

Hey, Can I Go Now? Travel Issues at Every Stage of the Game

Dotty Horton

dorothy.horton@unt.edu

David Ware

dware@david-ware.com

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What Will You Learn?

- Advising a student or scholar on travel outside the US is fraught with uncertainty and liability.
- This session will take you from F's and J's to other nonimmigrant visa types, all the way to persons applying for and who have received permanent residence. What are the tricky in's and out's? How to advise in each instance?

Order of Presentation

- General “rules of the road”
- Travel by those who are undocumented/OOS
- Nonimmigrant travel issues
- Travel issues for those contemplating/ applying for permanent residence
- Travel issues for those who are permanent residents

General Guideposts

- In general, every nonimmigrant must have a valid visa and passport, and other documents needed to demonstrate eligibility for the NIV category in which seeking entry. 8 CFR 214.1(a)(3)(i).
- Canadians, some Bahamians, Bermudians, and certain other Caribbean residents are generally not required to have a visa. 22 CFR 41.2(c).

Foreign Visa

- Travelers, particularly those from developing countries, often forget to adhere to visa requirements if they are not going to their home country.
- Most persons require a visa to enter Canada or Mexico.
- Countries of the *Schengen* zone (most of Continental Europe) require a valid US visa in order to issue a visa.
- Obtaining a foreign visa can take weeks and should always be figured into travel plans.

Place of Visa Processing

- DOS policy is that the home country is the “normal” place for NIV processing.
- However, Canada, Mexico, and certain Caribbean countries will also entertain third country national (TCN) applicants.
- Sometimes other countries will accept TCN's, especially if a visa renewal and the person has a valid reason for being there (conference, research, etc).
- Each TCN destination has special rules which should be reviewed prior to making travel arrangements at embassies.state.gov.
- Generally, no one will take B/VWP to anything, OOS, or persons with UP.
- H's, O's are generally easier for TCN processing than F's, J's and M's.

General Guideposts

- F's, J's, and M's who have visited contiguous territory or Caribbean islands other than Cuba for 30 days or less may be readmitted without a valid visa, as long as they have an expired nonimmigrant visa in **any category**, valid passport, **original** I 94, I 20/DS 2019 endorsed for travel, have not applied for a visa abroad, and meet certain other criteria, set out at 22 CFR 112(d), via automatic extension of visa validity (AEVV). Citizens of Cuba, Iran, Syria, N. Korea not eligible for AEVV.
- Other nonimmigrants may be readmitted under the same provision, after a visit of 30 days or less to contiguous territory only (Canada or Mexico).
- Doesn't matter if returning from country of nationality.

AEVV Example

- Carine, an H1B with no valid visa, wants to visit her cousin in Canada for a few days, proceed on to France, and then return through Canada and reenter the US under “automatic extension of visa validity,” within the maximum 30 day period.
- Is Carine eligible for “AEVV”?
- Is her plan wise? Legal?

AEVV Example

- Josep, an F student from Spain, would like to renew his visa in Mexico and then return to the US. He tells you, “If I don’t get the visa, I will just return to the US under automatic revalidation [sic].”
- Will Josep be able to return if he doesn’t get the visa?

Travel Guideposts to Remember

- Each application for a nonimmigrant visa is a detailed exploration of the individual's entitlement to admission to the US in a particular nonimmigrant category, even if a renewal. It is never a routine "stamping" and there is always possibility for delay or denial.
- Each application for a new entry to the US is a whole new ballgame—anything can happen—even if the person has entered in the same category many times before. The CBP officer determines admissibility anew each time.
- So, in advising, never say "you **will** get it," or "you **will** get back in." "**May**" is more appropriate.

Guideposts

- You'll never find this in any guide, regulation, or book, but the reality is this:
 - USCIS is most "liberal" with respect to enforcement of rules regarding travel and related issues.
 - CBP is in the middle, and is often very confused.
 - Consulates are most severe and "absolutist" in wielding rules in this regard.
- Thus the advice you give someone who is applying for a visa, making an entry with a valid visa, or applying for a benefit in the US after travel might each be different!

