

Immigration Alert

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Impact of Advancement of the Employment-Based Second Preference Numbers for China and India:

What if a Pending I-485 Adjustment of Status Application [to U.S. Permanent Resident] is Approved While the Applicant is Temporarily Traveling Abroad?

The U.S. State Department has indicated that due to the low demand this year for immigrant visas in the employment-based First Preference (EB-1) category (for persons of extraordinary ability, outstanding researchers or professors, and multinational managers and executives), unused immigrant visas will flow down into the Second Preference Immigrant Visa (EB-2) category which will be used to advance the backlogged EB-2 categories for China and India. The Second Preference category is for persons filling positions that require either an advanced degree or a bachelor's degree and at least five years of experience. Presently there is a large volume of pending I-485 applications in the backlogged China and India Second Preference categories because in the summer of 2007, for a 30-day period, both the EB-2 and EB-3 categories suddenly became "current," allowing thousands of people to submit their permanent residency applications at the same time. With the prospect of more rapid, although unpredictable, advancement in these two EB-2 categories, it is always possible that a pending I-485 application could be approved while the applicant is temporarily traveling abroad. For example, in July 2011, the Priority Dates for both EB-2 China and India will advance from October 15, 2006 to March 8, 2007. This is a significant advancement in one month. Accordingly, we would urge all I-485 applicants to check their Priority Dates and to consider the documents which will be needed in order to reenter the United States in the event that they or a family member are temporarily traveling abroad at the time U.S. Citizenship and Immigration Services (USCIS) approves their I-485 permanent residence. In order to ensure that all I-485 applicants understand the potential impact of international travel and what documentation will be required for reentry, all options should be discussed with one's attorney well before any planned travel.

Advance Parole

In order to maintain their continuing eligibility for Adjustment of Status, applicants with pending I-485 applications may apply for and be granted "Advance Parole," which will allow them to travel internationally and be "paroled" (i.e., conditionally readmitted) into the United States until a decision is made on their pending I-485 applications. The Advance Parole must be obtained prior to departure from the United States, and it typically takes USCIS approximately 90–120 days to process an Advance Parole application. The immigration regulations also allow I-485 applicants in valid H-1B/H-4 and L-1/L-2 status to reenter the United States after temporary travel abroad without negatively impacting their pending I-485 application. However, this leniency does *not* apply to any other category of visa holder. Everyone else with a pending I-485 application must present an Advance Parole

document upon entry to the United States.

A valid Advance Parole Document, unexpired H-1B/H-4 visa or L-1/L-2 visa can be presented to the airline in order to board a flight back to the United States. If an individual's I-485 application is approved during his or her temporary absence from the United States, the individual can still present a valid Advance Parole document, H-visa or L-visa to the airline in order to be permitted to board the plane for the return flight to the United States. And while it's true that once the I-485 is approved the individual is no longer eligible to be admitted in H or L status, nor is Advanced Parole the correct vehicle for entry, there are options available to U.S. Customs and Border Protection (CBP) once the person arrives in the U.S.

If the I-485 applicant is not aware that the I-485 application has been approved during the temporary absence from the United States, this fact could be picked up by the CBP officer who interviews the individual at the port of entry when the name is entered into the USCIS database. If the individual is aware that the I-485 application was approved during the temporary absence abroad, the individual should inform the CBP officer of the change in the immigration situation.

CBP Procedures on Reentry as a U.S. Permanent Resident

The CBP officer at the port of entry has several options if an individual's I-485 application was approved during the individual's temporary absence from the United States. One option is to waive the documentary requirements and allow the individual to enter as a U.S. permanent resident. In this case, the individual's fingerprint would be taken for the creation of the Permanent Resident Card, or "green card," and his or her passport would be stamped with temporary evidence of the permanent resident status. This temporary evidence would also allow the individual to travel internationally until the Permanent Resident Card is received.

Another option a CBP officer has is to "parole" (i.e., conditionally admit) an individual into the United States for a short period of time to conduct a "Deferred Inspection," so that the individual can present proof of the I-485 approval (e.g., the Form I-797 Notice of Approval or the actual Form I-551 Permanent Resident Card or "green card," which is usually issued within a few weeks of the I-485 approval), at a later date. Upon receiving proof of the I-485 approval, CBP will then "admit" (without condition) the individual as a U.S. permanent resident.

It has been our experience that the first option is typically followed.

Best Travel Option: Advance Parole

One circumstance that could cause a potential problem is if a person is already overseas and is intending to apply for a new H or L visa to reenter the United States, but the person's I-485 application is approved prior to applying for the visa. In this case the person would not be eligible for the H or L visa since his or her I-485 U.S. permanent residency application has been approved. If the individual does not have a valid Advance Parole document, he or she would not have any documentation required to board the plane or for presentation at the Port of Entry.

The most conservative approach is to routinely apply for and obtain Advance Parole documents for international travel for the entire duration of the pendency of the permanent residence application.

Conclusion

Plan in advance! It is important to talk with your immigration counsel well in advance of travel to avoid any potential delays or complications if an I-485 application is approved during temporary international travel in the upcoming months.

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