

MAINTAINING NONIMMIGRANT STATUS

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Prior to enactment of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), a failure to maintain nonimmigrant status might generally, for otherwise qualified applicants, result in little more than the inconvenience of traveling abroad and reentering the United States in a lawful nonimmigrant status. The enactment of IIRIRA, however, forever changed the way immigration practitioners address the issue of maintenance of nonimmigrant status. Because the IIRIRA-imposed consequences of failure to maintain nonimmigrant status now far exceed the comparatively “minor” inconvenience and expense of an unscheduled trip abroad, practitioners must carefully advise their clients how to maintain their status and what consequences arise for failure to do so.

I. Status Violators, Overstays, and EWI’s

A. Status Violators

Nonimmigrants are admitted to the United States for a specific purpose under a specific nonimmigrant visa classification, such as H-1, L-1, O-1, etc. In addition to the requirements and restrictions applicable to the specific visa classification, a nonimmigrant must also comply with all applicable statutory and regulatory requirements and restrictions placed on nonimmigrants generally, including the prohibition of unauthorized employment. One restriction commonly applicable to nonimmigrant visa classifications (including B, F, H (other than H-1), J, M, O, P, Q) is the requirement that an applicant maintain a residence abroad which he or she has no intention of abandoning.¹ A failure to comply with all such requirements and restrictions applicable to the classification in which the nonimmigrant has entered constitutes a violation of nonimmigrant status.

In addition to restrictions applicable to nonimmigrants generally and the terms and conditions applicable to the various nonimmigrant visa categories, nationals of certain foreign countries must now comply with a special registration requirement. 8 C.F.R. §214.1(c)(5)(f). Currently the special registration requirement applies to nationals of the following designated countries: Iran, Iraq, Libya, Sudan, Syria. Other countries may be designated by the Attorney General in consultation with the Secretary of State. Those subject to the special registration requirement must register with the INS as follows: upon entry into the United States; between 30 and 40 days after entry if still in the United States after 30 days; annually; upon change of address, employer, or school; and upon departure. Initial registration requires fingerprinting, photographing, and

provision of information required by the INS. Subsequent registrations require proof of maintenance of status. Willful failure to comply with all registration requirements constitutes failure to maintain nonimmigrant status. 8 C.F.R. 264.1(f).

B. Overstays

In addition to being admitted for a particular purpose, nonimmigrants are also admitted for a specific period of time, which varies by visa classification. Except for students, in most cases nonimmigrants entering the United States receive an I-94 card with a stamped entry date and a hand-written expiration date. Students receive an I-94 card indicating validity through "D/S," the duration of their status in the United States. The term "duration of status" in this context means the period of time during which the student is pursuing a full course of study or engaging in optional or curricular practical training PLUS a sixty-day grace period for departure. For other nonimmigrants who have a date certain on their I-94 cards, failure to depart the United States or to file a non-frivolous application for a change or extension of nonimmigrant status by the expiration date on the I-94 card constitutes an "overstay."

C. Entry Without Inspection (EWI's)

Status violators and overstays are to be distinguished from EWI's, those who enter the United States without inspection by an immigration officer. Because EWI's enter the United States with no valid nonimmigrant (or immigrant) status, a discussion of EWI's is beyond the scope of this article concerning maintenance of nonimmigrant status.

II. Consequences of Failure to Maintain Nonimmigrant Status

A. Status Violators

As noted above, a status violator is an individual who entered the United States in a lawful nonimmigrant status but has somehow violated the terms and conditions of that status.

1. Examples of Common Status Violations:

(a) B-1/B-2 Visitor for Business or Leisure accepts employment in the United States and begins work prior to acquiring an employment-authorized nonimmigrant status such as L-1 intra-company transferee or H-1B temporary worker in a specialty occupation.

(b) An F-1 student drops below the number of credit hours required for a full course of study or accepts unauthorized employment in the United States.

(c) An H-1B temporary worker in a specialty occupation is terminated, quits his job, or accepts employment with a different

employer and begins work prior to the employer's filing of a Labor Condition Application and H-1B petition on his or her behalf.

