The Law of United States Work Visas

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1. Immigration Law Basics

1.1. Everyone Has an Immigration Status

In order for any person to enter and remain in the United States to accomplish any purpose, that person must have permission from the US government in the form of a particular status. That status can be citizenship, permanent residence (often called a "green card"), asylum, or one of the other types of temporary statuses granted (often called "visas").

All employees of a company must have work authorization permission. For US citizens, this authorization is intuitive – that is, it is granted by the government "incident to status" and inherent in the very fact that the person is a citizen. The right to unrestricted employment is one of the rights in the bundle of rights granted by the government upon receipt of citizenship. However, this fact is often not acknowledged for what it is, that is, until the employer must verify whether its employees have permission to work in the US In the case of citizens, this permission is evidenced by possession of US citizenship, which, as an immigration status, comes with the unrestricted right to work incident to status. Therefore, immigration law governs all employees, even US citizens.

In the larger picture, immigration law fulfills many functions, not the least of which are designating who is qualified to pursue certain activities in the US, regulating the application procedure, admitting individuals into the US and controlling the borders, and establishing permissible and impermissible facts about a person that can lead to that person's expulsion from the US.

For each status available, the person derives permission to do certain things, for example, US citizens derive the permission to vote, lawful permanent residents may live and work in the US indefinitely, recipients of asylum can remain in the US and not be returned to the country they fled from, persons on student visas can study at a school, tourists can visit temporarily, and individuals on work visas can work temporarily.

Although we are accustomed to frequent discussions of free trade in the international arena, employment-based immigration laws are designed to, and have the effect of, insulating national labor markets from free market pressures on a global scale. The rules governing employment-based nonimmigrant status establish who qualifies to work in the US. These rules establish criteria that are seen not to have an adverse effect on the US labor market such as certain education, skills and duties, period of employment, and often, nationality. The understanding is that allowing certain types of jobs to be filled by foreign labor increases the competitiveness and hiring capacity of US businesses, whereas other types of jobs take away existing jobs from US workers. Whether we agree with this policy is another matter, but this is the assessment made in promulgating immigration laws. Therefore, we can say that the employment-based nonimmigrant regime is essentially protectionist and designed to minimize the effect of foreign labor availability on the US labor market.

1.2. What is an "alien"? What is a "green card"?

When we use the word "alien" we often think of science fiction movies, but the word has a particular meaning in the context of immigration law. Its meaning is simply any person who is not a citizen. This is the first, and most important, immigration status distinction. Is is often confused with "green card". A person with a green card is an alien (not a US citizen) who has permission to live and work in the US indefinitely. If that person qualifies, he may apply for "naturalization", which is the process of becoming a US citizen. However, until he takes the naturalization oath, he remains an alien.

1.3. Temporary and Permanent Immigration

Of all of the aliens coming to the US for work, tourism, study or any other reason, an initial important distinction must be made. This distinction is between temporary and permanent immigration.

- Temporary immigration, usually referred to as *nonimmigrant* status, is generally for a shorter period of time and often is only for single projects or to account for temporary shortages of available US employees, although nonimmigrant status can extend for several years. Aliens and employers frequently, however, use the temporary immigration categories in order to have an immediate temporary status in the US while the alien and employer pursue permanent immigration, and such use can be acceptable.

- Permanent immigration, usually referred to as *immigrant* status, is a long-term, multiyear process culminating in lawful permanent residence (a "green card") based on a permanent job offer from a particular employment sponsor.

This book will discuss both scenarios: (1) an alien coming to the US in a nonimmigrant temporary working status who will depart the US upon the expiration of his term of status, and (2) an alien pursuing the long process of obtaining permanent residence.

However, we cannot overlook the fact that these two processes are often conducted at the same time. The most common scenario is an alien coming to the US in a nonimmigrant temporary working status (again, often called a "visa") who, after arriving, begins the application process for permament immigration (often called a "green card"). This book will primarily discuss nonimmigrant status and will only secondarily discuss permanent immigration, insofar as it is relevant where aliens may engage in the immigration process at the same time as holding nonimmigrant status.

