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AOS Denial ? Consequences for H-1

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Submitted by Chief Editor on Jun 19th 2008

ANSWER:

Qo. If an AOS (adjustment of status or I-485) applicant has already used up six years on H1 and is currently in 8th year of H1, what are his/her options if AOS gets denied before the 8th year on H1 expires?

Ans. A lot depends upon the grounds of denial and whether they are likely to be overturned on a Motion to Reopen/Reconsider. Do note, there is no appeal against a 485 denial. Technically, as I see the law, if CIS denies the AOS, they can also revoke the H-1 given beyond six years. As a practical matter, they do not. So, even after denial, you should be able to stay in USA to the end of the already granted H-1. You can start a new PERM application and eventually, get H-1 extensions based upon that. Also, just because AOS is denied, may not mean the CP is not an option. Depending upon the facts of the case, consular processing for green card may still be an option.

Qo. So, would it not be better that a person who applies for AOS should NOT insist on maintaining H1 because he will use up the six years sooner. He should use Advance Parole and EAD to stop the H1 clock because H1 will give him/her more options ONLY IF six years are not up. Your thoughts?

Ans. That may be a good option if there is over one year left on the original H-1 AND the beneficiary is not entitled to three-year H-1 extensions. I get very nervous when your entire work options are based upon an EAD whose renewal time is left in the hands of CIS.

Qo. In your practice, have you encountered similar scenario where I-485 was denied but H1 was not canceled?

Ans. Yes. Several times.

Qo. I was given a three year H1 extension in my 8th year on H1 based on pending I-485 application and approved I-140. Please note that at the time of requesting H1 extension, my employer requested 3 year extension which I thought I wasn't eligible for as visa dates had not retrogressed for my category so I should have been given one year extension.

My three year H1 extension is valid until 2011(8th, 9th, 10th year on H1), in case of AOS denial in the 8th year, do I have two more years to sort it out?

The maximum time one can stay in H status is 6 year unless the AOS is pending. If AOS is denied and CIS DOES NOT cancel H1 with AOS denial, does such a person start to accrue

unlawful presence in US?

Ans. If you have been given an extension mistakenly, that can be taken away and you can have other issues as well. And, I don't want to us to digress into unlawful presence. That is a whole new topic.

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