(d) An L-2 accepts and engages in employment without having filed for and received a Form I-766 EAD card evidencing employment authorization.

2. Statements Made at the Border Can Come Back to Haunt You

B-1/B-2 visitors for business or leisure should be advised that, in addition to maintaining nonimmigrant intent and refraining from unauthorized employment, persons who enter the United States on a B visa should generally avoid applying for a change of status within the first thirty days of entry into the United States. INS Regulations at 8 C.F.R. §214.1(c)(5)(f) provide, in pertinent part, that failure to provide “full and truthful” information requested by an INS officer upon entry or thereafter constitutes a failure to maintain nonimmigrant status. Should an individual enter on a B visa and, within the first thirty days after entry, apply for a change of status to some other nonimmigrant classification, such as H-1B, then the individual may be presumed by INS to have provided less than “full and truthful” information to the INS officer upon entry into the United States. *Bitar v. United States Department of Justice*, 582 F. Supp. 417 (1983, DC Colo.) *See also*, 9 F.A.M. 40.63 N4.7-2, for the Department of State’s discussion of the 30-60 rule in application. In addition to any potential visa fraud issues, the INS may simply presume that the individual never intended to just visit the United States, but rather intended to use the B visa *as a mechanism* for entering the United States for some other purpose, such as attending school, engaging in employment, marrying a U.S. citizen, etc. *Mahmood v. Morris*, 477 F. Supp. 702 (1979, ED Pa.)

A request for change of status between thirty and sixty days after entry will not necessarily give rise to a presumption of fraud or failure to maintain status; however, if the facts of the case indicate that the individual had a preconceived intent to enter the U.S. for purposes other than those permissible B activities, the INS may then conclude that the B-1/B-2 visitor did not maintain nonimmigrant status and is thus ineligible for change of status. *See, Bitar v. U.S.* Such a conclusion is virtually inevitable should a B visitor seeking change of status to F-1 submit to the INS a Form I-20 issued by the school prior to his or her entry in B-1/B-2 classification. *See*, 9 F.A.M. 40.63 N4.7, for the Department of State’s discussion of such scenarios.

3. Status Violators are Removable (Deportable)

Status violators face several consequences, the most obvious and immediate being the simple fact that they are subject to removal from the United States if and when the INS becomes aware of the violation and initiates removal proceedings. INA §237(a)(I)(C)(i).

4. Status Violators Are Ineligible for Extension or Change of Status

Status violators are ineligible to change or extend nonimmigrant status in their nonimmigrant status in the United States. INA §248. For example, if it should come to the attention of the INS that an L-1 intra-company transferee "jumped the gun" by accepting and commencing employment with a different employer prior to approval of an H-IB petition on his behalf, the L-1 nonimmigrant will be ineligible to change his or her status to H-IB. If the L-1 nonimmigrant otherwise meets all requirements for H-IB classification, the petition for H-IB classification should be approved, but the request for change of status should be denied. End result: the L-1 nonimmigrant must depart the United States, apply for an H-IB visa at a U. S. Consulate abroad, and reenter the United States in valid H-IB status. Additionally, in this case, as of the date of the INS determination finding a status violation, the L-1 nonimmigrant is unlawfully present in the United States and begins to accrue days of "unlawful presence," a legal term of art discussed below in the context of overstays.

5. Status Violators are Ineligible for Adjustment of Status

Status violators are also ineligible to adjust status to lawful permanent resident if they have violated the terms and conditions of their nonimmigrant status since the date of their last entry into the United States. INA §245(c). For example, H-IB employment authorization is generally employer-specific, job-specific, and location specific. Therefore, should the INS determine that an H-IB employee has violated H-IB status by accepting a company transfer to a different geographic location (or by accepting a job in a different job classification) before the company has filed a new Labor Condition Application initiating the amended H-IB petition process to reflect the changes, the H-IB employee has violated his or her status and could be denied Adjustment of Status. In this situation, a failure by the employer to make the appropriate Labor Condition Application and H-IB Petition filings could result in consequences felt most harshly by the foreign national employee.