Example of Differing Advice

- Una, an F 1, has a shoplifting conviction. She stole baby clothes from Wal Mart in the amount of \$24.79. She was fined \$100. She is:
 - Planning to apply for a new F visa in home country, or
 - Has a valid visa but is planning to go home for Christmas, or
 - Would like to change status to F 2.
- Would your advice differ in each situation?

Example of Differing Advice

- Jeremy, a J 1, has recently married a US citizen. He would like your advice on:
 - Changing status to F 1 (he is not subject to 212(e)), or
 - Going to England on his honeymoon (his visa is valid), or
 - Getting a new visa in England while on his honeymoon (his visa has expired).
- Would your advice differ in these situations?

General Danger Signs for Travel

- Prior immigration violations/unlawful entry to US
- 222(g)—overstay/visa cancellation/no third country NIV's
- Prior unlawful presence—3/10 year bars to reentry
- Prior visa denial or visa cancellation with prejudice
- 214(b)—explicit or imputed
- COS in US and applying in new category (eg B 2 to F 1).
- Pending COS/EOS
- On OPT (but your experience may vary)
- Fraud profile
- Odd travel patterns
- Short travel time: don't have time for visa processing
- SEVIS termination, even if "innocent".
- Prior criminal history of any kind.
- Persons likely to be subject to security checks: common name, TAL issues, persons from certain areas of the world, with certain travel patterns.

Travel by Undocumented/OOS/ Overstays

- We use “undocumented” to mean someone who entered the US without paperwork or by fraud (eg, came across the border surreptitiously).
- “Out of status” means someone who has not complied with the conditions of their nonimmigrant admission (eg, F working illegally).
- “Overstay” means someone with a date certain I 94 who has stayed longer than permitted (eg, B 2 whose I 94 expired in December).

The Undocumented

- Persons who are undocumented begin to accrue “unlawful presence” (UP) in the US at age 18, in most cases.
- Once more than six months but less than a year UP has accrued, if the person leaves, he or she is barred from the US for three years.
- A year or more of UP creates a 10 year bar.
- Returning to the US without permission after accruing one year or more of UP results in a “permanent” bar to admission.
- INA Sec. 212(a)(9).

The Undocumented

- The undocumented, because either they have too many months of UP, or they cannot demonstrate a residence abroad they have no intention of abandoning, almost never get nonimmigrant visas abroad.
- So, advising an undocumented person to travel, for any reason, is always unwise, unless they have no intention of returning to the US.
- Likewise, issuing an I 20 or DS 2019 to such a person is always a bad idea, as the terminated record will bring ICE a'calling.

The Out of Status

- Persons who violate their status in the US are at risk for travel as they have a hard time convincing the consul and/or CBP that they will comply with their NIV category if given a new visa or readmitted.
- So, even if the person has a valid visa, readmission to the US may be difficult if CBP detects the violation (eg, terminated SEVIS record).
- Keep in mind that the internet has made detection of violations much easier!

Overstays

- Persons who overstay their period of authorized admission are subject to Sec. 222(g) of the INA: their visa is automatically cancelled and they must seek all new visas in the home country.
- Such persons may also have accrued UP.
- Even if UP is minimal, chances of getting a new visa and admitted to the US are usually nil.
- F's and J's, admitted D/S, are never considered overstays unless USCIS or an immigration judge makes a written filing of a violation of status.
- However, F's who are denied reinstatement become overstays and subject to these rules.

Nonimmigrants and “Residence Abroad”

- Certain nonimmigrant classifications are required to demonstrate a “residence abroad they have no intention of abandoning” in order to seek a visa, entry to the US, change of status, or extension of stay.
- The most typical examples with this requirement on campuses are F, J, M, B, TN, H1B1 (Chileans/Singaporeans), and E 3.

“Residence Abroad”

- The implication of the “residence abroad” requirement is that those nonimmigrant categories cannot take any step towards permanent residence, nor declare their intention to apply for PR to a government official, lest they call into question their “residence abroad.”