1.4. Dual Intent

Before addressing the intricacies of the two processes and how they work together concurrently, mention must be made of the doctrine of *dual intent*. This doctrine dictates that an alien cannot maintain in his head nonimmigrant intent and immigrant intent simultaneously when making any application.[1] If an alien truly seeks permanent immigration, the alien must comply with the permanent immigration process and in most cases may not use a nonimmigrant category to serve as a vehicle to get into the US with less scrutiny and, upon arrival, pursue an immigrant application. This requirement is obviously the complete opposite of the usual scenario of coming to the US on a visa and then applying for a green card. Considering the common scenario mentioned above of using the nonimmigrant category as a bridge to enter and begin a permanent immigration process, the doctrine is in many ways incompatible with the usual manner of permanent immigration for many working immigrants. The question is then how can an alien do it?

The usual solution is to find a visa status that is exempt from the dual intent rule. This rule is an extremely important consideration for many nonimmigrant categories but specifically does not apply to some of the principal nonimmigrant working categories that are discussed here, and

[1] *See* In re H-R-, 7 I. & N. Dec. 651 (R.C. 1958).

is often overlooked. That said, the doctrine remains and is used very frequently by consulates to deny visas for certain other visa categories, especially tourist and student visa applications.

1.5. The Term "Visa" Is Not the Same as "Status"

Before moving any further into the substance of the book, we must take note the terminology used. This book's title refers to "visas" which is, in fact, an incorrect term. The term "visa" is often used to refer to both the visa document stamped in a passport by an embassy or consulate as a prerequisite to travel to a country and also generally to admission in a particular non-immigrant status. Even seasoned immigration practitioners, and this author, often informally say that a person is in the country "on a visa" when in fact that usage is not correct.[2] A visa is merely evidence of the consular officer's review of the alien's qualifications and grant of permission to board transportation, travel to the country, and apply for admission at the border in a particular status.[3] This travel authorization usually takes the form of a stamp placed in a passport. It is this stamp only that is the "visa". The inspecting officer at the port of entry always retains the right to refuse an applicant entry even if holding a valid visa.[4] Provided the alien has applied for admission during the visa's validity period and has been admitted, the alien receives nonimmigrant status for a set period of time and the visa becomes irrelevant since its sole purpose is over (that is, unless the alien leaves the US and seeks entry again, in which case a valid visa is again needed).[5] Therefore, an alien is never in a country "on a visa", but rather pursuant to a particular grant of nonimmigrant status.

One of the sources of the confusion may be the fact that some of the more common visas are issued with validity periods identical to the periods for which the alien will receive authorized stay. Upon admission, the expiration of status is often the same day as the expiration of the validity of the visa. However, this is not always the case and many visas are issued with validity either longer or shorter than the proposed stay.[6] For

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[2] *See, e.g.*, Sheela Murthy, *H Nonimmigrants*, *in* 2 AM. IMMIGR. LAWYERS ASS'N., IMMIGRATION & NATIONALITY LAW HANDBOOK 112, 113 (Stephanie L. Browning, *et al.*, eds., 2004-05) (observing the common mistake of confusing a visa and authorized stay).

[3] Immigration and Nationality Act ("INA") § 221(h), 8 USC § 1201(h) (2006). *Also see* 22 Code of Fed. Regs. ("CFR") § 41.112(a) (2006); 9 DEP'T OF STATE, FOREIGN AFF'RS MANUAL ("FAM") § 41.112 Note 2.11.

