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H-1B Advanced Degree Exemption and H-2B Caps Reached

The H-1B Visa Reform Act of 2004 amended the Immigration and Nationality Act to exempt from the [H-1B cap](#) any alien who "has earned a master's or higher degree from a United States institution of higher education ... until the number of aliens who are exempted from such numerical limitation during such year exceeds 20,000." After botching initial implementation of this change in Fiscal Year (FY) 2005, USCIS began FY 2006 (on October 1, 2005) by counting H-1B petitions for those with an appropriate advanced degree against a separate cap of 20,000.

The FY2006 H-1B cap was reached on August 10, 2005. However, the 20,000 H-1B numbers that were set aside for those with advanced U.S. degrees remained available for several months. USCIS announced just today that this cap has been reached. Any petitions received by USCIS after January 17, 2006 will be rejected unless the petitioner or beneficiary is eligible for a separate cap exemption. Those petitions received on January 17 are subject to a computerized random selection process which will select the exact number of petitions from the day's receipts needed to meet the Congressionally mandated cap exemption of 20,000.

Now that the 20,000 Advance Degree Exemption Cap has been reached, no new H-1B petitions can be submitted until April 1, 2006, and then can only request a start date that is 1.) later than October 1, 2006, and 2.) no more than six months later than the date of filing.

It is hoped that Congress will pass "[Cap Gap Legislation](#)" this year to assist those students in F-1 or J-1 status who, upon graduating from college, wish to change status to H-1B but who would go out of status due to the unavailability of H-1B visa numbers. In July 2005, members of the American Immigration Lawyers Association met with officials from Immigration Customs & Enforcement (ICE). At the meeting, ICE stated that they were discussing the issue of Cap Gap Legislation with USCIS and that they expect a "fix" for the problem. They did not state precisely what the "fix" was going to be.

USCIS also **announced** in December 2005 that the H-2B cap for the first six months of FY2006 has been reached. Any H-2B petitions that reached USCIS after December 15, 2005 with a requested start date prior to April 1, 2006 were rejected.

H-2B status is issued to aliens "coming temporarily to the United States to perform other temporary service or labor if unemployed persons capable of performing such service or labor cannot be found in this country." Before USCIS

can approve a petition for H-2B status, the Department of Labor must issue a labor certification stating that there are no U.S. workers in the area of intended employment who are capable of filling the position.

H-2B status can only be issued with validity dates of less than a year. There is an annual cap of 66,000 H-2B visa numbers. 33,000 are issued for the first half of the fiscal year, which runs from October 1 to March 31; and 33,000 are issued for the second half of the fiscal year, which runs from April 1 to September 30. H-2B petitions requesting a start date of later than April 1, 2006 are now being accepted for processing. Many of the H-2B petitions which were originally submitted requesting a start date in the first half of the fiscal year can be resubmitted with a request for an April 1 start date.

I Second That- When Should You Seek a Second Opinion?

There are certain instances where it is highly advisable for immigrants and/or their U.S. employers or relatives to seek a second opinion on immigration legal matters. The two most common instances are where a conflict of interest arises for the immigration attorney currently representing the parties, or where an immigration attorney advises that there is nothing that can be done to help the individual.

Conflicts of Interest

The United States extends immigration benefits to individuals primarily on the basis of family ties to U.S. citizens or permanent residents, or based on job offers from U.S. employers. Whenever an immigration petition is filed by a U.S. citizen or permanent resident, or a U.S. employer, on behalf of a foreign national, there are two parties seeking a single immigration benefit. The granting of nonimmigrant or immigrant status to a foreign national is inherently beneficial to both parties. As a result of this legal framework, immigration attorneys frequently represent the joint interests of both the petitioner and the beneficiary in the filing of petitions for immigration benefits. So long as the interests of the petitioner and the beneficiary remain aligned, there is no problem with this arrangement. But whenever the interests of the petitioner and the beneficiary diverge over the immigration matter, the attorney is faced with a conflict of interest.

Conflicts of interest arise in both the employment-based and the family-based immigration contexts. In the employment context, the U.S. employer may decide that it no longer wishes to petition for the alien or, after the alien enters the U.S. to work for the employer, the employer may decide to fire or lay off the alien. If the employer notifies the attorney that it will be firing the alien, the attorney has a conflict of interest, as the alien obviously wishes for the employment to continue in most cases. Similarly, if the foreign national notifies the attorney that he will be changing jobs, the attorney has a conflict of interest because the employer in most cases wants the employment to continue. In the family-based

immigration context, a conflict of interest arises where a petitioning U.S. citizen or permanent resident spouse divorces the foreign national. When a conflict arises, the attorney must assess whether he can continue to adequately represent the interests of both parties. If not, he must withdraw from the case and both parties should seek independent legal counsel going forward.

