Overview of Key Concepts in Nonimmigrant Visa Practice: December 2020

WHAT IS A "VISA"?

The U.S. immigration system is complex and navigating even the basic concepts can be tricky. Before assessing visa options for a client, it is necessary to first understand the distinction between three key concepts: visa foil, visa status, and visa classification. While these three concepts are closely connected, they fall within the purview of different government agencies, are subject to different procedural and substantive requirements, and have a different effect on the applicant. A visa foil is a stamp placed in the foreign national's passport by the U.S. Department of State through a consular post abroad. Visa status is conferred by the U.S. Customs and Border Protection (CBP) upon the foreign national's entry to the U.S., or by U.S. Citizenship & Immigration Services (USCIS), an agency within the Department of Homeland Security, via a change of status. Visa classification (i.e. visa category) determines the scope of permissible activities of the foreign national while she is in the United States. There is also an important distinction between an immigrant visa (relating to permanent resident status, also known colloquially as green card) and nonimmigrant visa (relating to temporary classifications). This article will deal primarily with nonimmigrant (temporary) visas.

As a threshold matter, a person who is not physically in the U.S. does not have any particular status in the U.S. In other words, the concept of visa status only applies to those individuals who are physically present on U.S. soil. A visa foil (visa stamp) is a travel document issued by a U.S. consular post abroad. It enables the applicant to travel to the U.S. to apply for admission in a particular category. It does not guarantee admission to the U.S., and it does not confer any status to the visa holder. Rather, it is a key which enables the visa holder to request admission to the United States. Visa foil issuance falls solely within the purview of the U.S. Department of State.[i] Consular officers have broad discretion to determine whether the applicant is eligible for a visa, assessing both eligibility for the category in which visa is sought and also general admissibility of the applicant. Eligibility for certain visa categories requires prior approval by USCIS. Common examples are H-1B and O visa categories. Prior petition approval from USCIS is both required and serves as prima facie evidence of eligibility for the category. In addition, an applicant may be denied a visa if they are found to be inadmissible due to a prior immigration violation, criminal record, or failure to establish requisite intent.

Visa status is generally conferred by CBP upon the foreign national's application for admission at the port of entry. In simple terms, this occurs when the foreign national arrives at the airport or a land border and goes through customs. The applicant is required to present a passport containing a valid visa foil (unless the applicant is a Canadian citizen or is traveling on ESTA), and demonstrate to the satisfaction of the border patrol officer both the eligibility for the visa

category sought and general admissibility to the U.S. Admissibility is assessed by the CBP officer irrespective of prior determination by the State Department. Upon the determination of applicant's eligibility to enter, the CBP officer issued an I-94 entry/departure record specifying the classification and period of admission. The expiration date on the I-94 record controls the foreign national's period of stay regardless of the expiration date on the petition approval notice or visa stamp.

For applicants who are already in the United States, visa status can also be conferred by USCIS as a result of a request for a change of status or an extension of stay. USCIS, too, undertakes a de novo review of the foreign national's eligibility for the visa category as well as eligibility for a change of status based on admissibility. If a change of status or an extension of stay request is granted by USCIS, the foreign national is not required to travel abroad and apply for a visa foil. They can remain in the U.S. for the duration of approval. However, leaving the U.S. subsequent to the grant may necessitate applying for a visa in order to return. Upon the issuance of the approval of the change of status or an extension of stay request, USCIS issues a Form I-797 Notice of Action attaching an updated I-94 record which supersedes the I-94 issued by CBP upon the previous entry to the U.S.

Having been previously granted a visa classification, visa stamp and admission to the United States does not guarantee future visa issuance. All applications are reviewed de novo. Most temporary visa classifications require the applicant (whether the application is for a visa stamp at the consulate, application for admission at the border, or application for classification through USCIS) to demonstrate an intent to return to the home country upon completion of stay in the U.S. The presumption is always that the applicant intends to remain in the U.S. indefinitely and seek permanent resident status. It is, therefore, incumbent on the applicant to rebut this presumption by showing compelling evidence of their ties to the home country. The only clear exceptions to this rule are H-1B, H-4, L-1 and L-2 visa applicants, where temporary intent is not required, and the applicant may simultaneously pursue permanent residence in the U.S.