[4] *See id.*

[5] *See id.*

[6] *See*, e.g., INA § 222(g), 8 USC § 1202(g) (invalidating the individual's remaining validity of his visa if the individual remains in the US beyond the shorter period of stay granted upon admission); 8 CFR § 214.2(b) (a business visitor "may be admitted for not more than one

example, an alien could be admitted on the last day that his visa is valid, but permitted to stay in the US for the next three years. The reverse is also true: the alien could have a visa with a ten-year validity, but only be admitted to the US for six months at a time. If the visa is valid longer than the stay, the alien will receive a certain term at admission and must exit before its expiration, not before the expiration of the visa. The person may return another day, still during the visa's validity, to request another period of stay. On the other hand, if the visa's validity is shorter than the proposed stay, then the alien merely has a shorter window of time during which admission must be requested; however, the period of stay will not be limited to the visa's validity and may in fact extend beyond the visa expiration.[7] If the alien decides to leave the country and return after the visa expiration, even if only for a brief trip, the alien must apply for and receive a new visa from the country's foreign mission in order to receive renewed permission to apply for entry.[8]

One final note about visas and their statuses is their names. The various nonimmigrant statuses are given names from the alphabet, which corresponds to the section in the Immigration and Nationality Act ("INA") where they are codified. For example, there is "A" status, "B" status, "C" status, "D" status, and so on all the way to "V". Presumably in the future, Congress may add "W", "X", "Y" and "Z" visas, but for now those letters are unused. Some of these statuses are also given numeric subcategories. For example, there is "E-1" and "E-2" status, "F-1" and F-2" status, and so on. There are even sub-subcategories such as "H-1B" and "L-1A". Both the status of the alien and the visa that is issued to the alien are referred to by the same alphabetic-numeric system, so an alien might apply at a consulate for an E-1 visa in order to travel to and apply for admission to the US in E-1 status. The particular alphabetic-numeric designation for each status will be discussed in more detail in sections to follow, but this book will not address all of the statuses from "A" to "V", since only a few of them are for employment. The other statuses are for diplomats, tourists, students, trainees, interns,

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year and may be granted extensions of temporary stay in increments of not more than six months each"); 9 FAM § 41.54 Note 21.2(a) (describing the practice of visa issuance reciprocity, in which visas are issued for less than the approved period of stay and the consular officer must annotate the visas to indicate to USCBP the correct period of authorized stay so that it is not confused with the visa's validity period).

[7] *See* 22 CFR § 41.112(a); 9 FAM § 41.112 Note 2.11; Henry J. Chang, *E Nonimmigrants*, *in* 2 AM. IMMIGR. LAWERYS ASS'N, IMMIGRATION & NATIONALITY LAW HANDBOOK 186, 201-02 (Stephanie L. Browning et. al. eds., 2004-05) (noting the extreme case of treaty trader or investor admissions in which the alien may receive a two year period of stay even if the visa has only one day of remaining validity).

[8] *See* Chang, *supra* note 7, at 202.

government officials, performing artists on tour, victims of trafficking, law enforcement informants, etc.

1.6. Types of Employment Authorization in the US

As stated above, no person has authorization to work in the US unless the federal government grants the person employment authorization in the exercise of its plenary power to do so. If an alien wants to work in the US, he needs a status that gives him that authorization.

Contrary to casual usage, the US does not have a single, standard "work permit" scheme similar to that of other countries. As a result, the employer must be aware that there are three categories of employment authorization, and that each category has specific kinds of documents that evidence authorization.[9] The alien may qualify for

- Unlimited duration, unrestricted authorization for any job;
- Temporary duration, unrestricted authorization for any job; or
- Temporary duration, restricted authorization for a certain job.[10]

Although the employer need not be an immigration law expert with complete knowledge of the various statuses discussed below, preferably the employer will have a familiarity with the three categories.

1.6.1. Unlimited, Unrestricted Employment Authorization

The first category of employment authorization is authorization granted "incident to status." Persons falling in this category have automatic, inherent, unrestricted employment authorization that does not expire, and are generally free to work for an employer of their choosing, in a position of their choosing, and at a wage of their choosing.[11]

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[9] *See generally* 8 CFR § 274a.12-.14 (2004); 56 Fed. Reg. 41,767 (Aug. 23, 1991); 55 Fed. Reg. 25,927 (June 25, 1990).

