writing within 72 hours and shall be expeditiously forwarded through official channels to Headquarters (Operations). The receiving Headquarters unit shall forward a copy of the report to the U.S. Department of State. Reports involving United Nations personnel should be directed to United States Mission to the United Nations [799 U.N. Plaza, New York 10017]; reports involving other A or G personnel should be directed to the Department of State [Visa Office, Diplomatic Liaison Division, CA/VO/P/D, Washington, D.C. 20522-0113].

The report should include, but is not necessarily limited to, as much of the following information as is available: the case officer's name, title, duty office, and phone number; the alien's name, date of birth, place of birth, A-number, I-94 number, social security number, Department of State personnel identification number (PID), if known; the name of the principal alien, his/her official title, the international organization, mission, etc., which employs him/her, his or her Department of State PID, if known; whether the alien ceased working after being notified that the employment was unauthorized; the job the alien was performing, hours per week worked, length of employment, salary and other compensation received; whether social security, income taxes and other applicable taxes are or were being withheld; whether any fraudulent documentation was used to obtain the employment. Additionally, copies of any documentation relating to the unauthorized employment should be attached to the report.

The report shall also indicate whether the incident appears to be isolated or part of pattern. Indicators of a pattern include, but are not limited to: the alien has a history of unauthorized employment; other members of the alien's family are employed without authorization; aliens who can be identified with the same international organization, mission, etc. are found to be engaged in unauthorized employment; or the employer has a history of employing unauthorized aliens.

A copy of the report, all relating correspondence and supporting documentation shall be housed in the A-file.

(2) Department of State Determination .

If the Department of State notifies USCIS in writing that it no longer recognizes the alien as entitled to A or G classification and cancels the visa, USCIS may initiate appropriate action on the basis of the unauthorized employment. If the Department of State notifies USCIS in writing that it continues to recognize the alien as entitled to A or G classification, then USCIS is precluded from taking action against the alien as long as he/she remains in status. In either instance, the Department of State's written reply shall be housed in the A-file.

(3) Notification to the Field .

Upon receiving the Department of State's decision, the receiving Headquarters unit will expeditiously notify the region having jurisdiction and originating office of the decision and forward a copy of the report.

(4) Field Office Action .

The originating field office will take appropriate action in accordance with the Department of State's determination.

(5) Employer Sanctions Not Affected .

These instructions shall in no way be construed as discouraging or preventing USCIS or ICE from taking appropriate action against the alien's employer under section 274A of the Act and 8 CFR 274a.

(6) The Effect of Violations .

(A) Alien in A-1, A-2, G-1, G-2, G-3, or G-4 Classification Applying for a Change of Nonimmigrant Classification .

An alien in A-1, A-2, G-1, G-2, G-3, or G-4 classification who engages in unauthorized employment may be allowed to continue in that classification based on recognition by the Department of State. USCIS and ICE hold that such recognition and continuation in classification does not eliminate the fact that the alien has violated status under 8 CFR 214.1(e). Therefore, an application for change of nonimmigrant classification under section 248 of the Act filed by an A-1, A-2, G-1, G-2, G-3, or G-4 who is/was engaging in unauthorized employment is deniable based on his/her violation of status.

(B) Alien in A-1, A-2, G-1, G-2, G-3 or G-4 Classification Applying for Adjustment of Status .

An A-1, A-2, G-1, G-2, G-3 or G-4 alien who has engaged in unauthorized employment and who applies for adjustment of status under section 245 of the Act is subject to section 245(c) of the Act, pursuant to 8 CFR 214.1(e).

(C) G-4s Adjusting as Special Immigrants .

The provisions of section 245(c) of the Act do not apply to G-4s who are adjusting status as special immigrants under section 101(a)(27)(I) of the Act [see P.L.100-525 effective October 24, 1988].

(D) Alien in Violation of Status Other than G Status, Applying for G Status .

A change of nonimmigrant status to G requires a favorable recommendation from the Department of State. When a nonimmigrant who has violated status applies for G status, the adjudicator shall consider: the nonimmigrant's immigration history, the nature and length of the violation, the position being offered, the level of Department of State interest, and whether the Department of State knew the nonimmigrant was in violation of status when it made its recommendation. Clarification on the last three points may be obtained from the Department of State. Consultation with the Department of State is required prior to denying a case in which State has made a favorable recommendation.

(E) Alien in A-3 or G-5 Classification .

