

Memorandum

ACTION

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HQ 70/13-P

HQ 70/44.4-P

HQ 70/23.9-P

HQ 70/29.2-P

Subject

Policy Clarification Regarding the
Effect of Filing for Asylum on
Nonimmigrant Classification

Date

APR 29 1996

To

From

District Directors (Including Foreign)
Officers-in-Charge (Including Foreign)
Service Center Directors
Asylum Office Directors

Office of Examinations

Please be advised of the following policy clarification regarding the effect of filing for asylum on nonimmigrant classification:

1) **Nonimmigrant Classification.** While an asylum applicant is authorized to remain in the United States until his or her asylum request has been decided, the act of applying for asylum does not have the effect of extending nonimmigrant status. In fact, the act of filing for asylum does not by itself confer any type of lawful immigration status upon an applicant while his or her application is pending.

Nonimmigrants are strictly limited by the terms of their admission in a specific classification as to the activity in which they may and may not engage. Like other nonimmigrants, a nonimmigrant applicant for asylum may engage only in activities consistent with his or her nonimmigrant classification for the period of the admission specified by the Service on the alien's Form I-94 or, after lawful admission, the period of time specified on the Form I-797.

2) **Maintenance of Status.** A nonimmigrant does not violate status merely by filing an asylum application. However, a nonimmigrant asylum applicant remains in nonimmigrant status only as long as the alien's period of authorized stay as a nonimmigrant has not expired or the alien has not violated nonimmigrant status in some other way.

3) **Employment.** Certain asylum applicants may apply for and be granted employment authorization without restriction to a specific employer. See 8 CFR 208.7. However, a nonimmigrant asylum applicant violates nonimmigrant status if he or she accepts employment that is inconsistent with the terms of his or her nonimmigrant classification. During the pendency of an asylum application, nonimmigrants who wish to maintain nonimmigrant status may work only within the specific terms of their nonimmigrant classification. Thus, a nonimmigrant who applies for asylum may seek open-market employment attendant to the asylum claim, but should be aware of the legal consequences of that decision.

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If the employment is not consistent with the conditions and terms of the nonimmigrant classification, the alien fails to maintain nonimmigrant status. A nonimmigrant in a classification prohibiting employment (a B-2 visitor for pleasure, for example) would violate the terms of that classification by accepting any employment and, therefore, would be unable to change or extend his or her nonimmigrant classification. Similarly, an alien whose nonimmigrant classification authorizes work for only a single employer or company (for example, H-1B or E) would violate that nonimmigrant classification by accepting employment with other than the specific employer.

Additionally, dependents included on a principal nonimmigrant's asylum application who apply for employment authorization pursuant to the asylum claim violate the terms of their nonimmigrant status if they accept employment on terms other than those accorded nonimmigrant dependents in that specific category.

4) Change of Classification. An alien who applies for asylum and continuously maintains lawful nonimmigrant status during the pendency of the asylum claim may, if otherwise eligible under INA 248, apply to change nonimmigrant classification prior to the expiration of his or her authorized period of stay. The rules for timely filing and maintenance of status, found at 8 CFR 248.1(b), apply.

5) Violation of Nonimmigrant Classification During Pendency of Asylum Application. An asylum applicant who chooses to work outside the terms of his or her nonimmigrant classification, whose nonimmigrant status has lapsed, or who otherwise violates the terms of his or her nonimmigrant classification, is not eligible to change nonimmigrant status pursuant to INA section 248, because he or she is no longer in valid nonimmigrant status. See INA section 248. Similarly, except as otherwise provided in INA section 245(c), an asylum applicant who violates the terms of his or her nonimmigrant classification during the pendency of the asylum application may only adjust status pursuant to INA section 245(i), since he or she has failed to maintain continuously a lawful immigration status since entry into the United States. See INA section 245(c), and 8 CFR 245.1(d)(1)(defining "lawful immigration status"). Failure to maintain lawful nonimmigrant status during the period that an asylum application is pending is not considered to be a technical violation under 8 CFR 245.1(d)(2)(ii), since a request for asylum is not considered to be a request to maintain status. As stated in paragraph 1, above, the act of filing for asylum does not by itself confer any type of lawful immigration status to an applicant while his or her application is pending.

Further, an asylum applicant who violates the terms of his or her nonimmigrant classification by working beyond the scope of an authorized nonimmigrant classification, or otherwise, is subject to deportation pursuant to INA section 241(a)(1)(C). The INS, however, as a matter of policy, will not take any action to effect the removal before the Asylum Office has acted on the application.

6) Case-by-Case Comparison. As long as the period of authorized stay has not expired, the determination of whether a nonimmigrant asylum applicant has violated the terms of his or her status

requires a comparison of the terms of the nonimmigrant classification and the employment pursued by the alien as an asylum applicant. In certain nonimmigrant classifications, maintenance of status during the pendency of an asylum claim may have an impact on the alien's asylum claim. For example, the ability of E-1 treaty traders to continue to trade with their home country may raise questions regarding their fear of persecution within their country of nationality or last habitual residence.

7) Approval of Asylum Application. An asylum applicant who has maintained his or her nonimmigrant classification and whose request for asylum is granted relinquishes nonimmigrant classification at the time asylum is granted.

8) Denial of Asylum Application. An asylum applicant whose application is denied and who has violated the terms and conditions of his or her nonimmigrant classification, or who otherwise has not maintained status, is deportable under section 241(a)(1)(C) of the Act for having failed to maintain nonimmigrant status. The INS will take steps to effect such an alien's removal. An asylum applicant whose application is denied and who has continuously maintained nonimmigrant status may continue in that status in accordance with 8 CFR 208.23.

9) Asylum Application Cannot Cure Defects in Status. It should be noted that, in accordance with United States v Bazargan, 992 F.2d 844 (8th Cir. 1993), neither the filing of an asylum application nor the corresponding receipt of broad employment authorization under 8 CFR 208.7 can "cure" a nonimmigrant's deportability or excludability, even when this defect in status only comes to the attention of the Service after a final decision denying the asylum application.

For additional information, contact Miriam Hetfield, HQADN, at 202-514-5014.


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