Because a failure to make the required filings can severely prejudice the foreign national, it is important for practitioners to effectively communicate the necessity and means for maintenance of nonimmigrant status to the foreign national employee as well as the employer. Further, it is advisable to make clear at the beginning of representation that the individual foreign national employee is responsible for maintaining his or her status and for immediately notifying the attorney of any material changes in the terms and conditions of his or her employment. The employer must also be aware that, although the employer has an H-IB petition approved on behalf of the foreign national employee, the employee is not automatically authorized for any and all employment with the company. Employers should be advised to immediately notify their attorney of any material change in the terms and conditions of employment.

B. Overstays

1. Application of INA 222(g)

"Overstays" are nonimmigrants who have remained in the United States beyond the expiration date on their I-94 cards. If a nonimmigrant overstays the date certain on his or her I-94 card by even one day without having filed a petition for change or extension of status prior to expiration, he or she will be unable to change or extend nonimmigrant status and must apply for a new visa (and all future nonimmigrant visas) in his or her country of nationality. INA §222(g). This fact comes as a shock and disappointment to many foreign nationals who have grown accustomed to the convenience of applying for visas as third country nationals at a U.S. Consulate of convenience in Canada or Mexico.

2. Application of INA §212(a)(9)(B) – The Three- and Ten-Year Bars

Another consequence overstays face is the accrual of "unlawful presence." Unlawful presence means physical presence in the United States after the expiration of the period of authorized stay or without having been admitted or paroled. INA §212(a)(9)(B)(ii). For a status violator who has not overstayed the authorized period of stay noted on his or her I-94 card, unlawful presence begins to accrue when the INS makes a determination that a status violation has occurred. For an overstay, however, accrual of days of unlawful presence begins the day after the expiration date on the I-94 card. An individual who is unlawfully present in the United States for more than 180 consecutive days but less than one year and who voluntarily departs the United States is inadmissible for a period of three years after departure. INA §212(a)(9)(B)(i)(I). An individual who accrues one year or more of unlawful presence is inadmissible for a period of ten years after departing the United States voluntarily. INA §212(a)(9)(B)(i)(II). Note that days in unlawful presence must be consecutive; multiple periods of unlawful presence, each not exceeding 180 days and separated by departures from the United States, are not aggregated for purposes of the three- and ten-year bars. INS Memorandum 96ACT043 HQIRT 50/5.12, June 17, 1997, reprinted in 74 Interpreter Releases 1046.

3. Visa Waiver Entrants Ineligible for Future Visa Waiver Entries

In the case of an individual who entered the United States without a visa pursuant to the Visa Waiver Program, unlawful presence begins to accrue upon expiration of the period of authorized stay as noted on the I-94 card received upon entry. In addition to the accrual of days of unlawful presence, a visa waiver overstay is ineligible for future entry under the Visa Waiver Program and must apply for a visa at a U.S. Consulate abroad for future trips to the United States. For business travelers who frequently travel to the United States under the Visa Waiver Program, ineligibility for future use of the Program is a nuisance which can easily be avoided by making a timely departure.

4. Heightened Scrutiny by Department of State and INS

One final note should be made regarding the consequences of overstaying the authorized period of stay noted on the I-94 card. Overstays are likely to experience heightened scrutiny when applying for future visas at the U.S. Consulate in their country of nationality. The U.S. Consul always has the discretion to issue or not issue a visa, and the Consul's decision cannot be appealed. Status violations, and particularly overstays, which are known to the U.S. Consul become part of the Consul's discretionary decision-making process and could be the basis for denial of a visa even when the applicant may otherwise meet all criteria for the requested visa classification. This is true even when an overstay did not accrue more than 180 days of unlawful presence to trigger the three-year bar or one year of unlawful presence to trigger the ten-year bar.

