

SCOTT LEGAL SERVICES, P.C.

The Law Firm For Entrepreneurs, Business Owners & Investors

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What are the Differences Between Extension of Stay, Change of Status and Adjustment of Status?

People visit the United States for many different reasons, such as tourism, starting a business venture or visiting family members and friends. While you are in the U.S. your circumstances may change and you may want to extend your stay because of a sick family member, or change your nonimmigrant status because you are accepted to a university, or adjust your status from a nonimmigrant (temporary) status to an immigrant (permanent) status. There are different procedures you must follow depending on whether you want to extend your stay, change your nonimmigrant status or adjust from temporary nonimmigrant status to permanent immigrant status. This post will explain the process for each in turn, as well as who is eligible to apply and the risks and consequences if your petition is denied.

Extension of Stay

Who Should Apply: A foreign national who wants to stay in the U.S. for a longer period of time in the same nonimmigrant status in which they entered the U.S. For example, a foreign national who entered on a B visa for tourism and wants to stay past the expiration date on the I-94 for tourism purposes could apply to extend their stay.

Procedure: If you are visiting the U.S. and find that you want to extend your stay beyond the date on your I-94, you must file Form I-539, Application to Extend/Change Nonimmigrant Status with USCIS. This form must be filed before the expiration date on your I-94 and should be filed at least 45 days before your authorized period of stay expires. Once the I-94 expires your lawful nonimmigrant status ends and you are considered out of status, even if you have timely filed to extend the period of your nonimmigrant status. If the application to extend your stay is approved then the approval will relate back to the date your I-94 expired and you will be deemed to have been in lawful status the entire time. However, if your application is denied you must depart the U.S. immediately and any nonimmigrant visa in your passport will become void. It is important to note that once your authorized period of stay expires you may be deported and you will begin to accrue "unlawful presence" which could lead to future bars to entry. If your application is denied you will have been out of status and accruing unlawful presence for each day that you stayed in the U.S. past your authorized period of stay.

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Who is Eligible to Extend their Stay: Foreign nationals are eligible to extend their stay if they were lawfully inspected and admitted to the U.S. with a nonimmigrant visa that is still valid at the time of filing Form I-539. They must also have a passport that will remain valid through the extended stay. They may not apply to extend their stay if they committed any crimes making them ineligible for a visa or violated any of the conditions of their admission, such as conducting business while on a student visa.

Who is Not Eligible to Extend their Stay: People who entered the U.S. under certain visa categories are not permitted to extend their stay. This includes people who entered under the Visa Waiver Program and people in transit through U.S. airports without a visa (TWOV), as well as anyone on a D (crew member), C (in transit), K (fiancée) or S (informant) visa.

Changing to Another Nonimmigrant Status

Who Should Apply: A foreign national who entered with one type of nonimmigrant visa and now wishes to switch to another type of nonimmigrant visa. For example, if you are visiting the U.S. on a B visa for tourism and discover that you want to accept a job and change to an H-1B visa, you will need to apply to change your status from tourist to an employment visa before you can start work.

Procedure: Similar to the application to extend your stay, you must file Form I-539, Application to Extend/Change Nonimmigrant Status before the expiration date on the I-94. It is important that you do not change your activities until you receive approval from USCIS for the change in status. For example, if you enroll in school and begin attending classes before you receive USCIS approval you will be acting outside of the authorized activities for your current status under the tourist visa. This failure to maintain status could lead to future bars to entry or to you being removed from the U.S. Violating the terms and conditions of your status also makes you ineligible for a change of status.

You are allowed to remain in the U.S. until USCIS makes a decision on your application if the following requirements are met:

1. USCIS received the application before your nonimmigrant status expired;
2. You have not violated the terms of your status; and
3. You meet the basic eligibility requirements for the new visa.

Although you may remain in the U.S. while your application is being processed you still need to pay attention to the expiration date of your current nonimmigrant status. Once the I-94 expires you will not have a new nonimmigrant status until USCIS approves your application. This means you will not be allowed to conduct business or work in the U.S. after the expiration date, even if your previous nonimmigrant status allowed you to do so. You will not be considered “out of status” while your application is being processed but if USCIS denies your change of status

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application, you will be deemed to have been “out of status” for the entire period that you remained in the U.S. after your nonimmigrant visa expired. Once you receive the denial from USCIS you will be required to depart from the U.S. immediately.

Who is Eligible to Change Nonimmigrant Status: The eligibility rules for filing to change your status are the same as those for filing to extend your stay. Although you will generally not be eligible to extend your stay or change your status if you file Form I-539 after your I-94 expires, you may be eligible if you can show extraordinary circumstances beyond your control that caused the delay in filing, such as a medical emergency.

Who is Not Eligible to Change Nonimmigrant Status: Similar to extension of stay applications, people who entered under the Visa Waiver Program or who are in transit without a visa (TWOV) or entered on D, C, K or S visas are not eligible to change to another nonimmigrant status. Additionally, vocational students on an M-1 visa cannot change their status to F-1 (academic student) or any H status. International exchange visitors on J-1 visas generally cannot change their status unless they receive a waiver.

Adjustment of Status

Who Should Apply: A foreign national who entered the U.S. on a nonimmigrant visa, meets all the qualifications for a green card and wants to reside permanently in the U.S. The person must be physically present in the U.S. when the application is filed and remain in the U.S. while it is adjudicated. Adjustment of status is different from change in status. A change in status refers to changing from one temporary nonimmigrant status to another temporary nonimmigrant status. Adjustment of status means changing from a temporary nonimmigrant status to permanent immigrant status.

Procedure: The procedure for adjusting status will vary depending on the foreign national’s basis for seeking permanent immigrant status. For example, if someone entered the U.S. and married a U.S. citizen, their eligibility for a green card would be based on that relationship. A few of the forms for different eligibility categories is listed below.

Family-Based: Form I-130, Form I-485

Employment-Based: Form I-140, Form I-485

EB-5 Investor Entrepreneurs: Form I-526, I-485

Who is Eligible to Adjust Status: A foreign national who is physically in the U.S. and has a qualifying relationship with a U.S. family member or U.S. employer. Certain classes of immigrants, such as children seeking special immigrant juvenile status, are also eligible to adjust.

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Who is Not Eligible to Adjust Status: People who entered under the Visa Waiver Program, are in transit without a visa (TWOV) or who entered on a D visa are not eligible to adjust their status. Additionally, anyone who is physically outside the U.S. or who does not have the requisite family or employment relationship and does not fit into one of the special immigrant or humanitarian categories is not eligible to adjust to permanent immigrant status.

For more practical or legal advice contact **Scott Legal Services, P.C.**. We offer services in a number of business areas including, Immigration, New Business set up, Contract review and development and entrepreneurial support. Call 212-223-2964 or email iscott@legalservicesincorporated.com for a consultation.

If you considering starting a business or need strategic advice, contact Scott Legal Services, P.C. for a consultation. You can call us at 212-223-2964 or email us at iscott@legalservicesincorporated.com.