

Adjusting Your Life to Suit your Adjustment
Do's and Don'ts for Foreign Nationals with Pending AOS
Applications

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Rita McCarthy, Counsel, focuses her practice on business immigration issues for a vast range of corporate clients in the research, technology, and non-profit sectors, among others. She guides clients to the right immigration solution for every stage of their career, from trainee to specialist to executive, and helps their employers navigate the complexity of the various agencies involved in processing immigration applications including U.S. Citizenship & Immigration Services, the U.S. Department of Labor, the U.S. Department of State, and U.S. Customs & Border Protection. Rita also counsels multinational managers, persons of extraordinary ability, foreign investors, and Canadian and Mexican professionals applying for TN status. She has extensive experience in all aspects of employment based green cards, including PERM labor certification, immigrant visa petitions, adjustment of status, and consular processing.

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Khandikile “Khandi” Mvunga Sokoni, Counsel, focuses her practice on a wide range of business immigration matters for a variety of clients. Prior to joining Grossman Young & Hammond, Khandi was a Partner with the firm True, Walsh & Sokoni, LLP where she focused on both general corporate law and immigration law, finding her true passion at the intersection of both practice areas. In her ten years there, she handled a wide range of immigration matters representing individuals as well as corporate clients including those in the software development, architectural and engineering industries.

After graduating from Cornell Law School, Khandi joined the Ithaca City Attorney’s Office. Khandi spent 13 years as an attorney for the City of Ithaca, including six years as Assistant City Attorney.

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The names and hypothetical scenarios outlined in this presentation are fictional. Any similarity to any real life situation is purely coincidental.

Introduction





Introduction

With recent shifts in immigrant visa availability and COVID-related complications, new and more complex questions are arising about travel, work, and maintenance of nonimmigrant status while an AOS application is pending. In today's presentation, we discuss important considerations foreign nationals ought to look out for to ensure their actions do not jeopardize their pending AOS applications or other future immigration benefits.

Terms

- **Adjustment of Status (AOS)** – process of applying for permanent residence from within the U.S. No need to return to your home country.
- **Employment Authorization Document (EAD)** – a document that establishes work authorization for a period of time.
- **Advance Parole (AP)** – a travel document that allows you to travel back to the US without applying for a visa.
- **Green card (officially known as a permanent resident card)** - the document issued to show that a person has permanent residency.
- **Immigrant Visa Petition (IVP)** – a petition filed on behalf of a foreign national by either a relative, an employer, or in some cases by the foreign national, that can be used by the foreign national to apply for permanent residence.

Scenario 1: Joe Uno



Scenario 1: Joe Uno

- Joe has been an F-1 student for years, pursuing a PhD in Biomedical engineering.
- Joe secured an OPT work authorization internship with U.S. company after graduating.
- Joe and his girlfriend, a U.S. citizen, want to tie the knot.



How will getting married and applying for a green card affect their lives?

Scenario 1: Joe Uno

Question 1

Once they file an immigrant petition and AOS application, will Joe still be able to use the F-1 visa stamp in his passport for travel to visit family in his country of birth, Ireland, and return to pursue his OPT employment in the US?

- A. No, Joe would not be able to use his F-1 stamp in this case. F-1 is a *non-immigrant* status. F-1 holders must maintain a foreign residence and show non-immigrant intent. After filing an AOS application, Joe would not be able to show nonimmigrant intent. By travelling before receiving his AP he would abandon his AOS application. By returning on AP, Joe would lose his F-1 and, thus, his OPT.

Scenario 1: Joe Uno

Question 2

Joe's OPT employer is eager to continue Joe's employment long-term. With a green card as an option is there any need to pursue, say, an H-1B visa?

- A. There may be tangible benefits of petitioning for an H-1B visa including the fact that H-1B is a dual-intent status and could offer travel conveniences. These will be addressed in more detail later in the presentation.

Scenario 1: Joe Uno

Question 3

Joe applied for AOS and he and his employer finally decided to move forward with filing for a change of status from F-1 to H-1B. Joe's OPT EAD expired January 30, 2021 and his 60-day grace period expired March 31, 2021. Is he eligible for a change of status?

- A. No. Joe no longer is eligible because his student status expired and he has no underlying nonimmigrant status from which to change. The pending AOS application does not help. A pending application for AOS permits the applicant to remain in the U.S. in a period of stay authorized by the attorney general. This period is not a "status" from which you can change.

Scenario 2: Jane Dos



Scenario 2: Jane Dos

- Jane is an F-1 student who will complete her studies this coming May.
- She is married to a U.S. citizen and has a pending AOS application.
- She would like to maintain her F-1 status and apply for OPT work authorization.



Will Jane be eligible for OPT despite her pending AOS?

Scenario 2: Jane Dos

Question

Does Jane's pending AOS application preclude her from applying for OPT?

- A. As an F-1 student, Jane may apply for OPT and STEM OPT while her AOS application is pending. As long as she complies with F-1 regulations, her SEVIS record should not be terminated and she will be eligible for associated benefits.

