U.S. Department of Justice
Immigration and Naturalization Service

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425 I Street NW
Washington, DC 20536

April 2, 2003

MEMORANDUM FOR SERVICE CENTER DIRECTORS, BCIS
REGIONAL DIRECTORS, BCIS
OFFICE OF INTERNATIONAL AFFAIRS
DIRECTOR, ADMINISTRATIVE APPEALS OFFICE

FROM: Thomas E. Cook /s/
Acting Assistant Commissioner
Office of Adjudications

SUBJECT: Guidance on Interpretation of "Period of Stay Authorized by the Attorney General" in Determining "Unlawful Presence" under section 212(a)(9)(B)(ii) of the Immigration and Nationality Act (Act)

Attached is a legal memorandum from the Bureau of Citizenship and Immigration Services (BCIS) Office of General Counsel. It provides guidance to address questions on the accrual of unlawful presence. Specifically, the questions related to an alien who filed an application for extension of stay after the alien's authorized period of admission expired, but while in a period of authorized stay. The attached memorandum provided by the BCIS Office of General Counsel is BCIS policy.

Legal Memorandum

The attached legal memorandum, responding to questions from the Texas Service Center, advises that where the alien files a timely application for extension of stay (EOS) or change of status (COS), and where the application is denied, the alien can begin to accrue unlawful presence beyond the date of the denial regardless of whether the alien filed additional, but untimely, applications for EOS or COS. The BCIS Office of the General Counsel further advises that an application for EOS or COS filed after the alien's authorized period of admission has expired does not have the effect of prolonging the alien's status. The legal memorandum references two previously issued field memoranda, which are also attached:

- *Period of stay authorized by the Attorney General after 120-day tolling period for purposes of section 212(a)(9)(B) of the Immigration and Nationality Act*, March 3, 2000 ("3/3/00 Pearson memo"), and

- *Unlawful Presence*, June 12, 2002 ("6/12/02 Williams memo").

U.S. Department of Justice
Immigration and Naturalization Service

HQCOU 90/15

Office of the General Counsel

425 I Street NW
Washington, DC 20536

March 27, 2003

MEMORANDUM FOR THOMAS E. COOK
ACTING ASSISTANT COMMISSIONER, OFFICE OF ADJUDICATIONS

FROM: Janice Podolny /s/
Chief, Inspections Law Division, Office of General Counsel

SUBJECT: Interpretation of "Period of Stay Authorized by the Attorney General" in determining "unlawful presence" under INA section 212(a)(9)(B)(ii).

Issues:

1. Where an alien files additional (untimely) applications for extension of stay (EOS) or change of status (COS) during the period in which a timely filed application for EOS or COS is pending before the Immigration and Naturalization Service (the "Service"), does that alien avoid becoming unlawfully present even if the Service ultimately denies the initial timely filed EOS or COS application?

2. Where an alien is awaiting Service adjudication of a timely filed EOS or COS application, does an EOS or COS application filed after the alien's authorized period of admission has expired have the effect of prolonging the alien's status beyond the period of his or her authorized admission?

Practical concern:

The Service is experiencing an increase in multiple filings for the same alien where the alien seeks to extend his or her stay and the petitioner seeks to change the alien's status. The multiple filings arise in the context of an alien wishing to remain in the United States beyond the period of lawful admission without accruing unlawful presence while he or she awaits adjudication of the application/petition.

It has become apparent to the Service that some immigration practitioners consider the "period of stay authorized by the Attorney General" to be equivalent to "status." They argue that, because an alien is in "status" during the time the Service takes to adjudicate the alien's application for EOS or COS, an alien can continuously file EOS or COS requests which, in effect, protect the alien from accruing unlawful presence even if a decision to deny is made on one or more of the filings.

Summary answer:

1. Where an alien files a timely EOS or COS application and that application is ultimately denied, the alien can begin to accrue unlawful presence beyond the date of the denial regardless of whether the alien filed additional, but untimely, requests for EOS or COS that are awaiting adjudication.[1]

2. An EOS or COS application must be filed within the period during which the alien is in an "authorized status", i.e., within an authorized period of admission as contemplated by parts 214.1 and 248.1.[2] The period during which a timely filed EOS or COS application is pending continues the alien's period of authorized stay in the United States (allowing the alien to avoid accruing unlawful presence), but does not extend the alien's period of "authorized status."[3]

Case scenario for B-2 alien:

3/16/01 employer timely files I-129 for COS and H-1B

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[1] There appears to be no question that an alien who files, initially, an untimely EOS or COS request which is ultimately denied can be determined to be unlawfully present retroactively to the date his or her initial period of admission expired regardless of whether the alien filed additional (untimely) requests for EOS or COS that are awaiting adjudication. See AFM 30.1(d)(4). Therefore, we do not address this scenario any further.

