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Questions and answers

What to do when visas become due

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Termination of visa registration and the ramifications of unauthorized employment are discussed in this last portion of the question and answer guidelines recently issued by the Immigration and Naturalization Service.

The termination provision under the old law made possible the accumulation of unused visa numbers, thus prejudicing the aliens who possessed later priority dates. It now becomes mandatory under the new law for the Secretary of State to terminate the registration of an alien who fails to apply for an immigrant visa within one yearof his notification of visa availability.

The meaning of unauthorized employment as a bar to adjustment of status is clarified. Many doubts occasioned by the new law are resolved.

Under the law in effect on December 31, 1976, the Secretary of State may, in his discretion, terminate the registration on a consular waiting list of any alien who fails to evidence his continued intention to apply for a visa. Is there any change in this regard?

Yes, termination becomes mandatory; instead of discretionary. Section 203 (e) of the Immigration and Nationality Act is amended to require the Secretary of State to terminate the registration of any alien who fails to apply for an immigrant visa within one year following notification to him of the availability of such visa; however, the alien's registration shall be reinstated if he establishes within two years following notification of visa availability that his failure to apply was due to circumstances beyond his control.

Will the validity of an approved preference visa petition be affected by the Secretary of State's termination of registration of the beneficiary pursuant to section 203 (3) of the Act, as amended by P.L. 94-571?

Yes, the approval of such a visa petition shall be automatically revoked as of the date of approval upon termination of registration of the beneficiary by the Secretary of State.

Is there any additional change or modification concerning automatic revocation of approved visa petitions?

Yes, a regulatory modification. The approval of a relative petition will not be automatically revoked upon the death of the petitioner if the Attorney General, in his discretion, determines that revocation would be inappropriate because of humanitarian reasons.

Section 245 of the Act, as amended by P.L. 94-571, requires that an immigrant visa must be immediately available to the applicant as of the date the application is filed, rather than as of the date the application is approved. When is an immigrant visa considered to be immediately available?

An immigrant visa is considered immediately available for accepting and processing a section 245 adjustment application if the preference or nonpreference category applicant has a priority date on the waiting list which is no later than the date shown in the current Visa Office Bulletin on Availability of Immigrant Visa Numbers, or the Bulletin reflects that numbers for applicants in his category are current.

Do alien crewmen constitute the only class of aliens precluded from section 245 adjustment?

No. P.L. 94-571 adds two additional classes: aliens who enter the U.S. in transit without visas (a group already barred by regulation), and aliens, other than "immediate relatives," who after January 1, 1977, continue in or accept unauthorized employment prior to filing a section 245 adjustment application.

An alien has already been granted a labor certification or is granted a labor certification after December 31, 1976, but is ineligible to apply for adjustment of status because an immigrant visa is not immediately available. May the issued labor certification be equated to authorized employment for section 245 purposes?

No. The authority to grant or deny aliens permission to work lies with the Service. If an alien desires permission to engage in employment, he should request such permission of the Service. If permission is granted his Form I-94 will be stamped to indicate his employment authorization.

Will an alien who qualifies for the "investor exemption" from the labor certification requirement under 8 C.F.R. 212.8 (b) (4) be considered to have continued in or accepted unauthorized employment by reason of having acted as a principal manager in connection with his investment?

An alien who **fully qualifies** for the investor exemption will not be considered as performing employment. However, an alien who unsuccessfully seeks the investor exemption runs the risk that work performed in connection with his nonqualifying investment may be considered to be unauthorized employment.

What is considered to be "continuation of unauthorized employment" within the meaning of the provision of law that bars an alien from adjustment of status to permanent resident (Sec. 245)?

An alien who stops his unauthorized employment prior to January 1, 1977, and who **properly** files an application for adjustment of status after January 1, 1977, and resumes his unauthorized employment after filing this application will **not** be considered by the Service to have continued in authorized employment. It should be noted, however, that if this alien's adjustment application is subsequently rejected or denied, he will be barred by law from submitting a new application for adjustment. The bar to adjustment on the ground of unauthorized employment does not apply to the spouse or child of a United States citizen or the parent of an adult United States citizen.

Editor's Note: Mr. Seguritan is a member of the Philippine and New York Bars.