Scenario 3: Tim Tres



Scenario 3: Tim Tres

- Tim is a citizen of Bangladesh with E-2 investor status, which expires on June 30, 2021.
- Tim's E-2 employer is interested in sponsoring him for an employment-based green card as an outstanding researcher.
- According to the U.S. Department of State's visa bulletin, immigrant visas are currently available for citizens of Bangladesh in his employment-based category.
- However, even if the I-140 petition is filed by premium processing, the processing time for an AOS application is estimated at 20 months, and the processing time for an AP application is approximately 7 months.
- Tim's employer needs him to travel on international business between June and August.



Tim and the employer are weighing whether to hold off on filing the I-140/I-485 until after the June-August travel commitments or to file now and get the clock ticking on getting the green card.

Scenario 3: Tim Tres

Question

Should Tim and his employer wait to file the AOS until after the travel commitments or should they get started as soon as possible?

- A. Once Tim files for AOS, any travel before securing an AP travel document would result in abandonment of the AOS application. It makes sense for Tim to hold off on filing for AOS until after the required travel. Once Tim returns from travel, a concurrent IVP/AOS can be filed, which will then require Tim to remain in the US until the AP document is approved (which could take up to 7 months).

Scenario 4: Jenny Quatro



Scenario 4: Jenny Quatro

- Jenny is a Canadian citizen working for a U.S. company in TN status.
- She is married to a U.S. citizen and has a marriage-based AOS pending.
- Jenny's approved TN work authorization expires in 6 months.



May Jenny's employer extend her TN status?

Scenario 4: Jenny Quatro

Question

May the U.S. company Jenny works for file for an extension of her TN status?

- A. The TN classification is one of the few unambiguously nonimmigrant visa categories. There is guidance stating that once a TN files an application for AOS, that TN worker no longer is eligible for an extension of TN nonimmigrant status. Jenny would have to depend on the AOS-based EAD or qualify for a change of status to another nonimmigrant visa classification, such as the H-1B classification. If a change of nonimmigrant status is desired, the change request must be filed while the TN still is valid.

Scenario 5 – Carl Cinco



Scenario 5: Carl Cinco

- Carl is an H-1B worker at a U.S. tech company whose status expires in November 2021.
- Carl filed an AOS application and related EAD and AP applications.
- Carl is married to a U.S. citizen.



May Carl's H-1B status be extended? Can he travel?

Scenario 5: Carl Cinco

Question 1

May Carl's H-1B status be extended while his AOS is pending?

- A. Yes, H-1B status may be extended as long the H-1B worker is maintaining H-1B status by continuing to work according to the approved H-1B petition. Because the H nonimmigrant classification (the L visa classification too) permits 'dual' intent, which allows admission as a temporary nonimmigrant with the option to remain permanently, filing for AOS has no impact on whether the H-1B can be extended.

There is some authority suggesting that extension is also possible for some other non-dual intent categories, such as E-1 treaty trader and E-2 treaty investor. There is an INS memo specifically stating that an E-1 or E-2 may maintain status or obtain an extension while, at the same time, pursuing AOS. The Memo states that "an application for an extension of stay that is timely filed on behalf of an E-1, E-2, H-1B, or L-1 nonimmigrant alien may be approved in spite of the alien's pending application for adjustment of status."

Scenario 5: Carl Cinco

Question 2

Carl's brother is getting married overseas. Carl does not have an AP document but does have a valid H-1B stamp in his passport. Will Carl be able to travel to attend the wedding without AP?

- A. Yes. An H-1B worker who is an applicant for AOS who wishes to travel outside the U.S. and reenter while the AOS is pending may travel and return in H-1B status without harming the pending AOS. To return, the applicant must have a valid H-1B visa stamp and be returning to resume the approved H-1B job.

Scenario 5: Carl Cinco

Question 3

Will international travel impact Carl's pending AP application?

- A. Yes. First time AP applicants must remain in the US until the application is approved. All first time AP applicants, even H and L holders, who travel overseas while their AP applications are pending will be deemed to have abandoned their applications.

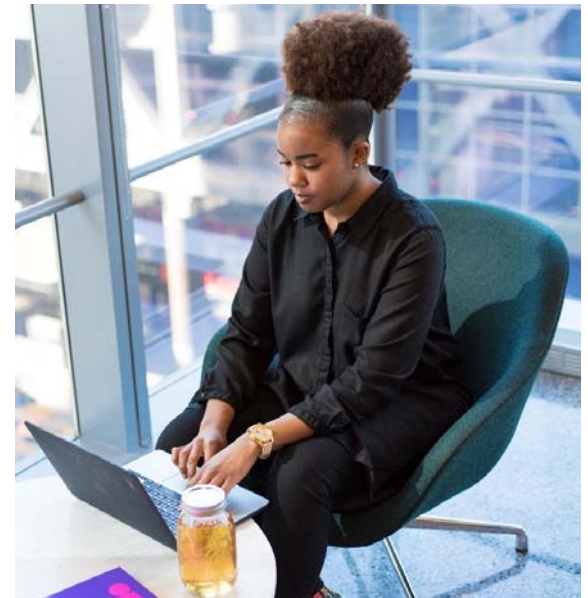
There is a little more flexibility in the case of an AP renewal application. USCIS has taken the position that an individual who has a valid AP document and a pending AP renewal application will not abandon the pending AP application as long as the currently valid AP document is valid for the entire time abroad. That means it must be valid when you leave and still valid when you return.

