AMERICAN IMMIGRATION LAWYERS ASSOCIATION

Practice Pointer

What's Next After Filing a Form I-539 "Bridge" Application?

By: AILA's USCIS Case Assistance Committee[1]

Since the United States Citizenship and Immigration Service (USCIS) published their Special Instructions for B-1 and B-2 Visitors Who Want to Enroll in School on April 5, 2017,[2] no clarification or additional guidance has been provided by the agency. With travel restrictions and long delays due to COVID-19, clients who have filed multiple I-539 "bridge" applications because of a deferred F-1 program start date are facing uncertainty as they plan for their stay in the United States. This practice pointer outlines some of the considerations immigration attorneys should take into account when responding to Requests for Evidence (RFEs) for these "bridge" applications and planning for their clients' next steps.

Background

The regulations at 8 C.F.R. § 214.2(b)(7) prohibit study in the United States while in B-1 or B-2 status. In order to pursue an F-1 (academic student) or M-1 (vocational student) authorized course of study without departing the United States, individuals in B-1 or B-2 status must first acquire F-1 or M-1 status by filing Form I-539, Application to Extend/Change Nonimmigrant Status with USCIS.

Prior to April 5, 2017, USCIS routinely approved the Form I-539 change of status application provided that the applicant was (a) maintaining lawful B-1 or B-2 visa status on the date of filing the change of status application with USCIS, and (b) had submitted a valid Form I-20, Certificate of Eligibility for Nonimmigrant Student Status along with the Form I-539. As these individuals could not begin their course of study until first obtaining approval of their I-539 change of status application, academic institutions routinely deferred the F-1 or M-1 program start date to the following academic term or semester.

USCIS Guidance

On April 5, 2017, USCIS published instructions regarding B-1 and B-2 visitors who want to enroll in school in the United States.[3] Per USCIS' instructions, individuals in B-1 or B-2 status are not only required to have maintained lawful status at the time of filing the Form I-539 change of status application with USCIS, **but must also maintain their B-1 or B-2 status while the Form I-539 is pending with USCIS and up to 30 days before the initial F-1 or M-1 program start date**. USCIS updated the April 5, 2017 instructions on November 8, 2018, with minor edits by broadening their FAQs to include clarification for non-student status.

Under the April 5, 2017 publication, USCIS' instructions provide the following guidance to

[1] Special thanks to USCIS Case Assistance Committee members, Lucy Cheung, Dan Berger, and Lisa Sotelo for their contributions to this practice pointer.
[2] *See* USCIS Provides Special Instructions for B-1/B-2 Visitors Who Want to Enroll in School (April 5, 2017), AILA Doc. No. 17041131
[3] *Id.*

AILA Doc. No. 21033030. (Posted 3/31/21)

those individuals whose B-1 or B-2 status will expire more than 30 days before the initial F-1 or M-1 program start date:

> *"We may approve your Form I-539 change of status request only if you are maintaining your B-1/B-2 status up to 30 days before your program's initial start date. If your status will expire more than 30 days before your F-1 or M-1 program's initial start date, you must file a second Form I-539 requesting to extend your B-1 or B-2 status. If you do not file this extension request on time, we will deny your Form I-539 request to change to F-1 or M-1 status. Please check our processing times to determine if you need to file a request to extend your B1/B-2 status."*

In addition, USCIS provides guidance for those in B-1 or B-2 status who have a pending I-539 change of status application and whose F-1 or M-1 start date is deferred due to a lack of decision by USCIS on the I-539 change of status application before the originally intended program start date:

> *"Your F-1 or M-1 program start date is deferred to the following academic term or semester because we did not make a decision on your Form I-539 change of status application before your originally intended F-1 program start date. You must file a second Form I-539* [to request an extension of B-1/B-2 status] *in order to bridge the gap in time between when your current status expires and the 30-day period before your new F-1 program start date."*

In the November 8, 2018 update, USCIS notes additionally:

