

## USCIS Adjudicator's Field Manual, Chapter 23.2(j) – General Adjustment of Status Issues

### (j) Effect of Departure While Application Is Pending.

#### (1) General Rule.

Except as discussed in paragraph (2), if an applicant for adjustment of status departs from the U.S. without first obtaining an advance parole, he or she has abandoned the application for adjustment as of the time of the departure. (See Chapter 54 of this *field manual* for information regarding the adjudication of an application for advance parole.) If during the course of your adjudication of an application for adjustment you determine that the applicant had abandoned the application before by departing without first obtaining an advance parole, you must terminate the application, citing the alien's abandonment of it as the reason for the denial. However, such termination is without prejudice to the filing of a new application for adjustment if the alien is eligible to do so. See 8 CFR 245.2(a)(4)(ii) .

#### (2) Exceptions to the General Rule.

Certain applicants for adjustment of status before USCIS are not considered to have abandoned their applications simply by having departed from the U.S., even if they did not obtain an advance parole prior to their departure. The following aliens fall within the exceptions to the general rule:

##### (A) H and L Nonimmigrants with "Dual Intent."

Under 8 CFR 214.2(h)(16)(i) and 8 CFR 214.2(l)(16) , H-1B, H-1C, L-1A, and L-1B nonimmigrants, and their dependent family members in H-4 or L-2 nonimmigrant classification, may be eligible to maintain and extend their nonimmigrant status while their applications for permanent residence under section 245 of the Act remain pending. The approval of a labor certification or preference visa petition or the filing of an adjustment of status application may not be the basis for a denial of an application for extension of stay by an H-1B, H-1C, or L-1 nonimmigrant or an application for change of status within the H-1B, H-1C, or L-1 classifications.

As long as an H-1B, H-1C, and L-1 nonimmigrant remains compliant with his or her nonimmigrant classification, including restrictions on periods of stay, changes in employers, and conditions of employment, the mere fact that he or she has filed an application for adjustment of status does not render him or her ineligible for an extension of nonimmigrant status. Similarly, the mere fact that an alien has filed an application for adjustment of status does not make him or her ineligible for nonimmigrant classification as an H-1B, H-1C, or L-1.

Under 8 CFR 245.2a(4)(ii)(C) , H-1/H-4 or L-1/L-2 nonimmigrant adjustment of status applicants who are not in exclusion, deportation, or removal proceedings are not required to seek advance parole to travel abroad. They may be readmitted to the United States in the same status they maintained at the time of their departure, provided that they are able to demonstrate to the immigration officer at a port of entry that they:

- remain eligible for H-1/H-4 or L-1/L-2 classification,
- are in possession of a valid H-1/H-4 or L-1/L-2 nonimmigrant visa (if a visa is required), and
- are coming to resume employment with the same employer for whom they had been authorized to work as an H-1 or L-1 nonimmigrant (or, in the case of dependents, the spouse or parent through whom they received their H-4 or L-2 status is maintaining his or her H-1 or L-1 status).

If there has been a recent change of employer or extension of stay, the applicant, in order to comply with the third requirement noted above, must have evidence of an approved I-129 petition in the form of a notation on the nonimmigrant visa indicating the petition number and the employer's name, or a notice of action, Form I-797, indicating approval.

#### (B) K-3 and K-4 Nonimmigrants.

Aliens present in the U.S. in a K-3 or K-4 nonimmigrant classification may travel outside of the U.S. and return using their nonimmigrant K-3 or K-4 visa, even if they have filed for adjustment of status in the U.S. prior to departure. USCIS recognizes that although the K-3 and K-4 statuses are nonimmigrant classifications, aliens entering with this status have an intent to stay in the U.S. permanently. The definition of a K-3 or K-4 nonimmigrant alien does not require that such an alien have a foreign residence that he or she has no intent of abandoning. Such aliens are married to a U.S. citizen (or the child of a U.S. citizen) and are coming to the U.S. to live with their spouse (or parent). Accordingly, USCIS will not presume that departure constitutes abandonment of an adjustment application that has been filed.

#### **Note**

This rule is different for a K-3 or K-4 nonimmigrant than for fiancés and their children (K-1 and K-2). USCIS notes that applicants for adjustment of status who entered as a K-1 or K-2 nonimmigrant, and who later filed to adjust status, will continue to be required to obtain advance parole to avoid abandonment of their adjustment application upon departure, as provided in 8 CFR 245.2(a)(4). This is the case because K-1 and K-2 aliens have only a 90-day period of admission prior to being required to marry the citizen petitioner and file for an adjustment application. Unlike those in K-3 or K-4 status, K-1 and K-2 aliens will have no status or visa to fall back on following the filing of their adjustment application.

#### (C) V-1 and V-2 Nonimmigrants.

A V nonimmigrant with a pending Form I-485, Application to Register Permanent Residence or Adjust Status, does not need to obtain advance parole prior to traveling abroad. Section 1102(d) of the LIFE Act amends section 214 of the Act to include V nonimmigrants in the list of nonimmigrant classifications that may have dual intent. This means that an alien in V nonimmigrant status may be considered a nonimmigrant despite the fact that he or she is an intending immigrant with a filed application for adjustment of status or an immigrant visa. Aliens with dual intent, including V nonimmigrants, do not need to obtain advance parole to

protect their pending applications for adjustment of status from being considered abandoned when they depart the U.S.

### **Note**

An alien who obtained a V nonimmigrant visa from a consular office abroad may be inspected and admitted to the U.S. in V nonimmigrant status after traveling abroad as long as the alien possesses a valid, unexpired V visa and remains eligible for V nonimmigrant status, even if he has applied for adjustment of status. However, as a general matter, an alien who was granted V nonimmigrant status in the U.S. by USCIS will need to obtain a V visa from a consular office abroad in order to be inspected and admitted to the U.S. as a V nonimmigrant after traveling abroad. (The alien will not need to apply for a V visa abroad in order to be admitted if he or she has traveled to contiguous territories or adjacent islands, had previously been admitted on another valid visa, and is eligible for automatic revalidation.) Procedures for obtaining a V nonimmigrant visa abroad are found in the Department of State regulations at 22 CFR 41.86 . In addition, the alien must remain eligible for admission in V nonimmigrant status. (See *IFM* Chapter 15.3 regarding automatic revalidation.)

(D) Applicants for Permanent Residence under Section 209 of the Act,

Applications for adjustment of status filed by asylees and refugee are governed by 8 CFR 209, not by 8 CFR 245. Unlike 8 CFR 245, there is no provision in 8 CFR 209 which mandates that the asylee or refugee's adjustment application be considered abandoned by the alien's departure from the U.S. while the application is pending. Instead, 8 CFR 209 holds that (among other requirements) in order to be eligible for adjustment, the alien's status as a refugee or asylee in the U.S. must not have been terminated. Mere departure from the U.S. does not terminate an asylee or refugee's status in the U.S.; however, such person is required to obtain a Refugee Travel Document in order to travel outside the country.

<http://www.uscis.gov/portal/site/uscis/menuitem.f6da51a2342135be7e9d7a10e0dc91a0/?vgnnextoid=f7e539dc4bed010VgnVCM1000000ecd190aRCRD&vgnnextchannel=fa7e539dc4bed010VgnVCM1000000ecd190aRCRD&CH=afm> (Accessed 10/10/2012)