While some U.S. Consulates in high-fraud jurisdictions may be more likely to exercise discretion against the issuance of a nonimmigrant visa, all applicants for nonimmigrant visas should be aware that, whatever their country of nationality, past status violations and overstays can be used as grounds for denying future visas. Applicants should also be aware that possession of a valid visa does not guarantee admission to the United States, and they may face a higher level of scrutiny by INS inspection officers upon arrival at the U.S. port of entry.

5. NSEERS Entry-Exit System

On September 11, 2002, the anniversary of the attacks on the World Trade Center and the Pentagon, the National Security Entry-Exit Registration System (NSEERS) was implemented pursuant to mandate by the USA PATRIOT Act. The NSEERS program has been described by Attorney General John Ashcroft as the first step toward the development of a comprehensive entry-exit system applicable to virtually all foreign visitors; therefore, nonimmigrants should be aware that there is now a system whereby the INS and Department of State can more easily track overstays.

Under the NSEERS program, the fingerprints of a small percentage of entering foreign visitors will be matched against a database of known criminals and a database of known terrorists. In addition to requiring the fingerprinting of higher-risk visitors at the port of entry, the NSEERS program requires such individuals to periodically confirm their whereabouts and maintenance of status in the United States. Presumably, this program will enable better tracking of high-risk visitors and may well lead to tougher entry and exit controls for all. According to Attorney General John Ashcroft, the NSEERS program is but the first step toward the development of a comprehensive entry-exit system applicable to virtually all foreigners.

In 2002, it has become increasingly clear that INS is attempting to data-enter all I-94 cards upon departure. This is evidenced by inquiries practitioners now receive from the INS Service Centers in connection with applications to change status where the INS notes that it appears the applicant has left the United States subsequent to filing the application for a change of status. This 'big brother' capability can be anticipated to broaden in the

near future and may thereafter be expected to be routinely available to U.S. Consuls adjudicating visa applications overseas.

III. Exceptions, Waivers, and Tolling Provisions

A. Persons Deemed to Be in an Authorized Period of Stay

1. Aliens Admitted as refugee or granted asylum;
2. Aliens granted withholding of deportation or removal, cancellation of removal, deferred enforced departure, or temporary protected status;
3. Cubans or Haitians eligible under INA §202(b);
4. Applicants for Adjustment of Status who filed their applications prior to being served with notice of removal proceedings. INS Memorandum 96ACT043 HQIRT 50/5.12, June 17, 1997, reprinted in 74 Interpreter Releases 1046.

B. Class Exceptions to the Accrual of Unlawful Presence

The three-year and ten-year bars are statutorily inapplicable to certain classes, the most obvious of which being those individuals who have been lawfully admitted for permanent residence (LPRs). INA §212(a)(9)(B)(i). Other than LPRs, the following classes will not be subject to the accrual of unlawful presence and, thus, the three- and ten-year bars to admission:

1. Minors

The sins of the father are not, in the case of unlawful presence, visited upon the child who, while unlawfully present in the United States, were under the age of 18. Because minors are generally subject to their parents' will and care, Congress has recognized that minors should not be held responsible for their unlawful presence. For this reason, no period of unlawful presence which would have accrued prior to a person's 18th birthday is counted when determining whether either the three- or ten-year bar applies. INA §212(a)(9)(B)(iii)(I). Please note, however, that minors who are unlawfully present in the United States are still subject to deportation should the INS initiate removal proceedings.

2. Asylum Applicants

Foreign nationals who have filed a bona fide application for asylum will not accrue unlawful presence while their applications are pending UNLESS they engage in unauthorized employment. INA §212(a)(9)(B)(iii)(II).

3. Battered Women and Children

Certain battered women and children who would qualify for benefits under the Violence Against Women Act are determined by the INS to have violated the terms and

conditions of their nonimmigrant status will not be held accountable for unlawful presence which would otherwise accrue so long as their violation was substantially connected to battery or extreme cruelty by their abusers. INA §212(a)(9)(B)(iii)(IV).

4. Family Unity Beneficiaries

Beneficiaries of Family Unity protection do not accrue unlawful presence. INA §212(a)(9)(B)(iii)(III). The Family Unity Program provides automatic stay of deportation for the spouse and unmarried children of Special Agricultural Workers (SAW), Amnesty, and Cuban or Haitian Entrants granted temporary or permanent residence status.

