

To Extend or Not to Extend?
Are NIV Extensions Necessary With Pending AOS Applications?

Internet rumors are buzzing about a recent memo released by the USCIS which implies that one becomes deportable when they fail to renew their nonimmigrant status, despite the pendency of their adjustment of status (AOS) petition. Long has this been one of those all-so-familiar gray areas for the USCIS, which has yet to be clarified. To determine whether the interpretation of the recent USCIS memo has any credence first we must look at the historical record of this issue.

This issue was first broached during the 2002 release of the National Security Entry-Exit Registration System (NSEERS). The NSEERS system was implemented as a system for tracking and monitoring certain nonimmigrants who are admitted into the United States. In a memo by then Executive Associate Commissioner, Office of Field Operations, Johnny N. Williams, Williams describes the purpose of NSEERS as being "to ensure that certain aliens, whose presence in the United States requires closer monitoring in the national security and/or law enforcement interests of the United States, provide specific information at regular intervals to verify their compliance with their visa and admission, and to verify that they depart the United States at the end of their authorized stay." (INS Memorandum, "Field Instructions on Conducting 'Call-In' Special Registration" (Nov. 27, 2002), *posted on AILA InfoNet at Doc. No. 02121241* (Dec. 11, 2002).

Backlash occurred when a number of people who had registered for the NSEERS system were put in deportation proceedings for failure to renew their nonimmigrant status, even though they had their I-485 Adjustment of Status petitions pending. In another Williams Memorandum issued January 8, 2003, additional guidance was given to officers on when to use prosecutorial discretion, particularly in these situations. Commissioner Williams writes:

Registrants in Unlawful Status with Applications for Benefits Pending. Call-in registrants who are not in lawful status may request or apply for benefits that, upon approval, would provide valid immigration status or relief from removal, such as adjustment of status (I-485)...**The mere filing of an application for benefits does not in and of itself mean that an NTA should not be issued.** However, the exercise of prosecutorial discretion may ordinarily be considered by the registering officer if a call-in registrant has a currently filed request or application for a benefit, appears to be immediately and prima facie eligible for the benefit sought, and if no adverse or disqualifying information is developed through indices checks or other sources. If prosecutorial discretion is exercised in favor of the alien and no NTA is issued, registration may be completed and the request of application for the benefit adjudicated in the normal course of proceeding without referral to an enforcement officer. If the request or application is ultimately denied, removal proceeding should ordinarily be initiated.

(INS Memorandum, "Supplemental NSEERS Guidance for Call-in Registrants" (January 8, 2003), *HQOPS 50/5.11.*) emphasis added.

This memo seems to indicate although an alien has filed an AOS application the filing alone does not protect the alien from being put in deportation proceedings. The memo highlights the basis

for this issue: what the USCIS considers the difference between “Unlawful Status” and “Unlawful Presence”.

It is crucial to note that pursuant to INA § 212(a)(9)(B)(i), “unlawful presence” (defined below) of 180 days up to 1 year will bar one from entry into the U.S. for a period of 3 years and “unlawful presence” of more than 1 year will bar one from entry for 10 years. The Immigration and Nationality Act (INA) defines “Unlawful Presence” as follows:

[A]n alien is deemed to be unlawfully present in the United States if the alien is present in the United States after the expiration of the period of stay authorized by the Attorney General or is present in the United States without being admitted or paroled. (INA §212(a)(9)(B)(ii).

Although both of these concepts are related (i.e. one is in unlawful status when accruing unlawful presence), they are not the same and hence where the confusion lies.

Typically, unlawful presence will accrue for nonimmigrants for periods of stay beyond the I-94 date. Nonimmigrants who timely file their extension or change of status applications do not accrue any unlawful presence, but upon denial of the application, the unlawful presence clock will start up. If the nonimmigrant untimely files a request for change of status or extension of stay that is ultimately denied, that individual can be determined to have been accruing unlawful presence retroactively to the expiration date of his/her initial period of admission.

An exception to this rule lies where an alien has a pending Adjustment of Status application. An alien holding a properly filed AOS application is in a period of stay authorized by the Attorney General. In the recent memorandum issued by Acting Associate Director Donald Neufeld, he provides an example where an alien’s nonimmigrant status expired, but the pending AOS application has tolled the unlawful presence clock:

Example 2: An alien admitted as a nonimmigrant, with a Form I-94 that expires on January 1, 2009. On October 5, 2008, he properly files an application for adjustment of status. He does not, however, file any application to extend his nonimmigrant stay, which expires on January 1, 2009. The adjustment of status application is still pending on January 2, 2009. On January 2, 2009, he becomes subject to removal as a deportable alien under section 237(a)(1)(C) of the Act because he has remained after the expiration of his nonimmigrant admission. For purposes of future inadmissibility, however, the pending adjustment application protects him from the accrual of unlawful presence.

(USCIS Memorandum, “Consolidation of Guidance Concerning Unlawful Presence for Purposes of Section 212(a)(9)(B)(i) and 212(1)(9)(C)(i)(I) of the Act”, (May 6, 2009) pg. 10).

In other words, although technically following the expiration of his nonimmigrant status he is in unlawful *status*, he is not accruing unlawful presence. As stated in the Neufeld memo, “there are situations in which an alien who is present in an unlawful status nevertheless does not accrue unlawful presence. As a matter of prosecutorial discretion, DHS may permit an alien who is present in the United States unlawfully, but who has pending an application that stops the accrual

of unlawful presence, to remain in the United States while the application is pending. In this sense, the alien's remaining can be said to be "authorized". However, the fact that the alien does not accrue unlawful presence does *not* mean that the alien's presence in the United States is actually lawful." (*id.* pg. 9).

We return back to our initial question then. Should one renew their nonimmigrant status if they have a valid pending AOS application and Employment Authorization Document (EAD)? As stated by an AILA representative "after the uproar over the NSEERS proceedings, they (i.e. USCIS) have rarely put anyone with a pending AOS's in proceedings, but they adamantly take the position that they can—they just refrain as a matter of prosecutorial discretion." It seems the USCIS likes to reveal that they have this power, but will they use it, likely not. As such, I would conclude one is safe to not renew their Nonimmigrant Status once expired, provided their AOS application is properly, timely filed and their EAD is valid.

###

Written by:

Amy Dalal, Attorney
Hammond Law Group, LLC
ard@hammondlawfirm.com
(513) 381-2011

Please visit www.hammondlawfirm.com for more information.