[10] *See generally* id. *See* 8 CFR § 214.2 (specifically including persons in E-1, E-2, H-1B, I, L-1, L-2, O-1, O-2, P-1, P-2, P-3, Q, and R statuses; crewmen in C status while in transit; and status pursuant to the North American Free Trade Agreement (hereinafter "NAFTA"), Dec. 8, 11, 14, & 17, 1992, *reprinted at* 32 Int'l L. Materials 289 (1993) (regarding Parts 1-3) *and* 32 Int'l L. Materials 612 (1993) (regarding Parts 4-8); *implemented into US law by* NAFTA Implementation Act, Pub. L. No. 103-182, 107 Stat 2057 (Dec. 1993) (hereinafter "NAFTA Act").

[11] *See* 8 CFR § 274a.12(a) (2004).

This category includes:

- US Citizens;[12]
- Legal permanent residents ("green card"); and
- Certain other temporary residents.[13]

These statuses are presented only for purposes of reference and will only be discussed in this book where necessary.

1.6.2. Temporary, Unrestricted Employment Authorization

The second category of employment authorization is eligibility for authorization, but the person is required to apply for a temporary, Employment Authorization Document (hereinafter "EAD") before taking up employment.[14] This category includes:

- Applicants for "adjustment of status" to permanent residency (*i.e.* persons who have applied for a "green card" and are waiting for a decision);[15]
- Citizens of the Federated State of Micronesia or the Marshall Islands;[16]
- Fiancées[17] and certain spouses of US citizens;[18]
- Parents of dependent children granted US legal permanent residency;[19]
- Persons in certain temporary, nonimmigrant statuses;[20]
- Certain students;[21]
- Certain spouses and children of nonimmigrants;[22]

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[12] Although US Citizens are not listed in the regulations for this category, for purposes of discussing the function of employment authorization, US citizenship may be considered falling within this category.

[13] Only temporary residents under INA §§ 245A or 210.

[14] *See* 8 CFR § 274a.12(c) (2004).

[15] *See* 8 CFR § 274a.12(c)(9) (2004).

[16] Although there is a proposed rule to eliminate the requirement for an EAD.

[17] Only fiancées admitted to the US on a "K" visa.

[18] Only spouses admitted on a "K" visa.

[19] Only parents of dependent children granted legal permanent residency as special immigrants under INA § 101(a)(27)(I).

[20] Including persons in S, T, U, or V status, or in Q-2 status pursuant to the Irish peace process.

[21] Including students in F-1 status with approved "Occupational Practical Training," international organization employment, or employment because of severe economic hardship, *see* 8 CFR § 274a.12(c)(3)(iii) (2004), and students in M-1 status *See*king employment for practical training following completion of studies.

- Certain personal domestic servants;[23]
- Certain employees of foreign airlines;[24]
- Applicants for asylum;[25]
- Refugees;[26]
- Asylees (*i.e.* persons who have received a grant of asylum);
- Certain parolees;[27] and
- Other persons benefiting from certain forms of relief from deportation or removal.[28]

The alien applies for an EAD by filing an application with US Citizenship and Immigration Services ("USCIS") and paying the fee. No fee is required for those who are authorized incident to status but still need to apply for the EAD;[29] for spouses or unmarried dependents of international government or organization employees in A-1, A-2, G-1, G-3, or G-4 status;[30] or for applicants for asylum.[31]

USCIS is mandated to adjudicate an EAD application within ninety days of receipt.[32] USCIS may take up to ninety days to adjudicate notwithstanding the requirements of the Administrative Procedures

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[22] Including spouses and unmarried children of international government and organization employees in A-1, G-2, G-3, and NATO status; spouses and children of exchange visitors in J-1 status; and spouses of employees in E-1, E-2, L-1A, or L-1B status.

