

Travel Outside the U.S. While Filing for A Change of Status or Extension of Status

In some situations a person may be in one nonimmigrant status and want to apply for another category. This is referred to as a Change of Status. In other situations, a person may want to remain in the United States in their current classification, but for a longer period than was authorized. This is referred to as an Extension of Status. There are different rules which apply to each of these cases and it is important that you review them carefully.

If a person is applying for a change of status there is no travel permitted while the application for change of status is pending. Legally, if a person leaves while the change of status application is pending the change of status request is deemed to have been abandoned and will be denied as a matter of law. Although the Immigration Service may actually approve the change of status because they are not aware that the person has left the U.S., it is legally null and void and the person can not use that change of status in the future. However, if there is an underlying petition filed along with the change of status, that petition may still be approved but the person would then have to obtain a visa at U.S. Consulate abroad (unless they are a Canadian citizen) before they can come back to the United States.

For example, if an F-1 student applies for a change of status to an H-1 category, and leaves the United States while the petition and application for change of status are pending, the Immigration Service may approve both the petition and the application for change of status, but the change of status application will legally be null and void. That person will then have to take the approved H-1 petition and go to the U.S. Consulate to obtain an H-1 visa and then re-enter the U.S.

An application for extension of stay is much more complicated and can lead to some very serious problems. The general rule is that we do not recommend that anyone travel while an extension of status request is pending with the Immigration Service unless it is absolutely necessary. If the person decides to travel while the extension of status request is pending, then there are several issues which must be determined. If the extension has been filed in an employment related case, such as an H or L, and the extension is with the same employer, then travel outside the United States has two potential problems. However, as is discussed below, the person must have a valid visa in their passport in order to return to the U.S. regardless of whether or not the extension was properly filed. The other issue which must be addressed is the so called "last action rule". This is a very complex rule used by the Immigration Service to determine the person's actual immigration status based upon the last act completed by the Immigration Service. Therefore, in every extension of status case we first look to whether or not the person has a valid visa (unless they are a Canadian citizen) and, second, what the last action rule tells us about the person's immigration status.

Several examples may be helpful. First, assume that an H-1 employee has an H-1 visa in their passport until December 31, 2009. They are also in status with an I-94 which is also valid until December 31, 2009. Further assume that an extension of status is filed with the Immigration Service on October 1, 2009 which requests a three year extension. As part of the extension process, a new H-1 petition is filed which also requested three additional years. On November 1, the individual leaves the United States on a trip and expects to return to the U.S. on December 1, 2009. While the individual is outside the U.S. the Immigration Service approves the extension on November 15, 2009 which extends the H-1 status from January 1, 2010 until December 31, 2012.

However it is important to note that the Immigration Service extended the status for the three years on November 15, 2009. If we assume the individual re-enters the United States on December 1, 2009 using the previous H-1 approval and visa, which expire on December 31, 2009, then the Immigration Service will only give an I-94 card valid to December 31, 2009. In this way, the "last action" of the Immigration Service on December 1, 2009 is to grant status until December 31, 2009 which eliminates the three year extension granted by the Immigration Service on November 15, 2009. As such, the person has effectively terminated the three year extension which was filed before they left. Therefore, this person must use the three year extension (the I-129 petition approval) upon his or her return to the U.S. Also note that a new visa is not required because the visa only needs to be valid on the date of entry, in this case December 1, 2009, and the person will still be given three years of status with a new I-94 card.

A related problem is when a person in H-1 status files an extension of status based upon a new petition with a new employer. In this case we in addition to the issue of a valid visa and the last action rule, have the additional problem, of someone entering the United States with the intention of working for a different company than the one stated on their current H-1 petition. For this reason, it is extremely risky for anyone to travel while a new petition with a new employer is pending even if in an extension of status situation.

Finally, everyone must realize that there is no way to accurately predict the outcome when someone travels while an extension of status is pending. The reason is because we do not know exactly when, or if, the Immigration Service will approve the extension of status request. Since the last action rule controls the status of the individual, and we do not know when the Immigration Service will approve the extension, it is extremely risky to travel in this situation although it is legally permissible.