Proving Nonimmigrant Intent

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Disclaimer: This Guide is general information, not legal advice. Make decisions only after consulting with your attorney about how the law applies to the specific facts of your case.

1. INTRODUCTION

Many types of nonimmigrant visas require the applicant to prove he or she (a) is not an intending immigrant, (b) has an unabandoned foreign residence, and (c) is coming to the U.S. temporarily.

Visa Symbol and Description	(a) Must prove he or she is not an intending immigrant?	(b) Applicant must have unabandoned foreign residence?	(c) Applicant must be coming to U.S. temporarily?
B (visitor for business or pleasure)	Y	Y	Y
E-1 (treaty trader, spouse, or child)	Y	N	N
F-1 (student)	Y	Y	Y[1]
H-1B (alien in a special occupation)	N[2]	N	Y
H-2 (temporary worker performing agricultural services or other services); H-3 (Trainee)	Y	Y	Y
J (exchange visitor)	Y	Y	Y
L-1 (Intracompany transferee)	N	N	Y
O-1 (Alien with extraordinary ability)	Y	N	Y
O-2 (accompanying alien)	Y	Y	Y
P (athlete; certain artists & entertainers)	Y	Y	Y
R-1 (Alien in a religious occupation)	Y	N	Y[3]
TN (NAFTA professional)	Y	N	Y

Note: A spouse or child applying for a derivative visa (e.g., F-2, H-4, O-3, L-2) has the same nonimmigrant intent requirements as the principal applicant.[4]

2. THE REQUIREMENTS EXPLAINED

2.1 PRESUMPTION THAT VISA APPLICANTS ARE IMMIGRANTS

The Immigration and Nationality Act provides for both immigrant[5] and nonimmigrant[6] visas. Immigrant visas (i.e., permanent resident status or "green

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[1] An F-2 must "intend to leave the United States upon the termination of the status of the principal alien." 22 C.F.R. § 41.61(b)(3).
[2] The presumption of immigrant intent does apply to entrants under the U.S.-Singapore and U.S.-Chile Free Trade Agreements. INA § 214(b).
[3] Must "seek to enter the United States for a period not to exceed 5 years." INA § 101(a)(15)(R).
[4] 9 FAM § 41.11 NN 4.3 (Aug. 29, 2002), 5.1 (Aug. 30, 1987).

card" status) allow for indefinite residence in the United States. In contrast, nonimmigrant visas allow entry only for a limited period an only to carry out specified activities.[7]

Section 214(b) of the Act[8] requires a consular officer to "presume" that every applicant for admission is an "immigrant" unless he or she proves qualification for a nonimmigrant visa.[9]

According to the State Department's current interpretation, section 214(b) "simply means that the nonimmigrant visa (NIV) applicant must prove to [the consular officer] that he or she meets the standards required by the particular visa classification for which he or she is applying,"[10] which—depending on the classification—may include the requirements that the applicant have an unabandoned foreign residence and be coming to the U.S. temporarily.[11]

2.2 UNABANDONED FOREIGN RESIDENCE

Various of the nonimmigrant visa categories require that the applicant "hav[e] a residence in a foreign country which he has no intention of abandoning."[12] For purposes of proving an unabandoned foreign residence, the term "residence"

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[5] INA § 201.
[6] *See* INA § 101(a)(15).
[7] INA § 237(a)(1)(C)(i) (ground of deportation for failure maintain nonimmigrant status or comply with the conditions of the status).
[8] "Every alien [other than H-1B, L, or V nonimmigrants] shall be presumed to be an immigrant until he establishes to the satisfaction of the consular officer, at the time of application for a visa, and the immigration officers, at the time of application for admission, that he is entitled to a nonimmigrant status." INA § 214(b).
[9] INA § 101(a)(15).
[10] 9 FAM § 40.7 N1.1. (June 13, 2006).
[11] According to DOS, section "214(b) does not provide any independent standards for qualifying for a NIV…. This section does not impose a separate standard on immigrant intent" beyond the requirements of keeping a foreign residence and coming temporarily. 9 FAM 40.7 § N.15 (Sept. 28, 2005). The DOS interpretation conflicts with other authorities which regard 214(b) as an additional requirement that the applicant have "nonimmigrant intent:"
First, certain nonimmigrant visa classes, including H-1B and L-1, are statutorily exempt from the presumption of INA § 214(b). Under the State Department's interpretation, this should mean that H-1B and L-1 visa applicants don't bear the burden of proving they qualify for visas. However, INA § 291 clearly places the burden of proof on all visa applicants.
Second, DOS regulations state that 214(b) is a ground for refusal. 22 C.F.R. § 41.121. That's not a very specific ground for refusal if it just means that the applicant failed to meet another unspecified requirement for the visa.
Third, the DOS Foreign Affairs Manual itself still at times refers to 214(b) as requiring nonimmigrant intent—for example, "[i]n a 214(b) refusal, the denial must always be based on a finding that the applicant's specific circumstances failed to overcome the intending immigrant presumption." 9 FAM § 41.121 PN1.2-11 (Feb. 26, 2008).
However, this debate is largely academic because the requirement of "nonimmigrant intent" is for practical purposes indistinguishable from the requirements of keeping a foreign residence and coming temporarily.
[12] *See e.g.* INA § 101(a)(15)(B).

