

MURTHYBULLETIN

Attorney Murthy's Immigration Bulletin
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NOTE : Announcing MurthyChat

Attorney Murthy will be available to answer your questions and to clarify matters on MurthyChat on Monday, September 25, 2000 from 9pm – 10pm Eastern Standard Time. This chat will be moderated and will be open to general questions (not case-specific) regarding U.S. immigration laws. You can log on to MurthyChat from this URL: <http://www.murthy.com/chat.html>

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1. H1B Processing at CSC - Update

On September 14, 2000, the California Service Center (CSC) of the INS reported to a representative of the American Immigration Lawyers Association (AILA) that CSC was adjudicating H1B cap cases filed on or about August 14, 2000, and non-cap cases dating from August 23, 2000. These processing times show substantial improvement over last year around the same time.

Unfortunately, CSC also found that there were problems in getting receipt and approval notices out on some H1B cases. There are many cases awaiting data entry at the CSC, so that even after a case has been received it is taking a while to be entered into the computer system and for the receipt to be printed. In regard to approval notices, a computer glitch in August 2000 caused some data on approvals to be lost. CSC personnel are now going through and updating the information so that approval notices can be printed and mailed.

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2. Family Leave Act and H1Bs

In a September 14, 2000 teleconference between officials at INS headquarters and representatives of AILA, INS indicated that H1B employees are allowed to take family leave

without jeopardizing their H1B status. This position is consistent with the laws and regulations that require H1B workers to be accorded the same working conditions as other employees.

According to the INS, an H1B employee can take time off from work under the Family Leave Act or under the company's maternity or parental leave policy, and still be in valid H1B status in the U.S. In order to maintain legal H1B status, the H1B employee cannot take more leave than is generally allowed for other employees. As evidence of maintenance of H1B status, such as for the purpose of filing a change of employer (often called a "transfer") petition, the INS recommended providing a letter from the employer indicating that the person is on parental leave but remains an employee of the company.

At an AILA meeting attended by attorneys from The Law Office of Sheela Murthy, P.C., INS officials made similar statements to the above with regard to educational leaves. Yet these policies, whether for educational leave or parental leave, have not been set forth in regulations. Please note that regulations have the force of law, while policies can change suddenly at any time if INS decides to change its interpretation of the law. Hopefully the policy on leave will not change; it is logical and, as mentioned above, it is consistent with other laws.

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3. Law Office of Sheela Murthy Prompts DOL Change in Policy in Certain States

The Law Office of Sheela Murthy, P.C. is pleased to announce a helpful change of policy by the Seattle Regional Office of the Department of Labor (DOL) with respect to jobs requiring frequent changes of location (often referred to as the "roving employee" scenario).

Where jobs have only one location, the labor certification application is filed in the state in which the work is to be performed. But what can an employer do when an employee is required to work at various unanticipated locations such as client sites, or existing / future company branch offices, across the country? The headquarters of the U.S. Department of Labor in Washington, D.C. has stated that the application for roving employees should be filed at the office where the headquarters of the company is located, regardless of whether the employee has ever worked in that state or jurisdiction.

As most readers are aware, the application for labor certification is first filed with the state labor agency, which then forwards it to the regional office of DOL. In correspondence written to the Law Office of Sheela Murthy during July and August 2000, the Oregon Employment Department (OED) has stated, unequivocally, that their office cannot assign a priority date or review a case for a beneficiary who has not as yet worked in Oregon. This policy is not only contrary to DOL's view as described above, but also does not make logical or legal sense, because job offers for labor certification are future job offers. In fact, a labor certification application can be filed for a beneficiary who has never been to the U.S. and is instead waiting abroad for the process to be completed. When questioned about this policy, a representative from the OED stated that this is a policy of the Regional DOL in Seattle, and instructed us to take the matter up with that office. We did.

Due to our persistent efforts, we are now happy to report that the Regional DOL office in Seattle, WA sought clarification from DOL headquarters in Washington, D.C. and changed its policy. Oregon and the other states covered by that Region (Washington, Idaho, and Alaska) are now accepting legitimate cases where the employer is based in one of those states, even if the employee has never worked in the jurisdiction but is being offered a job that requires work at unanticipated locations. Again, we would like to emphasize that this change makes the region's policy consistent with the practice in the other areas of the country, as it conforms to the DOL's

informal Memos on this issue. Of course, the roving employee issue is particularly relevant to the highly mobile work force of today's high tech businesses.

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4. Overview : "C" Visas for Persons in Transit through the U.S.

This article is another in our series in the **MurthyBulletin** presenting an overview of U.S. immigration law. We continue with the nonimmigrant (temporary) visa categories, the next one being the "C" category: foreign national in transit.

The basic requirement for the C Category is that the foreign national is passing in immediate and continuous transit through the U.S. Under this category, the person is admitted for a period fixed by the admitting officer, which will not exceed twenty-nine (29) days. In addition, the foreign national must show that he or she:

- is in possession of a ticket or other assurances of transportation to a destination outside of the U.S.;
- has sufficient funds to complete the trip; and
- has permission to enter the destination country, if such permission is required.

