

EXPRESS

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When can you be denied a green card?

QUESTION: I have a 3rd preference visa petition that was filed in September, 1989. In December, 1991, I went to the Immigration Service to file for my green card as I had been told that my 3rd preference was automatically converted to the new employment-based 2nd preference category. I filed an application for adjustment of status since visa numbers for my priority date of September 1989 were available. However, when I was interviewed recently in connection with the said application, I was given a denial. The reasons given to me were that I had worked without authorization, and that I had been out of status at one point. I am a little confused because I have always had an H-1 visa. Please enlighten me.

ANSWER: First of all, let me tell you that there are two ways to apply for a green card: 1) through the normal immigrant visa processing at the US consulate (in Manila for Filipinos), or 2) through adjustment of status. Aliens who are outside the US obviously can apply only by means of the first alternative.

On the second hand, aliens who are in the US may apply through the second, which means that they don't have to leave the US. If they are not approved, they may apply again but only through the visa processing alternative abroad.

It is also important to note that adjustment of status is a privilege and is thus exercised by the INS at their discretion. So that, even if one is a beneficiary of an approved visa petition with a current priority date, he may still be denied.

Generally, the following guidelines should be followed when applying for adjustment of status:

1. The alien must have entered the US with a valid visa. At the port of entry, his passport should be stamped to indicate the non-immigrant classification in which the alien is admitted, as well as the date through which the alien is allowed to stay here.



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2. He should not have been admitted under a D visa, or in transit without a visa, or as an exchange visitor who is subject to the two year foreign residence requirement.

3. He should not have been engaged in unauthorized employment; and

4. He should not be currently out of status or previously out of status.

Going back to your question, it appears that you don't have any problem with the first or second requirement. Let me then explain the third and fourth criteria.

The unauthorized employment must have occurred after Jan. 1, 1977. The rule applies even if you had left the US and came back with another visa. Example: You came to the US as a student in 1980 and briefly, you worked without obtaining a permit from the INS. In 1984, you went back to the Philippines and came back to the US in 1988 with an H-1 visa.

Here's another example: You came here under an H-1 visa in 1988 and you continuously maintained your H-1 visa until now. Does that mean that you have been authorized to work all the time? Not necessarily if you have moonlighted at other jobs without INS authorization. The H-1 visa that was given to you entitles you to work only for the employer that has

petitioned you.

Unauthorized employment also occurs if you transferred to another employment and started to work there before your H-1 approval was obtained.

The condition with regard to an alien being out of status at any time is even more restrictive. The rule is that even one day without a valid immigration status can disqualify you from being approved for a green card in this case. Example: You entered the US as a tourist in 1980 and left the US two days after the expiration of your tourist visa. Even if you came back later with a valid visa, your having left the US two days after your visa expired can be used as ground for disapproval in your application to adjust your status.

The only exception to the rule is what is termed as a technical violation, meaning that the lapse has not been the alien's fault. The following are considered as technical violations, and are therefore excusable: 1) The person designated by law to act on the alien's behalf failed to apply for the visa extension of the alien and acknowledges the failure was his fault; 2. The alien properly filed for extension but somehow the INS failed to act on the application; and 3. The alien was physically unable to apply timely for extension as when he was hospitalized.

(Next topic: What Can You Do If Your Adjustment of Status Application Is Denied? What Are The Risks Of An Interview In Manila?)