An A-3 or G-5 does not have the protection of other A and G aliens. Therefore, any violation of status subjects an A-3 or G-5 to USCIS or ICE action without referral to the Department of State.

(b) Other Reportable Incidents.

Service officers shall use the procedures described above as guidelines when they encounter an A-1, A-2, G-1, G-2, G-3 or G-4 nonimmigrant involved in other activities which would make him/her liable to deportation were it not for the diplomatic protection afforded him/her. When the activity involves a crime involving moral turpitude, a felony-level offense, or an offense involving controlled substances, telephonic notification to Headquarters (Operations) through channels shall also be made. While diplomatic immunity may preclude prosecution and removal proceedings, the reporting procedure will provide the Department of State with the information to decide whether or not to cancel the offender's visa and/or file a protest with the diplomatic mission or international organization regarding the offense.

### **30.8 Affidavits of Support for Nonimmigrants.**

Every nonimmigrant seeking admission or extension or change of status must satisfy the inspector or adjudicator that he or she is capable of maintaining status and will not become a public charge. In situations where the status sought involves employment, the income from the employment itself generally satisfies the support requirement. A separate affidavit of support or other evidence of financial resources is most commonly required for nonimmigrant students and for certain visitors for pleasure (e.g., elderly and infirm visitors seeking a lengthy stay in the U.S.). An affidavit in such a situation may be filed on Form I-134 or it may be prepared on plain paper and signed. It should be accompanied by documentation, such as bank records, to corroborate the claims made on the affidavit.

Such affidavits, although helpful in judging financial ability, are not legally binding. Form I-134 may only be used for nonimmigrant cases. The affidavit of support used for immigrants is Form I-864, discussed separately in Chapter 20.

Relatives and sponsors of visa applicants abroad who inquire at a USCIS office concerning the submission of affidavits of support in behalf of such applicants shall not be referred to anyone outside the USCIS ; instead, Forms I-134 shall be furnished them. They shall be advised, however, that the Forms I-134 are furnished solely as a guide as to items generally required in affidavits of support (see notes to 22 CFR 41.91(a)(15) and 42.91(a)(15) in Volume 9--Visas, Foreign Affairs Manual). Forms I-134 are to be made available only for use in individual cases and are not to be distributed outside the USCIS .

### **30.9 Geographically Restricted Nonimmigrants.**

A C-2 nonimmigrant admitted pursuant to the United Nations Headquarters Agreement is limited geographically to a 25 mile radius of Columbus Circle, New York City, New York during his or her stay in the United States. If such person wishes to depart from the 25 mile radius of he or she may make application to the New York District Office. There is neither application nor fee for this application and the decision of the director is final and unappealable. The decision should be communicated by letter and carried by the alien when traveling beyond the 25-mile limit.

### **30.10 Termination of Approval (Revocation of Approval of Petition).**

There are two different procedures under which the approval of an H, L, O, P, or Q nonimmigrant petition may be revoked by USCIS : automatic revocation and revocation upon notice. In addition, a decision to approve or deny a petition may be reopened or reconsidered under the provisions of 8 CFR 103.5 .

#### (a) Automatic Revocation .

A petition is automatically revoked if the petitioner goes out of business or files a written withdrawal of the petition. Place a copy of the evidence on which the automatic revocation is based in the relating file(s) and the annotate the petition to show that it has been revoked. An automatic revocation does not require notice to the petitioner or the beneficiary and may not be appealed.

#### (b) Revocation Upon Notice .

If automatic revocation is not appropriate, the approval of a nonimmigrant petition may be revoked under certain circumstances and upon appropriate notification to the petitioner (who then has an opportunity to rebut the alleged reasons for revocation). A notice of intent to revoke will be sent if any of the following occurs:

- The beneficiary is no longer employed by the petitioner in the capacity specified in the petition, or if the beneficiary is no longer receiving training as specified in the petition;
  
- The statement of facts contained in the petition was not true and correct;
  
- The petitioner violated terms and conditions of the approved petition;
  
- The petitioner violated the requirements of section 101(a)(15)(H), (L), (O), (P) or (Q) of the Act or of 8 CFR 214.2 (h), 214.2(l), 214.2(o), 214.2(p), or 214.2(q), as appropriate; or

· The approval of the petition violated the provisions of 8 CFR 214.2 (h), 214.2(l), 214.2(o), 214.2(p), or 214.2(q), as appropriate, or involved gross error.