C. Waivers for Immediate Relatives of Citizens and LPRs

The Attorney General is authorized to waive application of the three- and ten-year bars in the case of a spouse, son, or daughter of a U.S. citizen or Lawful Permanent Resident (LPR) when denial of admission would result in extreme hardship to the U.S. citizen or LPR spouse or parent of the applicant. INA §212(a)(9)(B)(v). Because waivers of the three- and ten-year bars are subject to a high evidentiary threshold, i.e., extreme hardship, and because only hardship to the U.S. citizen or LPR spouse or parent is taken into consideration, waivers of either bar can only be anticipated in truly exceptional cases. Applicants should also be aware that a denial of an application for a waiver of the three- or ten-year bar is not subject to judicial review.

D. Tolling Provisions and Reinstatement

1. Tolling of Unlawful Presence While Timely-filed Application/Petition Is Pending

Timely applicants for change or extension of status enjoy the benefit of tolling of unlawful presence for a period not to exceed 120 days. In order to take advantage of the tolling provision, the individual must have been lawfully admitted or paroled into the United States and must have filed a timely, non-frivolous application for change or extension of status. Additionally, the applicant must not have engaged in unauthorized employment prior to filing or while the application is pending. INA §212(a)(9)(B)(iv). Unlawful presence would begin to accrue upon the earlier of the 121st day after the applicant's prior nonimmigrant status expired OR upon denial of the pending application or petition.

In the case of an applicant for change of status who is not found to have violated status but who is ineligible for the new status for which he or she applied, denial of the petition or application should not start the accrual of unlawful presence. In such a case the applicant should be able to fall back upon his or her original, underlying status so long as he or she has and will at all times comply with all terms and conditions of that status.

For applicants for adjustment of status who do not maintain their original, underlying nonimmigrant status, a denial of the adjustment application would start the accrual of unlawful presence, except that such accrual is tolled upon renewal of the application in proceedings. INS Memorandum 96ACT043 HQIRT 50/5.12, June 17, 1997, reprinted in 74 Interpreter Releases 1046. This is true, for example, in the case of an H-1B employee who has filed for adjustment of status and subsequently fails to extend his or her H-1B nonimmigrant status, relying instead on an EAD for employment authorization and an Advance Parole for travel. Applicants who do maintain their underlying nonimmigrant status but are denied adjustment of status may not begin to accrue unlawful presence upon denial of the adjustment application. In such a case, whether or not unlawful presence begins to accrue would depend upon whether or not the INS, when denying the adjustment application, made a specific finding that the applicant failed to comply with all terms and conditions of his or her underlying nonimmigrant status. The adjustment denial should spell out the specific grounds for denial, thereby putting the applicant on notice that he or she begins to accrue unlawful presence as of the date of denial.

2. Innocent Error

If a nonimmigrant should fail to make a timely application for extension or change of nonimmigrant status and inadvertently overstays the period of authorized stay (i.e., date certain on I-94 card), it may be possible to apply for an extension or change of status with approval retroactive to the date the prior period of authorized stay ended. The applicant must not be in removal proceedings and must demonstrate to the satisfaction of the INS that: (a) the failure to make a timely application was due to extraordinary circumstances beyond the control of the applicant or petitioner; (b) the applicant has not otherwise violated the terms and conditions of his or her nonimmigrant status (such as by engaging in unauthorized employment); and (3) the applicant remains a bona fide nonimmigrant. 8 C.F.R. §248.1(b). Although these eligibility criteria are strict, the INS has previously granted such extensions under a surprisingly wide variety of circumstances, leaving practitioners with room for zealous advocacy stopping short of frivolity.

