



Fall 2004

Volume VII, Issue 2

*Editor: Susan J. Cohen, Esquire
Mintz, Levin, Cohn, Ferris,
Glovksy and Popeo, PC*

Contents

**SEPARATING BOND HEARING FROM
REMOVAL PROCEEDINGS**

**TOUGH CHOICES AROUND DURING
ADJUSTMENT OF STATUS PROCESS**

**Separating Bond Hearing from
Removal Proceedings**

By Yvette Lopez-Cooper

In Immigration Court, bond cases are at the top of the priority ladder. The distinct “detained at the government’s expense” sticker is immediately affixed to every new bond hearing file separating it from the other files. The Immigration Judge, law clerk and court staff are also alerted about the urgent matter.

There is no question that the bond hearing is a distinct and separate type of proceeding. Only in bond hearings is the general jurisdictional rule that mandates that the U.S. Immigration and Customs Enforcement agency (“ICE”) file a Notice to Appear with the Immigration Judge to commence removal proceedings suspended. In fact, an Immigration Judge does not need a filed Notice to Appear to conduct a bond

hearing. The bond hearing can go forward even if the Immigration Court has no jurisdiction to commence removal proceedings.

To start the bond process, the Respondent must first request release from the District Director. After the District Director sets a bond, the Respondent can post a bond or challenge the bond amount before an Immigration Judge. Interestingly, an Immigration Judge cannot redetermine a bond sua sponte, but must be asked to do so by the Respondent or his attorney.

In a bond redetermination hearing, the Immigration Judge is being asked to change the Respondent custody conditions that were set by the District Director. In reaching its decision, the Immigration Court will balance the facts presented to determine whether the Respondent is a threat to the safety of the community and/or property and whether he is flight risk. In determining the necessity and the amount of the bond the Immigration Court generally considers the following factors: employment history, length of residence in the community, the existence of any family ties, a record of nonappearance at court proceedings and any previous immigration law violations.

An Immigration Judge has the authority to adjudicate subsequent bond requests. This is true even if the bond file has been sent to the Board of Immigration Appeals for appellate review.

As a general practice, subsequent requests are handled by the Immigration Judge who presided over the bond redetermination hearing.

However, once the removal order becomes administratively final, further determinations regarding custody and bond are made by the District Director. The regulations, statute and immigration policy appear to envision the bond hearing as an efficient and just process. Unfortunately, there have been numerous complaints relating to high bonds and delays in Respondents being released once a bond has been set. It is particularly disturbing when high bonds are ordered by Immigration Judges for asylum seekers despite their lack of a criminal record or prior immigration law violations. Another concern for an immigration practitioner is the fact that the majority of bond hearings are not recorded. Although judicial economy has been cited as a reason for the lack of cassette recorders, there is a legitimate concern that facts raised at the bond hearing are being taken as established facts at the Respondent's removal proceeding. Such activity should constitute reversible error and a recording of the bond hearing would prevent these defects in the record of proceeding.

Many Respondents, especially asylum seekers, lose hope in fighting their removal cases when they are given no bond or a bond that is far beyond their means to post. With the prospect of detention for months during removal proceedings, many Respondents, sadly, opt for voluntary departure.

Bond hearings are unique. The Respondent's due process rights, including the right to freedom, should not be.

Yvette Lopez-Cooper is a former U.S. Department of Justice attorney and currently practices immigration law as a solo practitioner in San Diego, California. She can be reached at lopezcooperlaw@sbcglobal.net.

Setting the Record Straight: Employment and Travel Options for I-485 Adjustment of Status Applicants

By: Susan J. Cohen, Esq.

Applicants for permanent residence who file employment-based permanent residence applications (I-485 "adjustment of status" applications) face an average wait of two years while their applications are pending. A lot can happen during this lengthy processing time, and many applicants face difficult decisions and choices along the way. This article will focus on two aspects of the process that are the subject of intense anxiety and considerable confusion: (1) the right of an adjustment of status applicant to work for an employer other than the one that sponsored his/her I-140 immigrant visa petition; and (2) the right to travel outside of the U.S. during the pendency of the application and the effect on the application of subsequent reentries in Advance Parole, H-1B or L-1 visa status. Hopefully, this article will dispel some of the anxiety and confusion felt by adjustment of status applicants.

Except for beneficiaries of "extraordinary ability" or "national interest waiver" immigrant visa petitions, the general rule is that when the I-485 application is approved, the employment-based adjustment of status applicant is expected to work for the employer that sponsored his/her I-140 immigrant visa petition in the position described in the I-140 immigrant visa petition. In 2000, the Immigrant and Nationality Act ("INA") was amended to allow an exception to this general rule. According to this exception, an application for adjustment of status may still be approved if the applicant works for a different employer as long as three conditions are met: (1) the I-140 immigrant visa petition must have been approved; (2) at least 180 days must have passed from the filing of the I-485

adjustment of status application; and (3) the applicant must continue to work in “the same or similar occupational classification”.

There is a very good reason why many adjustment of status applicants are confused about whether they need to use an Advance Parole document when returning from overseas travel to avoid being accused of abandoning their adjustment of status applications and whether their entry into the U.S. in Advance parole (“parolee”) status requires them to work with an employment authorization documents (“EAD”) as a consequence. The reason for the confusion surrounding these questions is that the U.S. Citizenship and Immigration Services (“USCIS”, formerly known as “INS”) has flip-flopped dramatically on these issues.