[2] In limited cases, failure to file before the period of previously authorized status expired may be excused at the discretion of the Service. See 8 C.F.R. 214.1(c)(4); 8 C.F.R. 248.1(b)

[3] For the reasons explained herein, "authorized status" or authorized period of admission and "period of stay authorized by the Attorney General" are not interchangeable terms and do not carry the same legal implications. An alien's authorized period of admission is determined with reference to his or her Form I-94 (arrival/departure record) or, where the alien is the beneficiary of an approved EOS or COS application, with reference to the validity dates on the Form I-797 ("Notice of Action") approval notice.

	Thereafter, I-94 arrival/departure record for B-2 alien expires
9/10/01	B-2 alien files untimely I-539 for EOS (after difficult RFE is issued on I-129 case)
12/7/01	initial timely filed COS and H-1B denied
1/11/02	same employer files a second I-129 for COS and H-1B
2/8/02	untimely I-539 EOS is denied for late filing.
2/11/02	second H-1B is approved but COS is denied for alien being out of status at time of filing.

Arguments and Analysis:

Some practitioners have argued that the above scenario creates, in effect, a "bridge" of continuing status stemming from the initially timely filed COS application such that an alien can eternally avoid becoming unlawfully present as long as they have a pending EOS or COS application with the Service. The essence of their argument relies on their misinterpretation of "period of stay authorized by the Attorney General" as equivalent to status. They argue that if the alien is in "status" because they have been granted "a period of stay authorized by the Attorney General," then that alien should be able to extend his or her stay or change status. A review of the relevant statutes and regulations indicates that the "bridge" of continuing status analysis is an incorrect and improper interpretation of the relevant statutes, regulations and INS memos on unlawful presence (see Memorandum for Regional Directors from Johnny N. Williams, Executive Associate Commissioner (Office of Field Operations) ("6/12/02 Williams memo"); Memorandum for Regional Directors from Michael A. Pearson, Executive Assistant Commissioner (Office of Field Operations) ("3/3/00 Pearson memo")).

The relevant regulations distinguish between the period of time in which an alien is considered to be in "status" and the period of time during which he or she is deemed to be in a "period of stay authorized by the Attorney General".

8 C.F.R. 214.2(c)(4) provides that an extension of stay may be approved for an applicant who maintained his or her status before the application was filed. Similarly, 8 C.F.R. 248.1(b) provides that a change of nonimmigrant classification may be approved for an alien who maintained his or her status before the application was filed. In order to determine if an alien has maintained his or her status, the Service looks to see if the authorized period of admission has

been overstayed. The relevant inquiry as to "status" requires the Service to determine if the alien was still within a period of authorized admission at the time of filing the application.

For purposes of section 212(a)(9)(B)(ii) of the Immigration and Nationality Act an alien is "unlawfully present" in the United States after the expiration of the period of stay authorized by the Attorney General. The period of stay authorized by the Attorney General normally expires upon the expiration of the alien's Form I-94 (arrival/departure record).[4]

For the reasons stated in previous INS guidance and restated here, the Service will deem the alien to be within a period of stay authorized by the Attorney General (and not unlawfully present), if the alien has a filed a non-frivolous EOS or COS application with the Service Center and that application is still pending, provided that such application was timely filed, i.e., prior to the expiration of the Form I-94. See 3/3/00 Pearson memo.

In these circumstances, the alien benefits from a continuation of the period of stay authorized by the Attorney General, but not from a continuation of "status." I.e., the alien was in a period of authorized stay when he or she was within the initial period of his or her admission and the period of authorized stay continues after the filing of a timely EOS or COS application. There is simply no analogous rule or guidance providing for a continuation of the alien's "status." Therefore, the alien will be in status only as long as he or she remains within the initial period of his or her admission. Of course, **if** the alien's EOS or COS application is granted, the alien will again be in "status."

In the above case scenario, the alien's initial period of admission (as per her I-94 "Arrival/Departure Record") expired prior to 9/10/01. She was no longer in status once her I-94 expired, but was considered to be in a period of stay authorized by the Attorney General because of her pending, timely filed COS application. The second application for an extension of stay of the alien's B-2 nonimmigrant status was filed after the original B-2 status expired. Accordingly, it did not meet the requirements of 8 C.F.R. 214.1(c) as it was not timely filed. The alien became unlawfully present upon the denial of her original, timely filed COS application (12/07/01). The fact that the alien was also the beneficiary of an untimely filed EOS application (09/10/01) that was pending with the Service Center at the time it issued its denial of the COS application did not confer continuing "status" on the alien. As the alien was not within her initial period of admission when the B-2 EOS application was filed, she cannot invoke the policy outlined in the Pearson memo for purposes of avoiding unlawful presence.

