akerman

Practice Update

Extensions of Non Immigration Visa Status and Tax Residency Due to COVID-19

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With the restrictions on travel both into and out of the U.S. as a result of the rapid spread of the coronavirus (COVID-19) pandemic, non-U.S. or non-resident individuals ("NRA") may be forced to extend their status and spend a significantly greater amount of time in the U.S. than they originally projected during the current year.

1. Non-Immigrant Visa Extensions of Status in General

Most foreign nationals who wish to visit the United States temporarily enter with a non-immigrant visa issued by a United States consulate abroad or under the Visa Waiver Program with permission through the Electronic System for Travel Authorization (ESTA). Under ESTA, nationals of certain countries may enter the U.S. for tourism or business without obtaining the B1/B2 visa. Upon entry, all foreign nationals who enter the U.S. temporarily are given a specific period of time to stay in the United States. If a person stays past their period of status, they are considered to be out of status or an "overstay." With the current cancellation of flights and travel restrictions, many individuals have found themselves trying to figure out how to legally extend their stay in the United States.

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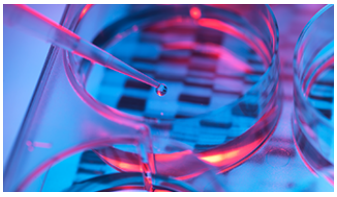

i. B Visa Status Extension
Under the Immigration and Nationality Act, individuals who enter with a B visa are allowed to request an extension of status for a variety of reasons with United States Citizenship and Immigration Services (USCIS) in order to remain in valid status. As long as USCIS receives the application before the status expires, the individual is protected because their status is tolled. The extensions have traditionally been liberally granted. Bear in mind that the notice of a decision usually takes about 4-6 months which is usually beyond the date the individual is meant to leave the U.S.

ii. ESTA extensions of stay
However, for individuals who entered with ESTA, a request for an extension is a bit more complicated. The Visa Waiver Program (VWP) permits citizens of 38 countries to travel to the United States for business or tourism for stays of up to 90 days without a visa. These individuals agree to use the program with the understanding that they are not allowed to extend or change status. Therefore, in an emergency situation, their status may expire and they may not be able to leave the U.S. If this is the case, they must try to obtain a "satisfactory departure." A period of satisfactory departure, if granted, is valid for up to 30 days. If departure is accomplished during that period, he/she is regarded as "having satisfactorily accomplished the visit without overstaying the allotted time." (8 C. F. R. § 217.3) According to the regulations, satisfactory departure may be obtained from USCIS or Customs and Border Protection (CBP). However, the USCIS Field offices are temporarily closed. The CBP office that would handle this benefit would be the Deferred Inspection office at any International Airport.

iii. Extension of Other Non-Immigrant Visa status
Individuals with other non-immigrant visas must also file extensions in order to maintain a valid

status. For an employment-based visa, the employer must file a new petition with USCIS and follow the procedures they previously followed. However, some of the visas may have reached their limit on the number of years allowed for the visa and an extension is not allowed. The individual might be able to file for a change status to another visa status to maintain status until they are able to effectuate their departure from the United States. But, they must comply with the requirements of that visa and must seek additional information since not all applicants would not be eligible for an alternate status.

iv. Late Filings or Overstays
In the past, USCIS and the Department of State have sometimes "forgiven" those who file their extension late or overstay due to an emergency situation. The regulations allow for a late filing and a request for USCIS to "backdate" the approval (Nunc pro tunc) in instances where the late filing is not due to the fault of the individual. However, those types of approvals are not always granted. In instances where the individual overstayed the B visa and left, they are not allowed to use the same B visa to return to the U.S. again even in cases where the B visa is still valid in their passport. They must return to a U.S. consulate in order to have their B visa re- issued. This is important in order to avoid issues with CBP upon re-entry. U.S. Consulates have been generous in the past to re-issue the visa despite the overstay when it involves a natural disaster. We are not sure if the consulates would again be generous in re-issuing the B visas due to flight cancellations and other Coronavirus complications. Only in extreme circumstances should the individual overstay or fail to request an extension past the date of authorized stay.

Besides having to maintain legal status in the United States, the question arises as to whether an unplanned physical presence in the United

States triggers U.S. tax residency for these non-U.S. individuals forced to stay in the United States. Under the U.S. tax residency rules, most of these individuals may be deemed U.S. tax residents with all the concomitant effects of such status

2. U.S. Tax Residency in General

An individual who is not a U.S. citizen is treated as a U.S. tax resident during a particular taxable year, and is thus subject to U.S. federal income tax on a worldwide basis (unless an applicable treaty provides otherwise) if such individual either (i) is a "lawful permanent resident" of the U.S. *at any time* during such calendar year (*i.e.,* holds a green card), (ii) satisfies the "substantial presence test," or (iii) makes an election to be treated as a U.S. tax resident.

