AMERICAN IMMIGRATION LAW FOUNDATION

Importance of Maintaining Status after September 11

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This practice advisory was adapted from my discussion on visa maintenance issues during the November 2, 2001 ILW teleconference on the immigration implications of the September 11th tragedy. After September 11, it is more important than ever for nonimmigrant workers to maintain lawful status in the United States. Nonimmigrants are being detained and/or placed in removal proceedings for minor, technical violations of immigration laws.

Q: What can practitioners do to ensure that clients maintain lawful nonimmigrant status?

There are a number of things that immigration lawyers can do. We can maintain and constantly update our internal calendaring systems to track the expiration dates of our clients' nonimmigrant status. Lawyers can use web-based access as case management tools (ILW provides web-based service for immigration attorneys) to maintain client relations and keep clients aware of expiration dates and compliance issues. We can also encourage our corporate clients to develop and maintain their own tickler systems that keep track of their employees' nonimmigrant status and expiration dates.

We can send letters to our individual and corporate clients to remind them about upcoming expiration of nonimmigrant status and warn them about the consequences of unlawful presence and the failure to maintain status. We can instruct our clients to carry documents of identity and proof of their right to be present in United States (passport, I-94 and I-797s) at all times. We can inform clients that they may not be re-admitted to the United States if they do not have proper documentation with them when they return from travel abroad. Michael A. Pearson, Memorandum to Regional Directors, et al. (HQ INS 10/10.10), Deferred Inspection, Parole and Waivers of Documentary Requirements, November 28, 2001, posted on AILA Infonet, Doc. No. 01121333 (December 13, 2001).

We can also remind our nonimmigrant clients (other than those in A or G status) of the obligation under § 265(a) of the Immigration and Nationality Act to report any change of address on Form AR-11 to the INS within 10 days of the move. Lastly, we can help them to be aware of the conditions for continued maintenance of status applicable to the individual's particular nonimmigrant visa category, such as the

obligation on an F-1 student to maintain a full course of study and refrain from engaging in prohibited forms of employment.

Finally, we can ensure that in a true emergency our clients can reach us (or a designated on-call colleague) twenty-four hours a day, seven days a week.

Q: Has INS adjudication of nonimmigrant visa petitions changed since September 11?

Expect more stringent nonimmigrant visa eligibility standards from INS. When filing for extension of status, do not depend on the initial grant of status as an indication of the approval of an extension. INS will not accord a presumption of correctness in its prior decision. The next officer who gets the case can disagree completely with the previous officer and offer no explanation for the incongruity.

INS's treatment of L-1A and L-1B categories exemplify the tightening of eligibility requirements for nonimmigrant visas. These nonimmigrant classifications allow multinational executives, managers and employees with specialized knowledge to transfer and work for a company in the United States when they have already worked for a foreign employer affiliated with the U.S. company. In the past, neither L-1A nor L-1B were known to be particularly problematic categories, especially for large well-established companies.

For L-1A (Multinational Executives and Managers), IMMACT 90 made it very clear that INS may not discriminate between functional managers and managers who oversee personnel. IMMACT 90 also made it clear that first-line supervisors who manage professional personnel can function as a manager. Since September 11, however, INS has perceived the L-1A category as a category that has been resorted to in lieu of H-1B, which is more heavily regulated. INS has also begun to combine requirements. For example, "functional" managers, under current INS regulation, are not required to manage people, yet practitioners report that recent INS denials or Requests for Evidence assert that a functional manager must also manage personnel.

INS has also restricted its stance on the L-1B (Specialized Knowledge) category. In 1994, INS issued the Puleo memorandum, which relaxed the formerly stringent criteria defining specialized knowledge. James A. Puleo, Memorandum to District Directors, et al (CO 214L-P), Interpretation of Special Knowledge, March 9, 1994. Now the INS is retreating to the pre-IMMACT90, pre-Puleo memorandum, restrictive requirements in an effort to distort the required proof. For example, IMMACT90 eliminated the requirement to show that a U.S. worker is not available or that it is not feasible to train a U.S. worker to fill the specialized knowledge position. However, there is now an effort to require proof of economic disruption to the U.S. petitioner if the company must train a U.S. worker as opposed to transferring a foreign worker who already possess the specialized knowledge.

While decisions of this sort may be aberrations, practitioners should be aware that many newer adjudicators hired by the INS in recent years may not be aware of the long and tortuous statutory and regulatory history of the L-1 category preceding and following passage of IMMACT 90. See, e.g., Matter of Sandoz Crop Protection Corp., 19 I&N Dec. 66 (Comm'r May 20, 1988); Richard Norton, Memorandum

(CO 214.2L-P), Interpretation of Specialized Knowledge Under the L Classification, October 27, 1988, reproduced in 65 Interpreter Releases 1170, 1194 (November 7, 1988); Preamble to Proposed Regulations Implementing IMMACT 90, 56 Fed. Reg. 31, 554 (July 11, 1991); James A. Puleo, Memorandum to District Directors, et al (CO 214L-P), Interpretation of Special Knowledge, March 9, 1994.

