

FILING FOR A CHANGE OF NONIMMIGRANT STATUS:
EIGHT ESSENTIAL RULES TO KEEP IN MIND



by

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After arriving in the United States on a particular visa (whether it be B-1/B-2, F-1, E-2, H-1B or any one of the many nonimmigrant visas), a nonimmigrant may decide that he wishes to change to another nonimmigrant visa status. The process of changing from one nonimmigrant visa classification to another nonimmigrant visa classification is commonly referred to as a “Change of Status” or “COS”. A change of status is governed by various immigration rules and regulations.

The statute which governs change of status requests is Section 248 of the Immigration and Nationality Act (INA). The regulations which supplement the statute and provide additional requirements for change of status requests are found at 8 CFR Section 248. Before applying for a change of status, it is critical to ensure that the nonimmigrant is eligible for a change of status under INA Section 248 and 8 CFR Section 248.

INA Section 248 specifically requires that anyone seeking to change his status must maintain his current status in order to be eligible for a change of status. This means that the nonimmigrant must comply with the terms of his current nonimmigrant status and cannot do anything to violate that status if he wants to change into another NIV status. For example, if a nonimmigrant enters on a B-1/B-2 visa, he must be abiding by the terms of that visa status (visiting for business or pleasure) at the time of filing for the change of status. If he wishes to change from B-2 to F-1, he cannot start school until the change to F-1 status is approved or else the change of status request will be denied. Maintaining the current NIV status is crucial if you wish to change to any other NIV status.

Since the law requires that you maintain your current NIV status, you may be required by USCIS to provide evidence that you are in fact maintaining that status. For example, if an F-1 student wants to change status to E-2 status, he must be able to document that he is going to school and not violating his F-1 status. Typically, we recommend that the F-1 student provide his current SEVIS I-20 and a letter from the Designated School Official (DSO) documenting his current enrollment at school when seeking to change from F-1 status to any other NIV status.

With the foregoing explanation in mind, here are the 8 general rules to keep in mind when considering a change of status:

1. In order to change from one nonimmigrant status to another nonimmigrant status, you generally must be maintaining your present nonimmigrant status. Nonimmigrants who do not maintain their current status or who have fallen out of status are typically not allowed to change their status. In my experience, nonimmigrants tend to focus more on whether or not they are eligible for the particular status which they want to change to as opposed to making sure that they are properly maintaining their current status. For instance, our office recently met with an F-1 student who wanted to change his status to E-2. He identified a business, lined up the money to purchase the business and even began preparing a business plan in anticipation of filing for a change of status from F-1 to E-2. The problem was that he had recently fallen out of status by not taking a full load of courses at his F-1 school. When he went to the school to obtain proof of his current F-2 status, the school informed him that he was no longer in F-1 status. As a result, this person was not eligible for a change of status.
2. With limited exception, the request to change status must be timely filed with the USCIS. For a change of status request to be timely filed, you must properly file the change of status request with the proper USCIS office before the current I-94 expires. F-1 student have what is commonly referred to a 60-day “grace period” (an additional 60 days from the end of their program date or the end of any USCIS-authorized Optional Practical Training (OPT)).
3. In order for a change of status to be approved, there must not be any gap between the end of your current NIV status and the start date of the new NIV status you are requesting. For example, if your current B-2 status expires on September 1, 2007, and you want to change to F-1 status beginning January 1, 2008, the change of status request will be denied due to the status gap between September 1, 2007 and January 1, 2008 (even if the request to change status is filed prior to September 1, 2007).
4. Working without authorization is a violation of nonimmigrant status and can bar a change of status request. All employment must be authorized by USCIS. If you want to change from a status which does not authorize employment to a status which does authorize employment (for example, H-1B, L-1, R-1, etc.), the change of status request must first be approved.
5. F-1s and J-1s are eligible for a change of status during the time period commonly referred to as the “grace period”. The “grace period” refers to the period of time during which the F-1 or J-1 is supposed to be preparing for departure from the United States. As noted above, F-1s receive a 60-day “grace period” (a period of 60 days beyond the expiration of their current program or their employment authorization period). Additionally, J-1s receive a 30-day grace period (a period of 30 days from the expiration of their current J program). The regulations provide that this additional period of time

is to prepare for departure from the United States. However, USCIS has allowed change of status requests during this period.

6. B-2 nonimmigrants cannot attend school until an F-1 change of status is approved. If a B-2 enrolls in school prior to obtaining the change of status from B-2 to F-1, the change of status request will be denied.
7. K nonimmigrants (K-1, K-2, K-3 or K-4) cannot change status. If a person enters as a K-1 fiancé and later decides that he does not want to marry the K-1 Petitioner and would rather file for a change of status, he cannot. INA Section 248 specifically bars a K nonimmigrant from changing to any other status.
8. J nonimmigrants who are subject to the 2-year home residency requirement cannot change status (or adjust status) without first obtaining a waiver of the 2-year home residency requirement. It is critical for any J-1 or J-2 nonimmigrant who wants to change status to first determine if he is subject to the 2-year home residency requirement and then to determine if he is eligible for a waiver of that requirement. For a detailed explanation

The foregoing are 8 general rules to keep in mind when planning on changing status from one nonimmigrant visa classification to another. Obviously, there are many other factors to keep in mind if you are considering a change of status. The key is to plan any change of status carefully and make sure that you are permitted to change from your current status to the new status you are seeking. Proper planning with an experienced immigration lawyer is recommended.

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