3. Student Reinstatement

F-1 students who have inadvertently failed to comply with all terms and conditions of F-1 status may apply for reinstatement. To qualify for reinstatement, the student must not be deportable on any other ground and must demonstrate that: (a) the status violation resulted from circumstances beyond the student's control OR a denial of reinstatement would result in extreme hardship to the student; (b) the student is currently pursuing or intending to pursue a full course of study at the school which issued the Form 1-20; and (c) the student has not engaged in unlawful employment. 8 C.F.R. 214.2(f)(16). A student denied reinstatement may NOT appeal the decision.

IV. It Took an Act of Congress . . .

A. The American Competitiveness in the Twenty-first Century Act of 2000 (AC-21)

Of all the nonimmigrant visa classifications, the H-1B visa classification is most often used as a stepping stone to achieving Lawful Permanent Resident status. Because most H-1B employees did not qualify for any employment-based first preference category, most were facing a three step process for reaching lawful permanent residence: (1) Labor Certification; (2) Immigrant Visa Petition; and (3) Adjustment of Status. Prior to AC-21, H-1Bs were strictly limited to six years of total H-1B eligibility; however, the three-step lawful permanent resident process in most jurisdictions was extremely lengthy and drawn out.

1. Historical Delays and Backlogs

State Employment Security Agencies (SESA's) processing labor certifications would frequently take 2 years to issue a job order on a regular track labor certification; the DOL would take from 6 to 14 months to review and certify the application; and the INS would take another year or more to approve an immigrant visa petition based on the labor certification. Only after INS approval of the immigrant visa petition could the H-1B employee apply for adjustment of status to lawful permanent resident, an application which could then remain pending for up to 3 years in some cases. Even concurrent applications for advance paroles and EAD's would remain pending with the INS for 90 days, and in some extreme cases up to 180 days. To make matters worse, the H-1B employee was tied to his or her petitioning employer for the years it took to complete the process, as any material change in the terms and conditions of employment (i.e., new job with new employer) would require the individual to start the entire process over again. Throw the priority date backlog for Indian and Chinese nationals into the mix, and many times the length of the overall process was astounding. This created a situation which many likened to involuntary servitude. **All the above factors would often combine whereby H-1B employees would simply run out of H-1B eligibility prior to reaching the adjustment of status stage of the lawful permanent resident process.**

2. Error in Drafting Led to Large Excluded Class and Much Creative Lawyering

While some of the lengthy processing times described above remain accurate, many of the adverse impacts of lengthy processing times have been ameliorated by AC-21 and subsequent legislation. AC-21 provided for additional H-1B extensions beyond the sixth year of eligibility for those individuals who had filed an I-140 Immigrant Visa Petition and whose labor certification or I-140 had been filed for at least 1 year. This provision was helpful to the extent the H-1B employee could reach the I-140 stage prior to using all six years of H-1B eligibility, which meant in most cases the employee still had to have an approved labor certification. While this provision was welcomed as beneficial, an error in drafting excluded the largest class of potential beneficiaries: those

whose labor certifications had been on file for over a year and were still pending with either the SESA or the DOL.

This unfortunate drafting error led to some creative lawyering on the part of practitioners seeking to secure for their clients the benefits of AC-21's H-1B extension provisions. Because the letter of the law required only that a labor certification had been pending for more than a year and that an I-140 Immigrant Visa Petition be filed, creative but ethical attorneys filed non-frivolous but weak I-140 Immigrant Visa Petitions under one of the EB-1 preference categories in order to obtain the receipt notice for use in filing for additional H-1B extensions. The best proof that such filings were merely creative and NOT frivolous is the fact that this author and many other practitioners know of more than one such filing which was actually approved!

3. October 2002

With the enactment of the Twenty-first Century Department of Justice Appropriations Authorization Act (H.R. 2215), the legislative drafting error leading to this incongruent result will now be corrected once the President signs the Bill.² H-1B employees running out of H-1B eligibility will now be able to apply for extensions of H-1B status beyond the sixth year of eligibility so long as they have either an Application for Alien Employment Certification or an Immigrant Visa Petition which has been pending for more than one year. Individuals who have already changed their status or left the United States may also take advantage of this benefit.