"Nothing Can be Done"

Any time an attorney advises an individual that nothing can be legally done to assist him or her, that individual should seek a second opinion. The attorney may be right, or may be unfamiliar with the legal remedies available. Or, it could be that another attorney could come up with a creative strategy that most attorneys are unaware of. In any case, there is nothing to lose by getting additional input before giving up hope. Most attorneys charge fees for a legal consultation, but the cost of a half hour consultation is not as prohibitive as hiring an attorney for full representation, and it may be that a short consultation opens the door to a possible solution.

Addressing the Legal Identity Crisis of Some Adjustment of Status Applicants: What Does it Mean that I'm a Parolee?

As a rule, applicants for [Adjustment of Status](#) who travel outside the United States are deemed to have abandoned their pending applications. There are two exceptions to this rule. The first exception is that adjustment of status applicants who are in H-1B or L-1 nonimmigrant status and return to the U.S. after travel abroad to resume employment with the original H-1B or L-1 petitioner do not abandon their adjustment applications. The second exception, which we will focus on in this article, is that adjustment applicants who apply for, and receive, an Advance Parole document (form I-512) prior to departing the U.S. may travel abroad and return to the U.S. while their I-485 applications are pending. The applications are not considered abandoned. In a previous [Immigration Newswire article](#), we discussed when it is safe to travel on Advance Parole. This article focuses instead on the legal identity and rights of aliens who have been paroled into the United States pending the adjudication of their adjustment of status applications. Exactly who are you as a Adjustment of Status applicant/ parolee?

Who You are Not

If you are legally present in the U.S. in a nonimmigrant status, you do not forfeit that status when you file an adjustment of status application. Your nonimmigrant status continues in effect until the expiration date shown on your I-94 Arrival/Departure card, so long as you abide by the terms of your status *and* do not depart from the United States. The moment you leave the U.S. after the filing of your adjustment of status application, you are no longer in any nonimmigrant status upon your return, unless you qualify to return in H-1B or L-1 status. In order to return from your travel abroad, unless you are in H-1B or L-1 status, you must have an Advance Parole. Upon your return, you are no longer a

nonimmigrant but a Parolee. Or, if you remain in the United States and your nonimmigrant status simply expires, you are again, not a nonimmigrant but a "pending adjustment applicant." Parolees and pending adjustment applicants are authorized to remain in the United States by the Attorney General while their adjustment of status applications remain pending, and they do not accrue [unlawful presence](#). However, they are technically out of status.

Why You Need Advance Parole In Order to Travel

Section 101(a)(15) of the Immigration and Nationality Act defines an "immigrant" as every alien except one who can prove that he qualifies for a nonimmigrant status. The Immigration and Nationality Act only permits the admission of immigrants and nonimmigrants to the United States. Thus someone who is neither an immigrant nor a nonimmigrant is inadmissible to the United States.

Other than those aliens who maintain H-1B or L-1 status while their adjustment applications are pending, applicants for adjustment of status are neither immigrants nor nonimmigrants. They have immigrant intent but do not yet have a permanent resident card or "green card." And once their nonimmigrant status expires, they are technically out of status. Therefore, there is no basis to "admit" adjustment applicants to the U.S. after they depart.

The Advance Parole document is issued by the Department of Homeland Security to allow adjustment of status applicants to return to the U.S. after travel abroad without abandoning their adjustment applications. The granting of an Advance Parole document is not an exercise of the government's parole authority; it exercises its parole authority when a Customs & Border Protection officer allows an alien to enter the U.S. using his Advance Parole.

Who You Are at the Port of Entry?

If an Advance Parole document makes you neither an immigrant nor a nonimmigrant, and you cannot be legally "admitted" to the United States, then how are you allowed back into the United States after travel abroad? The not-so-obvious answer is that an Advance Parole document secures your "entry" to the United States while not securing your "admission."

"Admission" is a term of art meaning the lawful entry of an alien into the United States after inspection and authorization by an immigration officer. An alien who is subject to "admission" must prove that he is "admissible" to the United States, meaning that he has never been convicted of any crimes that would bar his admission to the U.S.; that he is not inadmissible on medical grounds; etc. An alien subject to "admission" is also subject to expedited removal upon an application for admission if he has committed fraud or lacks the proper documentation.