Scenario 6: Susie Seis



Scenario 6: Susie Seis

- Susie has an H-1B approval notice valid through June 2022.
- She has an AOS pending and recently returned from traveling outside the U.S. to resume her H-1B job.
- Susie did not have a valid H-1B visa in her passport but did have a valid AP document.
- Susie returned on AP.



Will Susie be able to go back to her H-1B work?

Scenario 6: Susie Seis

Question 1

Can Susie be put back into H-1B status after using her AP document to return?

- A. According to Kurzban's (an authoritative immigration reference) the Cronin Memo of May 2000 says, yes, Susie can be put back into H-1B status. Although her H-1B status no longer is valid, she may continue to work for her H-1B employer in the same position she was in prior to international travel. To regain H-1B status, her employer must file an H-1B extension petition. If her employer files an extension and it is approved, her parolee status will terminate and she will return to her H-1B status. (This same situation applies to an L-1 worker who enters on AP.)

Scenario 6: Susie Seis

Question 2

Because she entered as a parolee, does Susie now need separate employment authorization to work?

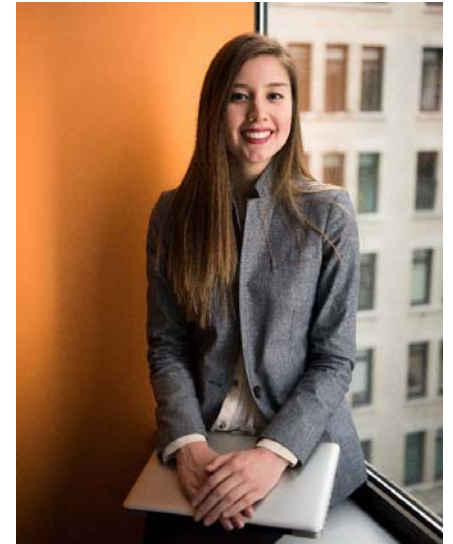
- A. Susie does not need separate work authorization if she was admitted as a parolee and continues to work in accordance with her approved H-1B petition. At this time, it is the position of USCIS that if a foreign national's H-1 or L-1 employment authorization would not have expired, had that foreign national not left and returned under AP, USCIS will not consider the failure to obtain a separate employment authorization document to mean that s/he engaged in unauthorized employment by working for the H-1 or L-1 employer.

Scenario 7: Sarah Siete



Scenario 7: Sarah Siete

- Sarah applied for AOS and received an AOS-based EAD.
- The EAD expires April 10, 2021.
- Sarah filed an EAD renewal application on February 1, 2021 that is still pending.



What is Sarah going to do about work after April 10th?

Scenario 7: Sarah Siete

Question

May Sarah continue working after her AOS-based EAD expires on April 10th?

- A. Yes, USCIS will automatically extend work authorization for certain expiring EADs for up to 180 days as long as certain conditions are met:
- 1) The renewal application must be filed before the current EAD expires;
 - 2) The EAD renewal must be in a category that is eligible for an automatic 180-day extension; and
 - 3) The category on the current EAD and the category requested on the renewal EAD application must be the same.

For example, if Sarah's current EAD lists her eligibility category as (c)(9), a category for pending adjustment of status applicants, and her renewal application meets all the requirements, including requesting EAD renewal in the (c)(9) category, she will be eligible for an automatic EAD extension of up to 180 days beyond April 10, 2021. A list of EAD categories eligible for automatic extension of up to 180 days is on the USCIS website.

Scenario 8: Ollie Ocho



Scenario 8: Ollie Ocho

- Ollie is interested in changing employers to accept a full-time permanent job offer.
- Ollie has a pending AOS application that is based on an employment-based IVP filed by his current employer offering him a permanent, full-time job as a Software Developer. The IVP was approved and Ollie's AOS application has been pending for a year.
- Ollie's prospective employer is offering him a full-time permanent job as Principal Software Developer.



Will Ollie be able to accept this new job?

Scenario 8: Ollie Ocho

Question

May Ollie change employers and accept a new, full-time, permanent job even though the new job was not part of the employment-based IVP approved by USCIS?

- A. Certain employment-based AOS applicants may change jobs or employers while their AOS applications are pending, if they meet certain requirements. Generally, to be eligible for this benefit, the AOS applicant:
- 1) Must be the beneficiary of an approved employment-based IVP;
 - 2) The AOS application must be pending 180 days or more at the time of the change request;
 - 3) The new job must be in the same or similar occupational classification as the job specified in the approved IVP;
and
 - 4) Form I-485 Supplement J must be submitted to request the change.

Ollie meets provisions 1 and 2 because he has an approved employment-based IVP and his AOS application has been pending more than 180 days.

He also meets provision 3 because the job offered by the new employer qualifies as same or similar.

Questions?





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Thank you!