“Residence Abroad”

- Other nonimmigrant classifications lack the “residence abroad” requirement, such as: O’s, H1B’s, E 1/2’s, L’s, A’s, G’s, R’s, NATO.
- Conversely, those not saddled with the requirement may take steps towards permanent residence without jeopardizing future visa issuance or entries to the US.

Some Examples

- Maxim has always meticulously maintained F status. Two years ago, he married a US citizen, filed for permanent residence, but withdrew his application for adjustment of status when the relationship foundered. His SEVIS record has remained active and he will finish his Master's degree this semester.
- May he travel at spring break and get a new visa for return?
- If his visa is valid, is he at risk of leaving and reentering?

Some Examples

- Srilatha, an H1B faculty member, has an approved I 140 immigrant petition but can't apply for adjustment of status yet because her priority date is not yet current.
- She's never had an H visa before and has an appointment to get one in Chennai.
- She is concerned about question 36 on Form DS 156, "Has anyone ever filed an immigrant visa petition on your behalf?"
- Should she be concerned?

Arrival Just Before COS

- The doctrine of “preconceived intent” holds that arrival in the US in one nonimmigrant category, with the intent of changing to another, usually amounts to deception, and requests for change of status in such situations will be denied.
- Generally, either: 1) a request for change of status filed within 60-90 days of arrival; or 2) a change of status request with documents dated within 60-90 days of arrival, will result in denial of COS because of preconceived intent. *Matter of Rapacon*, 14 I & N Dec. 375 (RC, 1973); 9 FAM 40.63 n. 4.8; but see, *Matter of Cavazos*, 17 I & N Dec. 215 (BIA 1980).
- “Preconceived intent” may not be applicable if the two visa statuses require the same or similar intent, eg, B 2 to H 4.

Travel After COS/Visa Issuance

- In general, travel after change of status from B, or following a fact pattern which may be construed as involving preconceived intent, may result in visa denial in the new category at the consulate.
- Consuls are much more strict on this issue than USCIS, so the fact that COS was granted in the US means ***nothing!***

COS Example

- Mayra arrived on December 12 as a B 2, and comes to your school on January 12 wanting to change status to F and enroll in ESL classes.
- Can she enroll?
- Can she file for change of status and if so when?
- If she obtains change of status, can she then go home to Honduras for a visit?

Travel during EOS (extension) or COS (change of status)

- J's and F's, except in very rare instances, do not request extensions of stay. Issuance of a new DS 2019 or I 20 are not considered an "extension" per se. 8 CFR 214.1(c)(2).
- With respect to most nonimmigrants, travel will not result in abandonment of a request for extension of stay. Moreover, if the application was timely filed and nonfrivolous, no unlawful presence accrued while it was pending. Cook Memo, 6/18/01.

Travel and EOS/COS

- Caveats to travel while EOS pending (usually applicable to work related categories):
 - Person must be physically present when EOS filed. 8 CFR 214.2(h)(15)(ii).
 - If visa issuance is required, will only be issued for prior petition, as new petition has not been approved and entered into PIMS. DOS Cable 6/11/2001.
 - Alien must arrive at POE prior to expiration of prior stay; I 94 upon reentry will only be given to expiration of prior petition. Pearson Memo, 1/29/2001.
 - When new petition is approved, is that the “last action” extending the period of stay given at POE?

Travel and EOS/COS

- Traveling while COS is pending automatically results in a withdrawal of the request to change status. Cook Memo, 6/18/01.
- So, for example, if a petition based COS (H1B), the petition will be granted, COS denied, and the person will have to pick up the visa outside the US.
- If based on an I 539, the person will have to apply for the visa in the new category at a US consulate.

EOS/COS Examples

- Evelyne has applied to extend her O status, but has an emergency and must travel before it is approved. She has a valid visa until the end of her previously approved O petition.
- May she travel and reenter prior to the end date on her prior O petition?
- Does her previously requested extension of stay remain valid despite her departure?
- If she is granted the extension after reentry, which I 94 governs, the one from the POE or the I 797?