The concept of "admission" is pivotal in determining the legal rights of aliens before the U.S. government. An alien who has not yet been admitted must prove his admissibility as either an immigrant or a nonimmigrant in order to be permitted to legally enter the United States. In order to be admissible, he must not only "fit" into an immigrant or nonimmigrant category; but he must also show that there is no bar to his admissibility. Some bars to admissibility include certain criminal convictions, health-related grounds, or past terrorist activity. If he does not prove his admissibility he will not be permitted to enter the U.S.

An alien who has already been legally admitted to the U.S. has proved his admissibility but can still become "removable" from the U.S. through, again, commission of certain crimes, on health-related grounds, etc. But once an alien has been legally admitted, he is entitled to a hearing before an Immigration Judge in Removal Proceedings before being removed (formerly, "deported") from the U.S. Aliens who have been admitted enjoy greater due process rights than those who have not been admitted.

It is important to note that "admission" to the U.S. is not synonymous with "entry" to the U.S. An alien can enter the United States without being legally admitted (by sneaking across the border, for example). An alien who illegally enters the U.S. has not been admitted and is not entitled to Removal Proceedings before an Immigration Judge.

Certain aliens are exempt from admission procedures. Most significantly, legal permanent residents are presumed not to be subject to admission procedures unless they have abandoned or relinquished their LPR status; have over 180 days outside the United States; have engaged in illegal activity after departing from the United States; have departed from the U.S. while in removal or extradition proceedings; has committed a crime that would make him inadmissible to the United States; or is attempting to enter at a time or place other than as designated by the Attorney General. Returning permanent residents are not subject to admission procedures because they are considered for legal purposes to have already been admitted to the U.S. and are therefore entitled to a hearing before an Immigration Judge in Removal Proceedings before being removed from the United States.

In addition, aliens whose adjustment of status applications are pending and who return to the United States using an Advance Parole document are not subject to "admission" procedures. However, they are not exempt from admission procedures because they are considered to have already entered the U.S. Instead, they are considered to be temporarily allowed to stay in the U.S. while their adjustment of status applications are pending, in a state of limbo. The amount of legal rights that parolees enjoy in the U.S. has not been fleshed out by case law since the concept of "admission," as defined above, was created in 1996. Immigration regulations do preserve for Parolees the right to renew a denied adjustment of status application before an Immigration Judge. However, it is unclear what the rights of a Parolee are if, for example, he is convicted of a crime

while his adjustment of status application is pending. On one hand, he is legally present in the United States and was once lawfully admitted as a nonimmigrant. But on the other hand, he has since departed the United States and his last entry to the U.S. was based on parole and not upon a legal admission. Whether such an alien is entitled to Removal Proceedings and full due process remains to be seen. Such an alien could be found to be in a perpetual state of applying for admission and as such, subject to the grounds of inadmissibility rather than to the grounds of removability.

Because of the uncertainty surrounding the legal standing of parolees before the U.S. government, it is best for those aliens in H-1B and L-1 status to maintain their nonimmigrant status while their adjustment of status applications are pending, if at all possible. Aliens not in H-1B or L-1 status would best preserve their rights by not leaving the U.S. until their applications for adjustment of status are approved, if possible.

Department of State Remarks on Outlook for Employment-Based Visa Number Availability

The Department of State informed the American Immigration Lawyers Association that it has seen a lower demand in employment-based visa numbers than it had expected based on the number of pending I-140 petitions. Overall, the result has been rapid advancement of established cut-off dates. However, if demand for visa numbers increases, it will result, at some point, in the freezing of cut-off dates or further retrogression. For an overview of how immigrant visa numbers are allocated, see our article entitled, "[Immigrant Visa Preference Categories Explained](#)."

The Department of State provided the following outlook for employment-based visa numbers:

Worldwide First and Second Preference

Based on current level of demand for visa numbers, there will be no need to impose a cut-off date for these categories.

Worldwide Third Preference

So far the large number of of 245(i) filings has not resulted in a large concentration of demand which would limit movement of the cut-off date. However, these cases may still be in the DOL backlog and could still result in a large concentration of demand in the future.

India & China First and Second Preference

There is a lack of demand for these categories, resulting in rapid advancement of the cut-off dates. This is expected to continue for the next several months.

China Third Preference

This category should stay at the Worldwide date.

India Third Preference

The cut-off date should continue to move forward, but such movement may become more limited.

~ Disclaimer ~

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