[23] Including servants of employees in B-1, B-2, E-1, E-2, F-1, H-1B, I, J-1, L-1A, L-1B status; status pursuant to NAFTA; or US citizens living abroad. *See* 8 CFR § 274a.12(c)(17) (2004); Operating Instructions ("OI") § 214.2(b); 9 FAM § 41.31 n. 6.3.

[24] *Generally* airline employees do not need separate employment authorization since they are usually admitted in E-1 or E-2 status under the terms of a treaty of Friendship, Commerce, and Navigation. However, where no treaty exists, airline employees are eligible for an EAD when admitted in B-1 status.

[25] Including applicants for either asylum or withholding of removal whose application has been filed and pending for 150 days, or whose application has been recommended for approval but not yet granted.

[26] Only refugees admitted to the US under INA § 207 or paroled into the US.

[27] Only parolees under 8 CFR § 212.5 (2004).

[28] Including persons granted deferred action; registry applicants; applicants for "Temporary Protective Status," legalization, cancellation of removal under INA § 240A, suspension of deportation under the former INA § 244, or special rule cancellation in removal proceedings; and persons with a final order of removal who are under supervision, if the person can show an economic necessity, dependents, and the length of time before removal from the US Including aliens benefiting from withholding of deportation, Temporary Protected Status, or "Voluntary Departure" pursuant to the family unity program. All others seeking or having obtained Voluntary Departure for other reasons are not generally eligible.

[29] *See* 8 CFR § 274a.12(a) (2004).

[30] *See* 8 CFR § 274a.12(c)(1), (4) (2004).

[31] *See* 8 CFR § 274a.12(c)(8) (2004).

[32] *See* 8 CFR § 274a.13(d) (2004).

Act[33] regarding reasonableness of delay because the delay must be considered within the context of the resources provided by Congress.[34] However, due to massive backlogs, USCIS rarely adjudicates an application within the mandatory ninety-day timeframe. Accordingly, if the application has been pending for ninety days, the alien is automatically eligible for an interim EAD card with a validity of up to 240 days, with the sole exception of asylum applicants.[35] The alien must apply for an interim EAD in person at the nearest USCIS District Office. If the pending EAD application is denied, then the interim EAD is also automatically terminated.

Please note that, as described above, the EAD will indicate an expiration date, however the nature of the expiration date will differ depending on the category in which the alien's employment authorization falls as listed above. If the alien is required to apply for employment authorization, then the expiration date of the card is likely to also be the expiration date of the authorization. However, if the alien is authorized incident to status, then the expiration date of the card may merely reflect an expiration of the document, not of the authorization, much like the expiration of a passport does not evidence the expiration of citizenship. Since a card may expire independently of the underlying employment authorization, or, in the case of interim EADs, a card may evidence validity when the employment authorization application itself was denied, the EAD should only be seen as evidence of the grant of employment authorization and not conclusive.

The validity period of the EAD differs according to category, but is generally issued for one year. This short period of validity usually causes a large degree of inconvenience for many applicants and employers. USCIS consistently fails to adjudicate the applications in the 90-day mandatory period, requiring aliens to apply for interim EAD cards, and the interim cards are often approved for less than the maximum regulatory period. Moreover, in some cases, USCIS has still not adjudicated the EAD before the interim EAD expires, requiring aliens to apply for extensions of the interim card. Recognizing the massive burden of paperwork for an application that is almost always granted, and in many cases is mandatory, USCIS has proposed to replace the rigid validity schedule with a flexible validity determination based on several factors, including the applicant's immigration status, general

[33] Pub. L. 79-404 (June 11, 1946), 60 Stat. 238, *codified at* 5 USC § 500 *et seq.*; *recodified by* Pub. L. 89-554 (Sept. 6, 1966), 80 Stat. 383.

[34] *See* 5 USC § 555(b) (2004); Singh v. Ilchert, 784 F. Supp. 759 (N.D. Cal. Jan. 3, 1992).

[35] *See* 8 CFR § 274a.12(c)(8) (2004); *but see John Doe I*, 690 F. Supp. 1572 (finding that rule applied to asylum applicants before change to current rule).