4. Country-Specific Backlogs

AC-21 also provided a means for obtaining an additional extension of H-1B status beyond the sixth year of eligibility for those individuals with an approved immigrant visa petition who were unable to apply for adjustment of status due to backlogs in visa availability for nationals of certain countries. Further, to address the issue of visa availability, AC-21 provided for the appropriation of unused visa numbers to be made available for nationals of countries which have exhausted their yearly per-country allotment of visa numbers. AC-21 has thus eliminated for the moment the recurring problem of backlogs in availability of visa numbers for Indian and Chinese nationals.

5. Portability—Some Practical Freedom From the Perception of H-1B Servitude

AC-21 also addressed the issue of “portability” for H-1B employees seeking to change H-1B employers. Pursuant to AC-21, H-1B employees may start work with a new employer immediately upon the employer's filing of a non-frivolous H-1B petition on behalf of the employee provided the petition is filed prior to expiration of the previous H-1B petition and the employee was not employed without authorization prior to the filing of the new H-1B petition seeking the change of employer.

6. Portability in the Midst of Adjustment of Status

Finally, AC-21 provided for job flexibility for adjustment applicants whose Application to Adjust Status has been pending for more than 180 days. Such applicants may change jobs or employers so long as the new job is “in the same or a similar occupational classification” as the job approved in the Immigrant Visa Petition.

B. Pub. L. 107-124 and Pub. L. 107-125

Effective January 16, 2002, Public Laws 107-124 and 107-125 authorize spouses of L-1 and E visa holders to apply for employment authorization. Because these spouses may now legally work upon approval of an Application for Employment Authorization, practitioners should begin to see fewer status violations resulting from unauthorized employment in these categories.

C. Child Status Protection Act; Pub. L. 107-208

Enacted in August of this year, the Child Status Protection Act has helped resolve the “age out” problem. A full treatment of this Act is beyond the scope of this article; however, it should be noted that generally a child’s age for purposes of adjustment of status will now be determined at the time a preference petition is filed rather than the previously applicable date of approval of the adjustment of status application.

D. New Regulation Permitting Concurrent I-140/I-485 Filing

In addition to recently enacted legislation, nonimmigrants may now take advantage of a new regulation permitting concurrent filing of their I-140 Immigrant Visa Petition and their I-485 Application to Adjust Status. For beneficiaries running out of nonimmigrant eligibility in their respective nonimmigrant visa categories, this regulation speeds the process of filing for adjustment of status, employment authorization, and advance parole by several months. Beware that portability benefits may be restricted when taking advantage of concurrent filing.

V. Concluding Remarks

Since the enactment of IIRIRA in 1996, the consequences for failure to maintain status have increased dramatically. The introduction of INA §222(g) and the three- and ten-year bars at INA §212(a)(9) significantly altered the ground rules for nonimmigrant status violators and overstays at a time when lengthy DOL and INS processing times were making it more and more difficult to remain both in the U.S. and in status. Fortunately, AC-21 and subsequent legislation and regulations have operated to ameliorate the effects of the often unconscionably long processing times while enabling additional H-1B extensions for H-1B employees running out of H-1B eligibility. Nonimmigrants seeking lawful permanent resident status should find that it is now easier to maintain and extend nonimmigrant status than in the years immediately following enactment of IIRIRA. Practitioners should remember to

consider and take advantage of every possible mechanism to assist their clients in maintaining status and should advise clients in writing of the harsh consequences for failure to do so.

¹ Note that persons in E, H-1B, and L nonimmigrant visa classifications are permitted what is known as “dual intent,” which means they need not necessarily have a residence abroad which they have no intention of abandoning. It is sufficient that they intend to leave the United States at the end of their authorized period of stay. *See* 8 C.F.R. §214.2(e)(5); 8 C.F.R. §214.2(h)(16)(i); 8 C.F.R. §214.2(l)(16).

² As of the date of this article, the Appropriations Bill, having passed both Houses of Congress, is currently being held for technical corrections and has not yet been sent to the President for signature. Because the Bill received such widespread support in both the House and the Senate, we anticipate that the President will sign the Bill as written with the technical corrections.