

Remedy for Out-of-Status RNs and PTs

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May a foreign registered nurse (RN) or physical therapist (PT) file for a green card while in the US if she has fallen out of status?

This common situation among foreign RNs and PTs arise from a variety of reasons. For instance, the tourist visa of the RN may have expired while waiting for the CGFNS Certificate or NCLEX exam results, or perhaps the H-1B visa of the RN or PT expired or the employment of such foreign worker has been terminated.

Retrogression

At the start of the year, RNs and PTs aiming for employment-based immigration would have been unable to apply for adjustment of status because of the retrogression in the processing of immigrant visa applications for the employment-based third preference category (EB-3) for the Philippines, China and India. In other words, the visa numbers for the EB-3 category for these countries were no longer current or were already unavailable. As a rule, a foreigner may apply for adjustment of status only if the immigrant visa number in the applicable category is current or available.

In an effort to cope with the increased demand for immigrant visa numbers in the Philippines, China and India, the Department of State retrogressed the processing of visa applications to January 1, 2002. Thus, as of January 1, 2005, visa applications with priority dates falling after January 1, 2002 could not be processed until visa numbers are made available.

The cut-off date moved slightly forward during the succeeding months, but a law passed on May 11 providing for the recapture of 50,000 unused EB-3 visas practically eliminated the 3-year delay caused by the retrogression. This law specifically allocated the recaptured visas for RNs and PTs worldwide, causing the visa numbers for this group of applicants to be available and current. As a result, foreign RNs and PTs who are already in the US may now apply for their green card.

Adjustment of Status

Adjustment of status by foreign RNs and PTs may not be so simple, however, for those who have fallen out of status. Generally, a foreigner is not eligible to apply for a green card if she has fallen out-of-status. There are exceptions to this rule though.

The most common recourse for out-of-status foreign workers is Section 245 (i) of the Immigration and Nationality Act (INA). Since this program actually ended on or before April 30, 2001, a growing number of out-of-status aliens would find it harder to meet the eligibility criteria of this provision.

Briefly, the alien must have been the beneficiary of an immigrant visa petition or labor certification application filed on or before April 30, 2001 in order to qualify for Section 245 (i). In addition, the applicant must have been physically present in the US on December 21, 2000 if the petition or application was filed after January 14, 1998. If eligible, the applicant must pay the penalty fee of \$1,000.

Another remedy for out-of-status foreign workers is Section 245 (k). This provision has another set of requirements for eligibility, but unlike the frequently-used Section 245 (i), Section 245 (k) does not require the payment of \$1,000.

Section 245 (k)

Foreign RNs and PTs who have fallen out of status may apply for their green card if they meet the following eligibility requirements of Section 245 (k): first, they must have entered the US lawfully; second, they must be present in the US at the time the adjustment of status application is filed; third, they must *not* have violated the conditions of their stay or engaged in unauthorized employment for an aggregate period not exceeding 180 days as of the date of filing the adjustment of status application.

The adjustment of status application is not affected by status violations occurring *after* it has been filed because the above requirements for eligibility are reckoned from the date of filing. Neither will the application be affected by status violations which occurred *before* the alien re-entered the US and applied for adjustment of status under Section 245 (k). In other words, the requirements for eligibility refer to the last admission to the US that the alien is currently in.

Moreover, the foreign RN or PT may still qualify under this provision even if she worked without permission or violated her status, as long as such unauthorized employment or violation did not exceed 180 days.

Counting 180 days

The aggregate 180-day period must be counted from the last day of the alien's lawful stay in the US. The expiration date of the alien's lawful stay is stamped on the I-94 Departure Record, and depends upon the type of visa under which the alien enters the US.

The expiration date on the I-94, however, is not necessarily the date on which the 180-day period should be counted. Immigration rules allow for a grace period within which the alien can prepare to leave the US after the expiration of the authorized stay. The grace period varies and depends upon the type of visa that the alien has. Such aliens are considered in lawful status for the duration of the grace period even if it is already after the expiration date on their I-94.

The grace period applies when the period of stay allowed in the I-94 expires. The USCIS has yet to clarify whether a grace period applies in a situation where the period of nonimmigrant status is not completed as when the H-1B worker is laid off or the employment is otherwise terminated.

A foreign RN or PT who meets the requirements of Section 245 (k) can certainly apply for a green card, despite having fallen out of status while in the US.