The notice of intent to revoke shall contain a detailed statement of the grounds for the revocation, shall state whether USCIS intends to revoke the petition in whole or in part (and if in part, which part(s)), and shall advise the petitioner of his or her right to review and/or rebut the allegations upon which the intended revocation is based within 30 days of the date of the notice. ("Revoked in part" means that the approval is revoked with regard to one or more, but not all, of the beneficiaries of a multiple beneficiary petition, or with regard to one or more, but not all, of the proposed employment sites or events listed in a multi-site/event petition.) The petitioner may submit evidence in rebuttal within 30 days of receipt of the notice. The director shall consider all relevant evidence presented in deciding whether to revoke the petition in whole or in part. If the petition is revoked in part, the remainder of the petition shall remain approved and a revised approval notice shall be sent to the petitioner with the revocation notice. A decision to revoke a petition, in whole or in part, may be appealed to the Office of Administrative Appeals.

There is a similar provision for automatic termination of a fiancé(e) petition if the petitioner dies or withdraws the petition prior to the beneficiary's arrival in the United States.

**30.11 Adjustment of Status to Nonimmigrant. [reserved].**

### **30.12 Nonimmigrant Health Care Workers.**

#### (a) General.

Under section 212(a)(5)(C) of the Act, an alien who seeks admission to the United States for the primary purpose of performing labor as a health care worker, other than a physician, is inadmissible unless he or she presents a certificate from the Commission on Graduates of Foreign Nursing Schools (CGFNS) or an equivalent credentialing organization. Section 212(r) of the Act provides an alternate certification process for nurses. The certification generally verifies that the alien's training, license, experience, and English-language ability meet minimum standards and are comparable with that required for an American health care worker of the same type.. Any equivalent credentialing organizations must be approved by the Department of Homeland Security (DHS) in consultation with the Secretary of Health and Human Services.

#### (b) Health Care Occupations Requiring Certification .

The health care occupations requiring certification are nurses (licensed practical nurses, licensed vocational nurses, and registered nurses), physical therapists, occupational therapists, speech-language pathologists and audiologists, medical technologists (also known as clinical laboratory scientists), medical technicians (also known as clinical laboratory technicians) and physician assistants.

#### (c) Affected Nonimmigrant Classifications .

Nonimmigrants coming for the primary purpose of performing work as a health care worker will most likely be in the H-1B, H-1C, J, O, and TN Classifications, although they may be petitioned for in other classifications.

#### (d) Certification Not Required .

Certification is required for all nonimmigrants who are entering for the primary purpose of performing labor as a health care worker. Accordingly, a nonimmigrant entering the United States to receive training in an occupation, including an F-1 or H-3 nonimmigrant receiving practical training or a J-1 nonimmigrant coming to undertake a training program in a medical field, is not required to obtain certification. The

nonimmigrant spouse and dependent children of an immigrant or nonimmigrant alien subject to the certification requirement are not required to obtain certification.

(e) Authorized Credentialing Organizations .

CGFNS is authorized to issue health care worker certificates for all 7 occupations. The National Board for Certification in Occupational Therapy (NBCOT) is authorized to issue certificates for occupational therapists only. The Foreign Credentialing Commission on Physical Therapy (FCCPT) is authorized to issue certificates for physical therapists only.

(f) Implementation Dates .

(1) Prior to July 26, 2004, the DHS will admit and approve applications for extension of stay or change of status for nonimmigrant health care workers without requiring certification. The temporary admission, extension of stay, or change of status of such a nonimmigrant will be subject to the following conditions:

(i) The admission, extension of stay, or change of status may not be for a period longer than 1 year from the date of the decision, even if the relevant provision of 8 CFR 214.2 would ordinarily permit the alien's admission for a longer period;

(ii) The alien must obtain the requisite health care worker certification within 1 year of the date of decision to admit the alien or to extend the alien's stay or change the alien's status; and,

(iii) Any subsequent petition or application to extend the period of the alien's authorized status or change the alien's status must include proof that the alien has obtained the health care worker certification if the extension or stay or change of status is sought for the primary purpose of the alien's performing labor in an affected health care occupation. If the alien is adjusting status, all eligibility requirements must be met at the time of filing the application for adjustment of status. 8 CFR 103. 2(b)(12). Therefore, a health care worker in one of the affected occupations must submit evidence of certification at the time the adjustment of status is filed.

