



FEBRUARY 2013

## Pending Green Card (Form I-485) May Not Equate To "Legal Status" After All

Whether to maintain either H-1B or L-1 status (or another nonimmigrant status) while an Adjustment of Status (AOS) application is pending has been the subject of much debate. Due to a recent 7th Circuit decision, *Chaudhry v. Holder*, it is now more clear that underlying nonimmigrant status is important. In a situation involving the denial of a Form I-485 application, the court held that the pending AOS application does not provide an applicant with "lawful status" for AOS purposes where the applicant's underlying nonimmigrant status has expired.

In 2003, Asim Chaudhry, a Pakistani national, and his family lawfully entered the U.S. under a business visitor (B-1) visa. While lawfully in the U.S., Amtal Inc., Asim Chaudhry's employer at the time, filed a petition to change his status from B-1 to L-1 (a nonimmigrant category for a skilled worker). The U.S. Citizenship and Immigration Services (USCIS) approved Amtal's petition, extending Chaudhry's lawful nonimmigrant status through January 21, 2005. On January 14, 2004, Amtal Inc. filed an employment-based visa petition (Form I-140) on Asim's behalf, and Asim concurrently filed an AOS application (Form I-485). After the applications were filed (but before they were adjudicated), Asim left Amtal Inc. and began working for Sarus Oil.

On December 13, 2005, the USCIS rejected the Form I-140 and Form I-485 applications because Asim was no longer employed at Amtal Inc. On May 25, 2006, Sarus (Asim's new employer) filed an employment-based visa petition (Form I-140) on his behalf, and Asim filed a new AOS application. The USCIS approved Sarus's employment-based visa petition but rejected Asim's AOS application. According to the USCIS, Asim's nonimmigrant status expired on January 21, 2005, and 180 days of "unlawful status" had elapsed between the expiration of lawful nonimmigrant (L-1) status and the filing of his AOS application. The 7th Circuit agreed, finding that a pending adjustment application does not toll the accrual of days without lawful status for AOS purposes.

Consequently, while an employee can lawfully remain in the U.S. while an AOS application is pending, if the AOS application is denied, the USCIS may consider any time spent in the U.S. without underlying nonimmigrant status to be unlawful (and accumulate toward the 180-day period of unlawful status, which prohibits subsequent adjustment of status in the U.S.). In its

decision, the court noted that periods of time spent as a parolee in the U.S. may be considered "legal status"; however, as this issue was not raised by the parties, it was not decided by the court. Thus, based on this decision, to ensure that employees do not accrue such unlawful status, companies may want to seriously consider extending an employee's nonimmigrant visa status while the employee's AOS application is pending.

---

## CONTACT US

If you have any questions about the content in this legal update, contact one of the members of our Immigration Practice Group below. [Robinson & Cole's Immigration Practice Group](#) has experienced attorneys who have assisted clients with a wide range of immigration issues.

Megan R. Naughton	Joshua S. Mirer	Lauren M. Sigg
(860) 275-8263	(860) 275-8344	(860) 275-8341
<a href="mailto:mnaughton@rc.com">mnaughton@rc.com</a>	<a href="mailto:jmirer@rc.com">jmirer@rc.com</a>	<a href="mailto:lsigg@rc.com">lsigg@rc.com</a>

---

© 2013 Robinson & Cole LLP. All rights reserved. No part of this document may be reproduced, stored in a retrieval system, or transmitted in any form or by any means, electronic, mechanical, photocopying, recording, or otherwise, without prior written permission. This document should not be considered legal advice and does not create an attorney-client relationship between Robinson & Cole and you. Consult your attorney before acting on anything contained herein. The views expressed herein are those of the authors and not necessarily those of Robinson & Cole or any other individual attorney of Robinson & Cole. The contents of this communication may contain attorney advertising under the laws of various states. Prior results do not guarantee a similar outcome.