means one's "principal, actual dwelling place in fact, without regard to intent."[13] This has been interpreted to mean:

- The officer should look at the objective facts (not subjective intent)[14] to determine whether the applicant has a residence abroad. If so, then officer should also consider whether the applicant intends to abandon that residence.
- An applicant needn't maintain an "independent household," so it's OK if the applicant's residence is in a home owned by someone else.[15]
- Also, one needn't intend to return to the same home where he or she lived in the past—for example, an applicant who has been living in Germany, may meet the residence abroad requirement by showing a clear intention to establish a residence in Canada after a temporary visit to the U.S.[16]
- The consular officer's suspicion that after entering the U.S., the applicant "may be swayed to remain in the United States because of more favorable living conditions," is not a sufficient ground to refuse a visa so long as the applicant's current intent is to return to a foreign residence.[17]

2.3 COMING TO THE U.S. "TEMPORARILY"

Various of the nonimmigrant visa categories require the applicant to be "seek[ing] to enter the United States temporarily."[18] The term "temporary" isn't specifically defined in statute. In its ordinary sense, "temporary" means "lasting for a time only; existing or continuing for a limited time."[19] There is no set outer limit such as six months or a year or even three years.[20] The consular officer must be satisfied that the intended stay has a time limitation and is not indefinite in nature.[21]

For a B visa applicant's trip to be considered temporary, the applicant must have specific and realistic plans for the entire period of the trip.[22] The period of time projected for the visit must be consistent with the stated purpose of the trip.[23] And the applicant must prove an intention to depart the U.S. upon completion of that purpose.[24] For example, the temporariness requirement would be met where one "cohabiting partner" will accompany another for a two-year work assignment or a four-year degree program and then depart the U.S.[25]

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[13] INA § 101(a)(33).
[14] 9 FAM § 41.11 N2.2.
[15] 9 FAM § 41.11 N2.1.
[16] 9 FAM 41.11 N2.2-2.
[17] 9 FAM § 41.31 N2.3 (Feb. 15, 2005).
[18] *See e.g.* INA § 101(a)(15)(F).
[19] *Webster's Third New International Dictionary* 2353 (1993), cited in John P. Elwood, Dep'y Ass't Atty. Gen., Memorandum Opinion for the Acting General Counsel, DHS (Dec. 18, 2008), AILA Infonet Doc. # 09022664 (Feb. 26, 2009).
[20] *See* John P. Elwood, Dep'y Ass't Atty. Gen., Memorandum Opinion for the Acting General Counsel, DHS at 3 n.3 (Dec. 18, 2008), AILA Infonet Doc. # 09022664 (Feb. 26, 2009) (citing various federal statutes defining temporary as meaning up to three years).
[21] 9 FAM § 41.31 N3.1 (Feb. 15, 2005).
[22] 9 FAM § 41.31 N3.2 (Feb. 15, 2005).
[23] 9 FAM § 41.31 N3.1 (Feb. 15, 2005).
[24] 9 FAM § 41.31 N3.1 (Feb. 15, 2005).
[25] 9 FAM § 41.31 N3.4 (Feb. 15, 2005).

For a TN visa, a "temporary entry" means "entry without the intent to establish permanent residence. The alien must satisfy the inspecting immigration officer that the proposed stay is temporary. A temporary period has a reasonable, finite end that does not equate to permanent residence. In order to establish that the alien's entry will be temporary, the TN applicant must demonstrate to the satisfaction of the inspecting immigration officer that his or her work assignment in the United States will end at a predictable time and that he or she will depart upon completion of the assignment.[26]

2.4 ANALYSIS

The requirements of keeping a foreign residence and coming to the U.S. temporarily are very closely related. When a consular officer analyzes whether an applicant meets these requirements, the officer will consider the factors that will push the applicant to return home and the factors that will pull the individual to stay in the U.S. These include[27]:

- Family and personal ties in each country.
- Work and business ties and opportunities in each country.
- Homes owned or leased in each country.
- Property ties (e.g., car, other real estate, bank accounts, investments) in each country.
- Social or cultural ties in each country.
- Prior efforts to establish permanent residence in the U.S. and prior U.S. immigration violations.

[26] 8 C.F.R. § 214.6(b).
[27] *See* 9 FAM 41.31 N3.4 (Feb. 15, 2005).

Whether the purpose of the U.S. clear, credible, and is consistent with the desire to keep a principal home abroad.

3. WHAT ABOUT "DUAL INTENT"?

A vexing issue in immigration law is whether a person can qualify now for a nonimmigrant visa that if there is also any evidence of immigrant intent—a past intent, an intent to seek to immigrate during this trip to the U.S., an intent to immigrate to the U.S. in the future, or even a hope to immigrate in the future. This is known as "dual intent."