EOS/COS Examples

- Ernesto has OPT valid until May 15. On April 1, his employer filed a request for change of status to H1B on his behalf, which is pending. He would like to travel on May 1, and has an F visa valid until August 15.
- Can he travel? Why or why not?

Special Situations: Cap Gap Travel

- “Cap gap” protection was provided to students via the new OPT rule of 4/8/08, providing that students whose OPT ends on or after April 1, receive an extension of OPT and D/S as long as an H1B petition with a start date of 10/1 is properly filed prior to the expiration of their OPT.
- USCIS has stated that students may not travel during the “cap gap” even if the change of status to H has been approved, since for reentry a valid EAD card is required, 8 CFR 214.2(f)(13) and a “cap gap” student’s EAD would necessarily be expired. USCIS FAQ’s 4/1/09.
- SEVP has stated cap gap travel “risky” but apparently referring to situations where COS still pending. SEVP 2009 Guidance Memo, 9.4.2.

Special Situations: F Absences

- Any absence from school, except during medical leave, study abroad, or breaks (including summer) should result in termination of the SEVIS record. Such termination may or may not result in difficulties at reentry.
- An absence of five months or more from the US causes automatic cancellation of the visa.
 - **9 FAM 41.61 N17.4** F And M Visa Invalidation after Five Months Abroad
 - A. "Students admitted to the U.S. in F-1 or M-1 status may lose that status if they do not resume studies within five months for transferring schools or programs. Unless USCIS reinstates the student's status, the student's F-1 or M-1 visa would also be invalid for future travel."

Other “Visa Cancellation” Situations

- Mere termination of a student’s record does NOT result in automatic cancellation of his/her visa, but obviously can create difficulties in getting new visas, reentry.
- Falling out of status, absent an official finding to this effect by USCIS or an Immigration Judge, does NOT automatically cancel the student’s visa, but likewise can cause future problems.

Old Visa, New Form

- F's and M's, once an initial entry is made, may travel on a new I 20 from a different school, with the visa bearing the previous school's information, assuming a valid transfer. 9 FAM 41.61 n. 17.2.
- J's may not use a prior program's visa with a new DS: "An exchange visitor must not use any single J visa for a program other than that specified on the [visa] annotation..." 9 FAM 41.62 n. 8.7.
- H's who change employer may also continue to use the prior employer's visa during its validity, with a new I 797. 9 FAM 41.53 n. 8.3-3.

Old Visa, Change Example

- Abiora came in as an F to study at Oregon State University, whose name appears on his five year visa. Two semesters later, he transfers and gets an I 20 from SUNY, goes home for Christmas, and wishes to return to study at SUNY.
- Can he? Does he need to get a new visa?
- What does he need at the POE?

Old Visa, Change

- Helga worked at another institution and got her first H visa “stamp” with their name and petition number endorsed on it. She’s now been at your school as an H for one year, and wants to go home for a few weeks. The visa will not expire until 2011.
- Does she need to get a new visa?
- What does she need to have at the POE?

Moving Towards PR

- If the person has the “residence abroad” (F, J, M, B) requirement, any step towards PR can cause difficulties in travel, including:
 - Marriage to a US citizen (doesn't matter if paperwork filed)
 - Plan to file immigrant petition shortly after return
 - Filing of immigrant petition
 - Filing of adjustment of status

Moving Towards PR, Example

- Klaus was previously your student but has just returned on a Visa Waiver to marry his college sweetheart, a US citizen.
- They plan to honeymoon right after the wedding in the Black Forest, then return to the US and file his PR paperwork. They have prepaid their tickets and hotel for Germany.
- Is this advisable or even possible?

Moving Towards PR

- Maria is a J research scholar who has two years left on her program. She has filed a National Interest Waiver petition, which is pending. She has received a waiver of the two year home residence reqt. Her mother has become ill and she needs to return to Peru to visit her. Her J visa is expired.
- Is travel advisable in Maria's case? How could she make the trip less risky?