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[4] Where the alien's application for EOS or COS has been approved, the alien is again in an "authorized status." The expiration of his or her status and authorized period of stay in these circumstances expires on the last day of validity of the EOS or COS approval notice.

Relevant Authorities:

The regulations governing the Service's ability to extend the stay of certain aliens are found at 8 C.F.R. 214.1. Under 214.1(c)(4), certain aliens are ineligible for grants of extension of stay. The regulations provide, in relevant part, that "an extension of stay may not be approved for an applicant who failed to maintain the previously accorded status or where such status expired before their application or petition was filed, except that failure to file before the period of previously authorized status expired may be excused in the discretion of the Service …" (emphasis added)

The Service's authority to change the nonimmigrant classification of certain aliens to another nonimmigrant classification is found at INA section 248 "Change of Nonimmigrant Classification." The applicant must be "continuing to maintain" his or her nonimmigrant status.[5]

INS regulations at C.F.R. 248.1 state that "a change of status may not be approved for an alien who failed to maintain the previously accorded status or whose status expired before the application or petition was filed, except that failure to file before the previously authorized status expired may be excused in the discretion of the Service …"(emphasis added)[6]

INA section 212(a)(9)(B)(ii) provides that "an alien is deemed to be unlawfully present in the United States if the alien is present in the United States after the expiration of the period of stay authorized by the Attorney General ... ."

The Service has previously provided guidance on the issue at hand. The 3/3/00 Pearson memo addressed the Service's change in policy allowing certain aliens with pending applications to remain in the United States beyond the 120 days provided by the tolling provision without accruing unlawful presence "because of the current backlogs, which in some cases extend beyond six months." As a result, a "period of stay authorized by the Attorney General" was defined to include the entire period during which a timely filed, non-frivolous application for extension of stay or change of status is pending with the Service … " Specifically, the "period of stay authorized by the Attorney General covers the 120 day tolling period described in section 212(a)(9)(B)(iv) of the Act, and continues until the date the Service issues a decision." The

[5] This memo does not address collateral issues that may otherwise affect an alien's ability to extend his or her stay or change status (e.g., lawful admission, inadmissibility, unauthorized employment, etc.)

[6] The regulations at CFR 248.1 do not provide a definition of "maintaining status." However, in determining whether the applicant has maintained status, the Service will consider whether the authorized period of admission has been overstayed and any other conduct relating to the maintenance of current status, including unauthorized employment.

policy change, consistent with the ensuing new Chapter of the Adjudicators Field Manual, stressed that only aliens with timely filed applications would benefit. "This policy applies only to those nonimmigrants who were admitted until a specific date and whose I-94 has expired while the EOS or COS application is pending." Presumably, the practitioners of the multiple filing (or "bridge") theory described above would read the above requirement as: "nonimmigrants who were admitted until a specific date and whose I-94 has expired **either before or while** the EOS or COS application is pending" in order to avoid an unlawful presence determination for their clients. This reading is contrary to the express language of the Pearson memo.

The Pearson memo added Chapter 30.1(d) to the Adjudicators Field Manual (AFM):

30.1(d) Unlawful Presence under Section 212(a)(9)(B) of the Act provides an exclusive designation of "periods of stay authorized by the Attorney General." This list includes "certain pending applications for extension of stay or change of status. See sections (d)(3) and (d)(4) of this chapter." Therefore, it is improper to consider whether a pending EOS or COS application is a "period of stay authorized by the Attorney General" without reference to (d)(3) and (d)(4). Sections (d)(3) and (d)(4) make it clear that for an alien with a pending EOS or COS request to be considered within "a period of stay authorized by the attorney general" the alien application "must have been filed before the previously authorized stay expired." See AFM 30.1(d)(3). If the application was untimely and was denied, unlawful presence begins accruing on the date the I-94 expired, regardless of the reason for denial. See AFM 30.1(d)(4).

The policy outlined in the Pearson memo is further reiterated, without modification, in the 6/12/02 Williams memo.

The Williams memo provides that, for purposes of section 212(a)(9)(B)(ii) of the Act, the INS has designated the following periods of stay authorized by the Attorney General "Certain pending applications for extension of stay or change of status." There is no express of implied indication in the Williams memo that the Service intends to alter existing Service practice and policy. Therefore, this section cannot be read separate an apart from sections (d)(4) and (d)(5) of Chapter 30.1(d) as introduced by the Pearson memo. See discussion supra.

For the reasons outlined above, where the alien filed a timely EOS or COS application and that application is ultimately denied, the alien can begin to accrue unlawful presence beyond the date of the denial regardless of whether the alien filed additional, but untimely, requests for EOS or COS that are awaiting adjudication.

Moreover, for the reasons outlined above, an EOS or COS application filed after the alien's authorized period of admission has expired does not have the effect of prolonging the alien's status.