DEEPER DIVE: CONSULAR PROCESSING vs. CHANGE OF STATUS

When a foreign national seeks to travel to the United States, they first must apply for a visa foil at a United States consulate. However, if an individual is already in the United States in a specific nonimmigrant status and would like to change to another nonimmigrant status, there are two options: 1) Consular Processing: The individual leaves the United States, applies for the new type of visa foil at a United States consulate, and then re-enters the United States with the new visa. 2) Change of Status: The individual (or, in some cases, an employer) applies to change the nonimmigrant status to that of a different visa category. The change of status application can be made by mail within the United States to USCIS.

From a technical legal perspective, both these routes achieve the same result – changing the I-94 admission record to reflect a different status. When consular processing, the individual abandons the initial status and admission period by departing the United States. They then return and are issued a new I-94 record with a new status and admission period. Conversely, when changing status, the very same I-94 record and admission number that the individual received upon arrival in the United States is changed to reflect a different nonimmigrant status category.

The decision of which route to take can be complex and should involve an in-depth evaluation of the legal and factual circumstances. Thus, one has to be both knowledgeable and careful when advising on this area. But here are some basic points to consider. The change of status route allows the applicant to remain in the United States during the process. This route avoids separation from friends and family in the United States. In addition, this route is advantageous for people for whom international travel is difficult or risky. Some people have nonimmigrant status situations where an application at a consulate abroad could result in additional security checks or subject the applicant to an unreasonable level of scrutiny. On the other hand, consular processing can be quite convenient for people who have a professional or personal need to go abroad. Also, in many cases, the change of status process is very lengthy – months, as opposed to weeks – for consular processing. And, while waiting for the change of status process to complete, the foreign national cannot engage in the very activity for which they need a change of status.

A good example of this last point is a situation where an individual is in the United States in B-2 visitor for pleasure status and wishes to change to F-1 student status in order to attend a university. An application to change to student status can make many months, and the individual may not enroll in classes until the process is complete. In the meantime, they also cannot work or leave the United States. However, if they leave the United States and apply for an F-1 student visa at a consulate, they may be able to re-enter the United States and begin courses within weeks.

COVID: WHEN A PANDEMIC HALTS TRAVEL

Even when the consular processing route is preferred by the applicant, there are situations in which the individual must apply for a change of status because consular processing is not an option. This became very clear when the COVID-19 pandemic spread across the world in 2020. Travel became dangerous and consulates, where one would apply for a visa, were either closed or heavily restricted.

In addition, a series of Presidential Proclamations prohibited consulates from issuing certain work visas and banned most nonimmigrant travel from countries that were deemed to be

COVID-19 hotspots. As a result, even if an applicant was able to leave the United States and secure an appointment at a US consulate to apply for visa, they may not be able to actually obtain the visa or return to the United States.

Nonetheless, even for targeted countries and visa categories, consular processing continues to be an option for some during COVID. Interestingly, since the Presidential Proclamations contained exceptions for people whose travel to the United States would be in the national interest, an entire sub-area of immigration law and practice developed surrounding the legal requirements and process to obtain a National Interest Exception ("NIE"). In order to obtain an NIE, the individual applies to a consulate, or sometimes to the US Customs and Border Protection ("CBP") office at the airport, for permission to be issued a visa and/or travel to the United States for a significant economic or humanitarian need.

A great many NIEs have been granted under this exception, even in highly meritorious cases, the path to an NIE remains unclear. The precise rules and process keep shifting, and each consulate and CBP office seems to have its own procedure and adjudication standards. Therefore, before applying for an NIE, it is important to check the latest information from the Department of State and the relevant consulate or CBP office. It is also advisable to manage the expectations of the applicant. Many NIEs are not granted, and the applicants can be left stranded abroad.

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The above article was cowritten by Partner Avram Morell, a member of Pryor Cashman's Immigration Group and is one of the premier attorneys in his field. Rosanna M. Fox of Lepore Taylor Fox LLP also contributed to the article. It was originally included in the Practising Law Institute's Litigation and Administrative Practice Course Handbook Series in a book titled "Basic Immigration Law 2021: Business, Family, Natrualization and Related Areas."

[i] In the past, it was possible to apply for a visa stamp through the U.S. Department of State office in Washington D.C. However, in the wake of 9/11, this option has been eliminated.