Prior to June, 1999, anyone who had filed for adjustment of status who travelled outside of the U.S. and returned without Advance Parole, was considered to have abandoned their permanent residence application. Advance Parole was always required, and subsequent employment in the U.S. required an Employment Authorization Document (“EAD”). On June 1, 1999, the former INS published an interim regulation clarifying that a person in H or L visa status with a still-valid H or L visa in their passport, could travel on such a visa during the pendency of his/her application without abandoning it, as long as the person remained eligible for H or L visa status and was coming to resume employment with the same employer that sponsored his/her H or L visa petition. (This allowance does not apply to persons who are under deportation or removal proceedings.) The interim rule has the weight of law and clarified that H or L visa holders who meet the criteria could either travel with Advance Parole or enter with their visas, without jeopardizing their applications. (A significant distinction is that if the adjustment of status application is denied, those who entered with Advance Parole would find themselves in removal proceedings, while those who entered in H or L status would remain in

status, assuming they hadn’t used an EAD to work for an employer other than their sponsoring H or L employer.)

While the June 1, 1999 interim rule sought to provide helpful guidance, it served to create some confusion as well, because it specifically stated that those people who don’t fit squarely within its parameters “shall be deemed to have abandoned their adjustment of status applications, constituting grounds for termination of the pending application.” Take, for example, the case of someone who enters the U.S. with Advance Parole and uses an EAD to work for an employer other than the one that sponsored his/her H-1B, L-1 or I-140 petition. Rather than renew the EAD, the second employer obtains approval of an H-1B visa petition on the individual’s behalf and sends the employee abroad on a business trip. While abroad, the individual secures an H-1B visa stamp in his passport. He no longer has valid Advance Parole or EAD documents, and uses the new H-1B visa to enter the United States. According to the terms of the interim rule, this individual would have, by implication, abandoned his permanent residence application.

In light of the confusion that this interim regulation caused, the former INS issued a clarifying memorandum on May 18, 2000, which departs somewhat from the interim regulation and expands on it as well. The memorandum, authored by Michael D. Cronin, then Acting Associate Commissioner, Office of Programs, specifically indicates that its guidance is valid only until the issuance of final regulations and that the issuance of such regulations will supersede the guidance in the memorandum. At this point, we seem to be no closer to publication of a final regulation than we were in May, 2000.

The “Cronin Memo”, as this memorandum is called, made several surprising pronouncements. First, it states that even if an adjustment of status applicant enters the U.S. in

Advance Parole status, he/she may file to extend his/her H-1 or L-1 visa status (assuming the status would still be valid if he/she hadn't entered the U.S. with Advance Parole) and if the H or L extension petition is approved, the person will somehow "morph" from parolee status to H or L visa status, respectively. (This pronouncement seems highly suspect to this author, as there appears to be no legal basis for it.) By the same token, the Cronin Memo states that persons who enter with Advance Parole, but then work without an EAD, will not be deemed to have worked without authorization, as long as they continue to work for the employer who sponsored their H or L visa petition, and as long as that petition remains valid. (This pronouncement appears to be equally without legal basis, yet it represents the current policy. In this author's opinion, it is always safest to have a valid EAD for employment following entry as a parolee.)

The Cronin Memo takes pains to state that this "forgiveness" of H or L employment following entry with Advance Parole, will be "trumped" by the publication of the final rule. Finally, the Cronin Memo also clarifies that, under certain circumstances, people who don't fit squarely into the criteria specified in the June, 1999 interim rule, in fact will not be deemed to have abandoned their adjustment of status applications. It specifically states that someone who previously entered the U.S. with Advance Parole can come back the next time with a valid H or L visa and I-797 approval notice, even if there has been a recent change of employer. Of course, the I-797 approval notice must be issued to the new employer.

The clarifications provided in the Cronin Memo should bring comfort to persons who fit the description of the hypothetical applicants described earlier, who previously had H or L status, lost their jobs and then worked for a new employer with an EAD. These adjustment of status applicants, and there are many people in this situation, may either use Advance Parole or an H or L visa to reenter the U.S. without fear

of abandoning their adjustment of status applications. Furthermore, they may choose to enter with Advance Parole one time, and enter with their H or L visa the next time they return to the U.S. after overseas travel.

Persons with pending adjustment of status should always consult with their immigration counsel before leaving the U.S. to learn the most up-to-date information both about the status of their application and the status of the law, which changes rapidly. The liberal pronouncements in the Cronin Memo could become obsolete upon publication of the final regulation, or upon the issuance of a superseding memorandum by the USCIS.

Copyright 2004, Mishra Group, Inc. All rights reserved. Reprinted with permission.

Susan J. Cohen manages the Immigration Section of Mintz Levin Cohn Ferris Glovsky and Popeo PC and can be reached at either (617) 348-4468 or by email at scohen@mintz.com

Welcome!

We are pleased to bring you the ABA International Law and Practice Section: Immigration and Nationality Committee Newsletter. Please send all future submissions and/or suggestions to either Susan Cohen at scohen@mintz.com or Aaliyah S. Nagji at anagji@mintz.com

Disclaimer: The materials contained herein represent the opinions of the authors and editors and should not be construed to be those of either the American Bar Association or Immigration Section. Nothing contained herein is to be considered as the rendering of legal advice for specific cases, and readers are responsible for obtaining such advice from their own legal counsel. These materials and any forms and agreements herein are intended for educational and informational purposes only.