

COMMUNITY

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Entry visas that create adjustment problems

YOUR IMMIGRATION SOLUTION



ATTY. ROBERT REEVES & NANCY MILLER

PREVIOUSLY, we talked about the ramifications of entering on a C or D visa. This time we will discuss the import of entry on a K or a J visa or without inspection. K-1 visas are issued to fiances who are coming to the United States solely to enter into a valid marriage with the petitioner within 90 days of entry. The parties must be legally free to marry and the marriage must be one that is recognized under US law. The parties must have met in person within 2 years of filing the petition (with some exceptions). The petition can be denied if the petitioner has a conviction for certain crimes involving violence, sexual assault, child or elder abuse, stalking or drugs, unless the United States Citizenship and Immigration Services (USCIS) is satisfied that the beneficiary will not be in danger. The petition can be denied, or an investigation may be conducted, if the petitioner previously filed petitions for two or more fiances.

The K-1 may adjust even if the marriage does not take place within 90 days as long as the application for adjustment is based upon the marriage to the K-1 petitioner. K-2's, who are unmarried children under the age of 21 of K-1s, can adjust even if the child is over 18 at the time her parent marries the USC because she is not entering as a step-child but rather as the child (under 21) of the K-1.

K-3 visas allow the spouse of a USC who has filed a family petition on her behalf to come to the US to await the approval of the petition. If the petition has already been approved, the alien will not be issued a K-3 visa. She will have to immigrate through regular processing.

K visa holders cannot change

status. K-3's can extend that status if the family petition or the adjustment application is still pending. With one exception, they cannot adjust status based on any ground other than the marriage to the person who filed the K petition. If the USC spouse is abusive, the K holder can adjust under the Violence Against Women Act. The K-3/K-4 (unmarried children under the age of 21 of K-3s) status is terminated within 30 days of any of the following occurrences: the denial or revocation of the I-130; the denial or revocation of the application for adjustment; the marriage of the K-4 (minor child of the K-3); or the termination by divorce of the K-3 marriage. In the 9th Circuit, divorce does not prevent the K visa holder from adjusting.

J visas are exchange visitor visas. The typical recipient of a J visa is a college student, a student in a travel/work program, an au pair, a teacher or a foreign physician. Many J-1 visa holders (and their J-2 spouses and children) are subject to a requirement that they return to their country of citizenship or lawful permanent residence upon completion of their training before they are eligible to adjust status, apply for an immigrant visa, apply for an H or L visa or change status in the US. Grandfathering under 245(i) does not waive the two year residency requirement which is a separate ground of inadmissibility. Waivers of the requirement are possible under certain very specific circumstances. The bases include persecution, exceptional hardship or a no-objection waiver (not for medical doctors or where the US government provided funding). Going to a third country or repayment of the funding will not waive the residency requirement. In addition, J visa holders are not eligible for cancellation of removal.

An alien who enters without inspection (EWI) is subject to being placed into removal proceedings.

However, an alien who is apprehended at the border and cannot prove that he has been present in the US for 2 or more years, or, one who is apprehended within 100 miles of the border and cannot establish that he has been physically present in the US continuously for the preceding 14 days, is subject to expedited removal. Unless he asserts that he has a credible fear of persecution or torture in his home country, he can be placed on the next plane or bus home. Unfortunately, he will be accompanied by a deportation order. If he returns without permission, he will be subject to a lifetime bar from admission and will be required to wait ten years before being eligible to apply for a waiver.

An EWI alien who has avoided deportation orders and lifetime bars is still not home free. If he becomes eligible to apply for a green card, he will not be able to adjust status unless he is 245(i) grandfathered. If he chooses to consular process, he will need to request a waiver of a 3 or 10 year bar if he has been unlawfully present in the US for 6 months or more.

One should learn the ramifications of a visa before using it to enter the US. One should also know the impact of that visa before filing to change or adjust status. This is clearly a situation where knowledge is power and what you don't know could hurt you.

Atty. Reeves has represented clients in numerous landmark immigration cases that have set new policies regarding INS action and immigrants' rights. His offices are located in Pasadena, San Francisco, Las Vegas and Makati City.
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The analysis and suggestions offered in this column do not create a lawyer-client relationship and are not a substitute for the personalized representation that is essential to every case. (Advertising Supplement)

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