i. Substantial Presence Test

As a general rule, if an individual who is not a U.S. citizen or a green card holder ("NRA"), is physically present in the U.S. for 183 days or more in the calendar year, he/she is a U.S. tax resident under the "Substantial Presence Test" ("SPT"), and thus, will be subject to U.S. federal income tax on a worldwide basis. However, a foreign individual may also be treated as a U.S. tax resident under the SPT if the sum of (i) the number of days of his/her physical presence in the U.S. in the current calendar year, (ii) one-third (1/3) the number of days of his/her physical presence in the U.S. in the first preceding calendar year, and (iii) one-sixth (1/6) the number of days of his/her physical presence in the U.S. in the second preceding calendar year, equals or exceeds 183 days. under this test, a person will generally not be classified as a U.S. tax resident unless he or she spends on average more than 121 days per calendar year within the U.S.

i. Exceptions

There are numerous exceptions that permit certain categories of NRA to avoid U.S. tax

residency even if they otherwise satisfy the SPT. Under the closer connection exception, an NRA who has 183 or more "deemed" days in the U.S. under the three-year lookback formula, but whose actual days in the U.S. in the current year are less than 183, can claim the exception if he/she as a "tax home" in a foreign country for the entire current year; and has a "closer connection" with the foreign country containing the NRA's tax home than with the U.S. for the current year.

If an NRA meets all these conditions, he/she will not be classified as a U.S. tax resident during the current year notwithstanding the operation of the three-year lookback formula under the SPT. To claim the closer connection exception, an NRA must file a Form 8840 (Closer Connection Exception Statement for Aliens) by the applicable deadline to claim this exception.

In practice, the closer connection exception provides protection from resident alien status principally for individuals who are resident in countries that do not have an income tax treaty with the United States. Individuals resident in most treaty countries are often protected from resident alien status without the need for this exception, because the "tie-breaker" rules in the applicable treaty often results in their being classified as treaty country residents, and thus as nonresident aliens for U.S. tax purposes.

Under the treaty "tie-breaker" rules, an individual who is deemed a tax resident of both the U.S. and a treaty party country will only be subject to tax as a resident of one of the two countries. Normally under the treaty "tie-breaker" rules, the NRA must demonstrate he/she had closer ties to the treaty party country than the U.S. (i.e. foreign country remained the "center of vital interest" for the NRA). An NRA taking a treaty "tie-breaker" exception must file IRS Form 1040NR (U.S. Nonresident Alien

Income Tax Return) and IRS Form 8833 (Treaty-Based Return Position Disclosure), on which the individual would claim the treaty "tie-breaker" position, Note that while the treaty "tie-breaker" exception would avoid worldwide U.S. federal income taxation for the NRA, the NRA may be required to file certain information returns to report certain ownership of non-U.S. entities, financial interests or signature authority over non-U.S. financial accounts, and gifts from an NRA.

iii. Medical Exception
Section 7701(b)(3)(D)(ii) of the Treasury Regulations provides that days of U.S. presence are ignored if the NRA "was unable to leave the United States because of a medical condition that arose while such individual was present in the United States." The Treasury Regulations require an NRA establish: (i) whether the NRA would have remained in the U.S. anyway if the medical problem had not occurred; and (ii) whether the medical condition arose before the NRA's arrival in the U.S.

Persons who have a pre-existing medical condition and who come to the U.S. for medical treatment do not qualify for the medical exception. Note that under the Treasury Regulations a "pre-existing medical condition" is any condition that existed before the NRA's arrival in the U.S. nd of which the NRA was aware, "regardless of whether the individual required treatment for the condition or problem when the individual entered the U.S." Under this rule, an NRA who has a chronic but manageable medical problem who enters the U.S. for nonmedical reasons would likely not be permitted to claim the exception if the medical problem flares up during his/her visit and requires hospitalization. Similarly, the medical condition exception is not available to any immediate family members who remain in the U.S. with the NRA who do qualify for the

exception.

To claim the medical exception, an NRA must file Form 8843, “Statement for Exempt Individuals and Individuals with a Medical Condition”, together with a statement from the NRA’s U.S. physician that the NRA was indeed prevented from leaving the U.S. because of his/her condition and that “there was no indication that his/her condition ... was preexisting.” Failure to file Form 8843 may result in the loss of the medical condition exception, in the absence of reasonable cause.

3. Impact of Coronavirus

Absent any forthcoming guidance from Treasury or the IRS, NRAs who exceed their days of physical presence in the U.S. as a result of the Coronavirus travel restrictions and do not meet any of the exceptions mentioned above, will be deemed U.S. tax residents. The only exception that may apply is if an NRA becomes sufficiently ill with Coronavirus symptoms that he/she is hospitalized and therefore unable to leave the U.S. to return to their home country and that there is evidence the NRA contracted the virus while in the U.S.

Given the complexities involved in extending a person’s stay under the immigration rules and the possible tax impact of continued physical presence in the U.S., it is essential that any NRA in danger of exceeding the number of days of physical presence in the U.S. consult with an immigration and tax adviser to properly plan for this circumstance that would potentially result in being subject to restrictions on further entry into the U.S., possible removal, worldwide taxation as well as a series of U.S. tax and information compliance filing requirements. Visitors and immigrants to the U.S. should both seek the proper advice to avoid inadvertently violating U.S. law and being subject to U.S. tax rules.