(2) On or after July 26, 2004, if an alien seeks admission to the United States, a change of status, or an extension of stay, the alien must provide evidence of health care worker certification if his or her primary purpose for coming to or remaining in the United States is employment in one of the affected health care occupations. The DHS will then exercise its discretion to waive the certification requirement only on a case by case basis.

(g) Applications for Authorization to Issue Health Care Worker Certificates.

Credentialing organizations may seek authorization from USCIS issue health care worker certificates. An organization must apply for authorization by submitting Form I-905, Application for Authorization to Issue Certification for Health Care Workers, to the Nebraska Service Center (NSC). The application must be accompanied by the appropriate filing fee. The NSC will issue a receipt notice, and then forward the packet to the Department of Health and Human Services (HHS):

[(b)(2) or (b)(7)(E)]

Once HHS has reviewed the application, it will return the Form I-905 and any accompanying documents to the NSC with a formal recommendation on whether or not the credentialing organization should be authorized to issue health care worker certificates for the requested occupations. The NSC will issue a final decision to the applicant advising the applicant whether or not the Form I-905 has been approved. Though DHS will give great weight to the HHS recommendation, the final authority to approve or deny the application rests with the DHS. If the application is approved, the NSC will advise the applicant that it has been authorized to issue health care certificates for a period of five years and notify the public through publication in the Federal Register. The approval notice must list all of the health care occupations for which the organization is authorized to issue certificates. If the application for authorization is not approved, the applicant will have 30 days in which to appeal the decision to the Administrative Appeals Office.

Credentialing organizations that seek to extend their authorization must file an application on Form I-905 prior to the expiration of the five-year authorization period. If an organization's authorization expires prior to USCIS approval of the extension application, the organization will not be authorized to issue health care worker certificates until the USCIS approves the extension application. At the time the authorization extension is filed, the DHS will review the credentialing organization to ensure continued compliance with the regulatory standards. In addition, the DHS reserves the right to conduct a review of the approval at any time within the 5-year period. If the DHS determines that an organization has been convicted, or the directors or officers of an authorized credentialing organization have individually been convicted, of the violation of state or federal laws, or other information is developed such that the fitness of the organization

to continue to issue certificates or certified statements is called into question, the DHS shall automatically terminate authorization for that organization. The DHS will provide notice, including the basis for the termination, to the organization.

(h) Information on the Certificates .

A certifying organization generally must verify that the foreign health care workers' education, training, licensing, experience and English competency meet all statutory and regulatory requirements of section 212(a)(5)(C) of the Act or, for certain nurses, section 212(r) of the Act. The health care worker certificate or certified statement must contain the following elements:

- The name, address, and telephone number of the credentialing organization, and a point of contact to verify the validity of the certificate or certified statement;
  
- The date the certificate or certified statement was issued;
  
- The health care occupation for which the certificate was issued; and
  
- The alien's name, and date and place of birth.

### 30.13 Employment Authorization for Abused Spouses of Certain Nonimmigrants

(a) Background. INA section 106 extends eligibility for employment authorization to abused spouses of nonimmigrants admitted under INA section 101(a)(15)(A), (E)(iii), (G), or (H).

INA section 101(a)(15):	
(A)	A nonimmigrant (or Foreign government diplomats and officials, immediate family members of foreign government diplomats and officials, and their personal employees, attendants, or domestic workers)
(E)(iii)	E-3 nonimmigrant (or Australian specialty occupation worker)
(G)	G nonimmigrant (or Foreign government or international organization representative, immediate family members of foreign government or international organization representatives, and their personal employees, attendants, or domestic workers)
(H)	H nonimmigrant (or Specialty occupation worker, temporary or seasonal agricultural worker, temporary non-agricultural worker, trainee or special education visitor, and immediate family members of specialty occupation workers)

Please see INA section 101(a)(15)(A), (E)(iii), (G), and (H) for a complete listing of all of the applicable nonimmigrant categories.

(b) Eligibility.