A foreign national in transit is not allowed to apply for change of status (change to another nonimmigrant classification), accept employment, or apply for an extension of temporary stay. However, the transit person is not prohibited from filing for adjustment of status for the Green Card unless he or she is a C-1 crewmember.

Under current law, the four types of foreign nationals who generally pass through the U.S. under the C category are: General Transit (C-1), TWOV (Transit Without Visa), UN Transit (C-2), and Foreign Government Officials (C-3).

General Transit (C-1) :

A foreign national is eligible to apply for the C-1 General Transit status if the person is merely passing through the United States while traveling to a foreign destination.

TWOV (Transit Without Visa) :

A foreign national is eligible to apply for the TWOV (Transit Without Visa) when the person is admitted under an agreement with a transportation line, which guarantees him or her immediate and continuous passage to a foreign destination.

A TWOV is not available, however, to citizens and residents of certain countries. As of May 1, 1982, the privilege became unavailable for citizens and residents of Afghanistan, Cuba, Iran, Iraq, North Korea, and Vietnam. Citing widespread abuses, the government made this privilege unavailable also for citizens and residents of Bangladesh, India, Pakistan, and Sri Lanka on November 8, 1985. An announcement on May 22, 1986, citing danger from state-sponsored terrorist activities, made the privilege unavailable to citizens and nationals of Libya. A 1993 interim rule, citing fear of anticipated increases in the abuse of the TWOV procedure, made the privilege unavailable to citizens of the former Socialist Federal Republic of Yugoslavia, which includes Bosnia, Croatia, Serbia, Montenegro, Slovenia, and Macedonia. In addition, an application for entry as a TWOV transit must generally be made at a designated Port of Entry.

A Crewmember joining a ship who wishes to apply for TWOV (instead of the C-1 or D status) must show that s/he: **(a)** will proceed directly to the vessel and remain aboard at all times until

departure; **(b)** is admissible under immigration laws; and **(c)** will depart the U.S. within eight hours of arrival. If there is no scheduled transportation available within the eight hours, the next available departure is acceptable.

United Nations Transit (C-2) :

A foreign national who is an invitee, accredited representative of information media, or a representative of a consulting nongovernmental agency traveling to or from the United Nations headquarters district in New York City can apply for C-2 status.

A person is admitted in this category for up to 29 days, on the condition that s/he will remain continuously within a twenty-five (25) mile radius of Columbus Circle, New York City during her/his stay in the U.S.

Foreign Government Transits (C-3) :

A member of a foreign government, when in transit through the U.S., is eligible to obtain C-3 status while on official business. The official's immediate family members, attendants, servants, or personal employees are also permitted to pass through the U.S.

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5. AAO Decision in Cuban Adjustment Act Appeal

From time to time in the **MurthyBulletin**, we report on cases of interest to our readers involving appeals to the INS Administrative Appeals Office (AAO, which was formerly called AAU). The AAO considers certain cases that were previously denied by the District Offices or INS Service Centers. On occasion we report on a successful appeal put forth by the Law Office of Sheela Murthy, while at other times we report on cases that we read about in the legal literature, such as the case below.

In a case decided on August 10, 2000, the AAO ruled that an applicant was eligible for Adjustment of Status to permanent residence under the Cuban Adjustment Act (CAA), despite having been admitted under the Visa Waiver Program (VWP). By way of background, the Visa Waiver enables citizens of certain countries, including most Western European countries, Australia, Japan and others, to visit the U.S. without obtaining tourist visas. Persons using the VWP are admitted for a 90-day period and are not allowed to extend their stay, change to another temporary status, or adjust status to permanent residence. The AAO found, however, that this prohibition on adjustment applies only to the usual adjustment process (governed by section 245 of the Immigration and Nationality Act), and does not apply to adjustment under the CAA.

The applicant in this case was a native of Cuba but a citizen of the Netherlands. She was able to benefit from this unusual status by using the VWP as a citizen of the Netherlands and later filing for adjustment as a native of Cuba. The basic requirements for an adjustment applicant under the CAA are to be **(a)** a native or citizen of Cuba; **(b)** legally admitted or paroled into the U.S.; **(c)** physically present in the U.S. for at least one year; **(d)** admissible for adjustment (i.e. having no issues that would make one ineligible, such as a criminal conviction, the commission of fraud, etc.)

While this applicant's situation was uncommon, this case shows that special provisions such as the CAA can come with their own sets of rules. Laws that apply only to natives of certain countries, or people from certain professions, for example, can provide valuable opportunities but at the same time make the immigration laws more complex and difficult to navigate. In cases

such as the one above, clearly the efforts of a competent and knowledgeable attorney can make a difference.

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6. U.S. State Department Visa Bulletin and INS Service Center Processing Times

The U.S. State Department publicizes its Visa Bulletin monthly. We immediately make this available to visitors of our WebSite at: <<http://www.murthy.com/visadate.html>>

You can always locate the most up-to-date processing times for the INS Service Centers on our website:

California	< http://www.murthy.com/pt_calif.html >
Nebraska	< http://www.murthy.com/pt_neb.html >
Texas	< http://www.murthy.com/pt_tex.html >
Vermont	< http://www.murthy.com/pt_verm.html >

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