> *"If your current nonimmigrant status will expire more than 30 days before your F-1 or M-1 program start date and you wish to remain in the United States until your start date, you must find a way to obtain status all the way up to the date that is 30 days before your program start date ("bridge the gap"). For most people, you will need to file a separate Form I-539 to request to extend your current status or change to another nonimmigrant status, in addition to your other Form I-539 application to change to student status. If you do not file this separate request prior to the expiration of your status, USCIS will deny your Form I-539 request to change to F-1 or M-1 status."*

USCIS also makes specific note of the necessary new deferred program start date if the change of status application is not approved before the original I-20 start date:

> *"Note that because of processing times, your F-1 or M-1 program start date may be deferred to the following academic term or semester because USCIS did not make a decision on your Form I-539 change of status application before your originally intended F-1 or M-1 program start date. In that instance, you will need to obtain status all the way up to the date which is* ***30 days before your new program start date****. If you had already filed an I-539 to bridge the original gap, you may need to file another I-539 to bridge the new gap.*

As such, based on these two USCIS instructions, in order to maintain status, the B-1 or B-2 nonimmigrant may be required to file a separate (and possibly multiple) I-539 application(s), with the applicable fee, to USCIS to extend his or her B-1 or B-2 status until USCIS approves

the I-539 change of status petition and effectuates the change of status from B-1or B-2 status to F-1 or M-1status.

Recent Developments

On August 7, 2019, a lawsuit was filed in the U.S. District Court for the Northern District of Illinois challenging the legality of the "Bridge" Special Instructions.[4] In *Jaradat v. Mcaleenan*, the complainant argued that the USCIS Special Instructions imposed a new, binding obligation on B-1 and B-2 nonimmigrants constituting a legislative, substantive rule. The complaint further argued that by this new rule, USCIS failed to follow the notice-and-comment process required by the Administrative Procedure Act (APA), and the rule should be set aside. Sidestepping the APA issue, USCIS reopened the case and settled the case by approving the plaintiff's F-1 change of status request and providing six months to the original status.

I-539 Applications Filed with USCIS After April 6, 2017

With much time lapsed since the publication of the 2017 USCIS Special Instructions for "Bridge" applications, AILA members have experienced that USCIS has been issuing RFEs to applicants with multiple pending I-539 change of status applications. USCIS has been inconsistent in their adjudication of these I-539 applications with some later filed I-539 applications for change of status to F-1 status approved before the initial extension, or "Bridge", I-539 applications. Many of these "Bridge" applications remain pending, with some reporting that the "Bridge" application(s) being denied when the ultimate F-1 change of status applications have been approved.

Practice Tip: Although some USCIS adjudicators are approving F-1 change of status applications from B-1/B-2 with only showing of receipts for "Bridge" applications, others have noted in RFEs that a change of status application cannot be approved with the underlying "Bridge" application pending.

When responding to RFEs questioning whether an F-1 change of status application can ultimately be approved with pending "Bridge" application(s), members should consider utilizing the Vermont Service Center I-129 H-1B Local Adjudicator's Guide published by USCIS in 2014.[5] On page 120, the Guide notes that an officer should attempt to adjudicate the "bridge" petition to "bridge" the gap in a beneficiary/applicant's status. Only if the "bridge" "petition is denied or cannot be worked for fraud reasons" should the final petition be denied due to not maintaining a valid nonimmigrant status. The Guide also provides a useful tool for adjudicators to request the gap case before working on a succeeding case.

AILA members have received approvals from USCIS on the extensions of B-1 or B-2 status applications concurrently with the change of status application when notice of the existing extension application(s) is provided within the RFE response. Members have also reported approvals when relying on the Guide as noted above.

With USCIS unwilling to contend the APA procedural issue, the "Bridge" Special Instructions will likely continue to create headaches for change of status applicants. Immigration attorneys should continue to conduct a careful review of USCIS' processing times as well as to keep an eye on the client's proposed program start date, in order to ensure the client maintains his or

[4] *Jaradat v. McAleenan et al*, 1:19-cv-05320.
[5] *See* https://www.aila.org/File/DownloadEmbeddedFile/66573.

her B-1 or B-2 status up to 30 days before the program's initial start date.