Moving Towards PR

- Conversely, starting PR, if in a category without the “residence abroad” requirement, has no effect on extensions, entry, or visa issuance.

Moving Toward PR Example

- Winnie is an H Assistant Professor. She wishes to marry a USC colleague, file all her paperwork, and then leave on honeymoon to Uganda.
- Alternatively, Winnie would like to marry and immediately depart for her honeymoon, then return and file her papers.
- Is either of these alternatives advisable?
- Would your answer be different if Winnie were applying for AOS based on employment?

Travel and Advance Parole

- “Advance parole” is a benefit generally granted to applicants for adjustment of status, which allows them to proceed abroad and return during the validity of the parole document. The document can be used for multiple entries to the US.
- A person who has returned to the US is a “parolee”, and is not admitted in a nonimmigrant category.

Travel and Advance Parole

- H1B's and L's who have applied for adjustment of status do not need advance parole in order to return to the US, but will need a valid visa if they do not have AP.
- H's who return to the US in parole status do not need a work card, and are considered to be authorized to work for the H employer for the duration of the H petition validity.
- Cronin Memo, 5/25/00.

Extension of Paroled H

- To extend the work authorization of a paroled H, you must request an extension of stay on Form I 129 (and I 539 for dependants, if any), with this wording in the cover letter: “Please admit Dr. X as an H1B nonimmigrant and extend his stay until ____, as he was most recently paroled into the US on _____. Please see attached Cronin memo of 5/25/00.”

Example: Paroled H

- Claude and his wife Yoriko, both Canadian citizens, return to the US on advance parole following denial of Claude's EB 1 I 140. Your H petition for Claude is valid until August 5, 2010 (first period). Yoriko has an old H 4 I 94 valid to the same date. Neither applied for an EAD.
- Is Claude authorized to work for your institution?
- In order to keep Claude work authorized and Yoriko in status, what do you need to do?

Travel and Advance Parole

- All other nonimmigrants who apply for adjustment of status need advance parole to travel.
- If they travel without advance parole, the adjustment application is considered withdrawn, and USCIS is strict in enforcing this.
- Evidence of departure is pretty accurate.
- Even if departure not detected, wisest choice in such circumstances is to refile AOS.

Parole Example

- Lili is an F 1 student, but her husband Xiaoqing is an H. They have applied for AOS based on the husband's approved I 140. They leave for China without informing your office, and neither has advance parole. Lili's visa is valid.
- Will this cause any problem with their pending applications?
- How should they return to the US?
- What if they applied for AOS during "Visagate" and their priority date is not yet current?

Expedited Advance Parole

- In emergent cases, it is sometimes possible to expedite advance parole.
- This was previously done at District Offices of USCIS but is now done at the Service Center handling the application for adjustment of status.
- Expedite request and documentation can either be included with the original application or sent later.

Advance Parole and TPS

- Persons granted TPS are eligible for advance parole.
- It is possible to maintain nonimmigrant status and still enjoy TPS; it is not a nonimmigrant “status,” nor a declaration of immigrant intent, so there is no prohibition on simultaneously being a nonimmigrant, provided the person otherwise maintains status.
- However, once the person is readmitted as a “parolee” nonimmigrant status ends in most cases.
- Also, persons who have accrued UP should not utilize AP, since in doing so, they may become subject to the 3/10 year bars.

Travel by Permanent Residents

- All travel issues end with PR, right? Wrong!
- Permanent residents who remain outside the US more than six months at one time may be refused entry as having abandoned residence.
- Persons outside the US for more than one year will be presumed to have abandoned and generally will not be readmitted.
- Extended absences can also impede naturalization.

Travel by LPR's

- A reentry permit can resolve this issue for persons who need to be out more than six months (Form I 131).
- An N 470 permits persons working outside the US for an American institution to preserve some physical presence in the US for naturalization purposes.
- Persons who have been convicted of crimes (even minor ones) may have problems reentering the US and should always seek the advice of an immigration attorney before attempting travel.
- Persons granted asylum, then PR, who return to the persecuting country may be refused admission or have other issues upon return.