Q: Are INS and DOL increasing their enforcement of employer sanctions and labor protections?

Employers can expect more DOL and INS enforcement of employer sanctions and labor protections. INS's shifting interpretations and methods of operation should encourage employers to take proactive curative steps to show employer record-keeping compliance is up to par with DOL and INS regulations.

Also, there has been a call for a digital national identity card. Sun Microsystems, the software company headed by Larry Ellison, has offered the government free software to create national identity cards and digital identification for all Americans and foreign nationals. Furthermore, as shown by the recent indictment of 69 individuals in Utah arising from an audit of airport security measures, the government has shown its willingness to use the I-9 as a basis for criminal prosecution. Aside from criminal enforcement, there have also been instances in which employers' failure to comply with INS requirements have served as a catalyst for the INS to determine that the alien employees are out of status. Therefore, it is wise for employers to be proactive and address all compliance issues before the INS or DOL does.

Q: How should I deal with a client's lapse in status? For example, what should I do if a client is laid off by his or her employer?

Individuals, whether intentionally, innocently or unwittingly, may fall out of status. While the INS has discretion to forgive a lapse in status in connection with an extension of status or change of status application, an "extraordinary circumstances" standard must be established.

As a result of the current recession, many H-1B workers have been terminated or benched. These individuals are likely viewed by the INS as being out of status. One could argue, in the context of a request for relief based on extraordinary circumstances, that it is the alien's conduct that should be the focus of the INS. If the alien is terminated through no fault or his or her own, he or she should be considered to have been subject to an extraordinary circumstance that was beyond his or her control. Matter of Siffre, 14 I&N Dec. 444 (Comm. 1973), gives some justification, at least in dictum, to that argument by referring to the issue of an alien falling out of status by "*his own conduct*."

Practitioners should also note that there is no formal grace period yet available. In June 2001, Michael Pearson released a memo indicating that INS was considering a 60-day grace period. Michael Pearson, Memorandum to Service Center Directors et al (HQ 70/6.2.8), Initial Guidance for Processing H-1B Petitions, June 19, 2001, posted on AILA InfoNet, Doc. No. 01062031 (June 20, 2001). However, that memo also expressly warned that no one should rely on that provision. One should also consider the recent AILA/Nebraska Service Center (NSC) liaison minutes, in which NSC commented that an alien who had been terminated from H-1B employment thirty days ago would have spent too much time out of

status for NSC to exercise favorable discretion in his or her case. AILA, INS Nebraska Service Center Liaison Minutes, posted on AILA InfoNet, Doc. No. 01101833 (October 18, 2001). When submitting these cases, practitioners may want to refer to the INS Commissioner's memo on prosecutorial discretion to outline the factors for a favorable grant of discretion. Doris Meissner, Memorandum to Regional Directors, et al. (HQ OPP 50/4), Exercising Prosecutorial Discretion, November 17, 2000, posted on AILA InfoNet, Doc. No. 00112702 (November 27, 2000). Perhaps this will lead to a favorable outcome at the administrative level, but if not, it will also lay out the record for possible appeal or litigation.

You should also consider AC21 and its H-1B portability and adjustment of status portability provisions, as well as the availability of open-market employment authorization for adjustment applicants, as means of surviving a termination. Lawyers must become well versed in discretionary grants, exceptions and savings clauses that exist in current law because until time passes, current law is the only means to show that clients are eligible for forgiveness.

Q: How does a lapse in status affect an alien's ability to adjust status?

In terms of adjustment eligibility, the two subsections of INA § 245 to master are INA §§ 245(k) and 245(i). To obtain information on using these provisions to your client's advantage, see the article Never Say i (Unless You Must): Employment-based Options for Adjustment of Status that Avoid INA § 245(i), by A. Paparelli and J. Valdez, which can be found at http://www.entertheusa.com/publications.htm. For a discussion of § 245(i) and its applicability as a means to adjust the status of asylees, parolees, aliens with qualifying family relationships, and persons who entered the United States without inspection, see, e.g., Lorna Rogers Burgess, Advanced Practice\Removability\Unlawful Presence and Bars to Admissibility, Immigration & Nationality Law Handbook, Vol. II (AILA 1998-99); Stanley Mailman, The New Adjustment of Status Law, Background and Analysis, 44 Interpreter Releases 1505 (Nov. 14, 1994). Also see Q & A exchange on ilw.com listserve.

More than ever, this is a time when lawyers can add value by providing well documented cases in initial submissions, including in extensions of status, providing good evidence in response to INS request for evidence, as well as appealing or litigating in response to denied petitions and visa refusals.