(1) Eligibility Requirements. To be eligible for employment authorization issued under INA section 106, credible evidence must be submitted demonstrating that the applicant:

Is the qualifying spouse who accompanied or followed to join a principal nonimmigrant admitted under INA section 101(a)(15)(A), (E)(iii), (G), or (H); The applicant must demonstrate that he or she:

- Is married to a qualifying principal nonimmigrant spouse; or
- Was married to a qualifying principal nonimmigrant spouse and

a. The spouse died within two years of filing the EAD application;

b. The spouse lost qualifying nonimmigrant status due to an incident of domestic violence; or

c. The marriage to the principal spouse was terminated within the two years prior to filing for the INA section 106 employment authorization, and there is a connection between the termination of the marriage and the battery or extreme cruelty. (See AFM 21.14(q)(2) for additional guidance);

- Was last admitted as a nonimmigrant under INA section 101(a)(15)(A), (E)(iii), (G), or (H);
- Was battered or has been subjected to extreme cruelty perpetrated by the principal nonimmigrant spouse during the marriage and after admission as a nonimmigrant under INA section 101(a)(15)(A), (E)(iii), (G), or (H); and

- Currently resides in the United States.

If the applicant remarries prior to adjudication of the application, he or she will be ineligible for initial issuance or renewal of employment authorization under INA section 106.

(c) Filing Requirements. Applicants must file the Form I-765V, Application for Employment Authorization for Abused Nonimmigrant Spouse, in accordance with the form's instructions.

(1) Supporting Documentation. The application for employment authorization under INA section 106 must include:

- Evidence of applicant's admission in qualifying nonimmigrant status;
- Evidence of principal spouse's admission in qualifying nonimmigrant status

(Note: Although the applicant may not be able to provide documentary evidence of her/his spouse's nonimmigrant status, the applicant must provide some identifying evidence such as name, place of birth, country of birth, date of birth, date of entry into the United States, I-94 number, employer, etc. Officers will conduct a search of the appropriate electronic systems to attempt to verify the qualifying nonimmigrant status of the spouse.);

- Evidence of qualifying spousal relationship with the principal nonimmigrant;
- Evidence of applicant's current residence in the United States; and
- Evidence of abuse, such as police reports, court records, medical records, reports from social service agencies, or affidavits. If there is a protective court order in place, a copy should be submitted.

(2) Consideration of Evidence. USCIS will consider any credible evidence relevant to the application. The determination of what evidence is credible and what weight is given to that evidence is within the sole discretion of USCIS.

(d) Adjudicative Process.

The adjudicating officer must ensure the applicant has met the following requirements prior to approving the Form I-765V:

- Completed and signed Form I-765V in accordance with 8 CFR 103.2(a)(2);
- Submitted the required passport-style color photographs;
- Resides in the United States;
- Provided evidence of applicant's qualifying admission;
- Provided evidence of the qualifying spousal relationship;

- Provided evidence of the abusive spouse's qualifying nonimmigrant status; and
- Provided evidence of the qualifying battery or extreme cruelty that occurred during the marriage and after most recent admission to the United States as a nonimmigrant under INA section 101(a)(15)(A), (E)(iii), (G), or (H).

(e) Approval. If the applicant has met these requirements, the Form I-765V will be approved for employment authorization under INA section 106. Employment authorization will be issued under one of the following codes:

- (c)(27) as the abused spouse of an A nonimmigrant;
- (c)(28) as the abused spouse of an E(iii) nonimmigrant;
- (c)(29) as the abused spouse of a G nonimmigrant; or
- (c)(30) as the abused spouse of an H nonimmigrant.

(f) Validity Period of Employment Authorization Document (EAD). USCIS will issue the EAD for a period of two years.

(g) Renewals. USCIS may approve requests for renewals of an INA section 106 EAD in two-year intervals. The application for renewal of employment authorization under INA section 106 must include:

- Completed and signed Form I-765V in accordance with 8 CFR 103.2(a)(2);
- The required passport-style color photographs;
- Evidence of applicant's current residence in the United States;
- Evidence the principal nonimmigrant maintains valid immigration status under INA section 101(a)(15)(A), (E)(iii), (G), or (H) on the date of filing the EAD renewal application (*Note: An application for EAD renewal may also be filed within two years of the date of the principal nonimmigrant's death, within two years of the principal nonimmigrant's loss of status as a result of an incident of*
- Evidence of previous EAD issued under INA section 106.

If the renewal applicant is unable to provide evidence that the principal nonimmigrant maintains valid immigration status under INA section 101(a)(15)(A), (E)(iii), (G), or (H), officers will conduct a search of the appropriate electronic systems to attempt to verify the principal nonimmigrant's status.

If the applicant remarries prior to adjudication of the Form I-765V, he or she will be ineligible to renew employment authorization under INA section 106.

Unless otherwise requested by USCIS, renewal applicants need not submit any additional documentation.

(h) Denials. There is no appeal from the denial of Form I-765V.

**Appendix 30-1 [Reserved]**