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Status, authorized period of stay and unlawful presence

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Submitted by Chief Editor on May 11th 2009

ANSWER:

Status, authorized period of stay and unlawful presence are three VERY important concepts in US immigration laws with far reaching implications. The nuances in these concepts are so intricate that they can trip up even my fellow-lawyers. I see issues in this all the time.

Here is a brief primer to enable you to understand the basics. This is by no means an exhaustive analysis.

Status

Status is the immigration designation what has been given to you by USCIS. For instance, when USCIS approves your H-1 with an I-94 attached to the approval notice, you are in H-1 status.

Status and Visa

The difference between status and visa is important. A visa is a stamp on your passport. This stamp is placed by US consulates outside USA. The system of entry and stay in USA is governed by dual permission (DHS and DOS). When you are outside USA and you wish to enter, you first go to a US consulate (an arm of DOS - Department of State or State Department) for the appropriate visa stamping.

For instance, for a tourist visa, you go the US consulate in your home country, follow their procedures and apply for a "B-2" visa. When you get the B visa stamp you have been permitted by one agency (US State Department) to enter USA. If the visa stamp is valid for 5 years, you may travel to USA any time during those 5 years. This is your first permission in the dual permissioning system.

Now with the B-2 visa, you travel to USA. When you land at the US port, CBP (an arm of DHS - the Department of Homeland Security) decides whether you will be allowed to enter USA and how long you can stay in USA. The permission to stay in USA is given to you in the form of a small card that is put inside your passport. This card is called "Arrival Departure Record" or Form I-94. The I-94 has an expiration date.

Once you are inside USA, you are "in status" only till your I-94 is unexpired. If you wish to seek an extension of your stay, you must request USCIS (another arm of DHS) for an extension.

Authorized Period of Stay

Authorized period of stay means you are not illegal but you are not in full status. Taking the example of B-2 extension I was discussing above, let us say you want to stay longer than the stay initially given on your I-94. You will need to apply for an extension BEFORE your current status (the termination date on your I-94) expires. Once you have made a timely application for extension or a change of status (for instance you wish to change to H-1B), you can continue to stay in USA till your application is decided (but not past the point you had asked for as an extension). The moment your I-94 expires, you go from being "in status" to being in "authorized period of stay." This is less than full status (for instance you cannot change status within USA when you are in authorized period of stay, but you can do so when you are "in status."

Authorized period of stay also applies to people who have applied for the last step of their green card, "Adjustment of Status" (AOS or I-485). When someone files an appropriate AOS, they are in authorized period of stay until their AOS is adjudicated, no matter how long it takes.

Unlawful Presence

This is the real bad one you have to watch for. If you accrue 180 days of unlawful presence in USA, you are barred from entering USA for 3 years. If you are unlawfully present for one year, you are barred for 10 years. This is referred to as the 3/10 bar. A rule of thumb is, unlawful presence begins to accrue when your I-94 expires and you have done nothing to extend/change your status or when the government says your unlawful presence has begun (typically happens when an extension or change of status is denied).

In AOS (I-485) Context

Quote: Hope you remember me. I am one of your clients and you had represented me for my H1-B. Today I was laid off from my employer who was the H1-B sponsor. I have my AOS EAD as a beneficiary to my husband's PR process. I am concerned about my status in the US. My husband is also on EAD as he recently changed his employer using AC-21. Could you please help me? What status am I on now? Can I stay in the US? I currently have a valid I-94 in my passport. I need to decide the future course of action

Ans. You are now in authorized period of stay and can legally stay in USA. To work, you will need an EAD and to travel an AP.

In Change of Status Context

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Q. I am currently on H4 visa and the expiration date of my I-94 is May 23, 2009. My spouse

had applied for an extension during the last week of April 09. In between, I received an offer for MS course at Penn state University, PA - US. I am planning to join school again on F1 visa since I have received assistantship/ financial aid from my University. I am planning to join for Fall 09 semester which begins in August 09.

Since I have to apply for a change of status from H4- F1 , is it possible to do this having applied for H4 extension now? Is there any way by which I can submit an application for F1 visa directly to USCIS without going for H4 extension?

Ans. The rule of thumb is you can always apply for COS when you are in status, but not when you are in authorized period of stay. Upto 23 May, you are still in full H-4 status. After that day you will move to authorized period of stay because your H-4 status would have expired. So, if you file for a COS now, it should be fine. After 5/23 you have two choices. Wait for H-4 to be extended, then apply for COS to F-1 OR go outside USA any time and get F-1 visa stamping.

Unless the context shows otherwise, all answers here were provided by [Rajiv](#) [2] and were compiled and reported by our editorial team from comments and blog on [immigration.com](#) [3]

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