3.1 H-1B, L-1, O-1

The rules for H-1B, L-1 and O-1 visas are clear. Approval of labor certification or the filing of an immigrant visa petition does not preclude granting H-1B status,[28] L-1,[29] or O-1 status.[30] The officer must, however, be satisfied that the applicant will depart the U.S. voluntarily when his or her authorized nonimmigrant stay expires if not granted permanent resident status.[31] So, for example, past immigration violations may be evidence that the applicant isn't coming merely temporarily.

3.2 OTHER VISAS

The filing of an immigrant petition does not automatically make an applicant ineligible for other types of visas, such as B1/B2. But the applicant must affirmatively prove that his or her activities in the U.S. will be consistent with what is allowed for that visa, and that he or she does *not* intend to use the visa to enter the U.S. and stay permanently. And, if required for the visa category, the applicant must affirmatively prove an unabandoned foreign residence. [32] A B1/B2 visa should be denied if the applicant's "true intent is to remain in the United States until such a time as an immigrant visa … becomes available."[33] In the past, the State Department has made similar announcements regarding other types of nonimmigrant visas.[34]

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[28] INA § 214(h); 8 C.F.R. § 214.2(h)(16)(i).
[29] INA § 214(h); 8 C.F.R. § 214.2(*l*)(16).
[30] 8 C.F.R. § 214.2(o)(13).
[31] 8 C.F.R. §§ 214.2(h)(16)(i), 214.2(*l*)(16), 214.2(o)(13).
[32] 9 FAM § 41.31 N17.
[33] *Id.*
[34] "With respect to the question of issuing a nonimmigrant visa to an alien registered on an immigrant visa waiting list, whether as the spouse or child of a permanent resident or on any other basis, the Department has long recognized the concept of 'dual intent.' The Department's position in this respect has for many years been that an alien who is registered for immigration or who otherwise shows an intent to immigrate to the United States may nonetheless be issued a nonimmigrant visa if the alien can establish to the satisfaction of the consular officer that he or she intends in good faith to make a temporary trip to the United States and depart upon completion of his or her temporary trip." U.S. Dep't of State, Cable 92-State-193038 (June 17, 1992). *See also* 9 FAM 41.31

And the Department of Homeland Security (DHS) has made announcements about "dual intent" similar to those of the State Department.[35] This means that even if an individual is issued a nonimmigrant visa by the Consulate abroad, DHS may still refuse to admit the individual at the airport or other port of entry.

In summary, as a practical matter, once a foreign national is engaged or married to a U.S. citizen or has begun the immigration, K-1, or K-3 visa process, it may be difficult to get a B1/B2 visa and enter the U.S. This is true despite the fact that the immigration authorities recognize there are legitimate reasons for a fiancé or spouse of a U.S. citizen to enter the U.S. as a nonimmigrant. For example, according to the State Department's Foreign Affairs Manual, there are legitimate reasons for a fiancée of a U.S. citizen to enter the U.S. with a B1/B2 visa:

- Simply to meet the family of his and/or her fiancée.
- To become engaged.
- To make arrangements for the wedding
- To renew a relationship with the prospective spouse. [36]

N15 (B visa may be issued to a permanent resident who due to emergency circumstances, such as an urgent U.S. meeting, can't wait for a returning resident visa.).

[35] Letter, LaFleur, Business and Trade Services, Benefits Branch, INS, HQ 1815-C (June 18, 1996); *see Matter of H-R-*, 7 I. & N. Dec. 651 (Reg. Comm'r 1958) (Applicant withdrew immigrant visa application in order to more quickly obtain visitor's visa. Six months after entering U.S., he applied for adjustment of status. Held: "The fact that the applicant previously expressed a desire to enter the United States as an immigrant--and may still have such desire--does not of itself preclude the issuance of a nonimmigrant visa to him nor preclude his being a bona fide nonimmigrant" for purposes of adjustment.); *Matter of Wellhofer, 12 I. & N. Dec. 522 (Reg. Comm'r 1967)* (following *Matter of H-R-*). *See also* DHS Inspectors Field Manual § 17.10(b) (Green card holder at DHS port of entry may relinquish permanent resident status and be admitted as a visitor.).

[36] Some courts have gone further than the agencies by holding that a nonimmigrant visa—even one requiring an unabandoned foreign residence and a temporary stay—may be issued so long as the applicant intends to leave the U.S. if it's not legally possible to immigrate. *Brownell v. Carija*, 254 F.2d 78 (D.C. Cir. 1957) (An alien actually and in good faith in transit through the United States does not become an unlawful entrant because he entertains a desire, purpose or intent to remain here if the laws of the country permit him to do so. Such a purpose, so limited, could at best be only a hope.); *Choy v. Barber,* 279 F.2d 642 (9th Cir. 1960) (It is permissible for a nonimmigrant to intend to comply with terms of a temporary visit and also intend to pursue permanent residence, if an opportunity arises. Following *Carija.*); *Lauvik v. INS*, 910 F.2d 658 (9th Cir. 1990) (E-2 treaty investor visa extension denied by INS on the basis that applicant expressed a wish to immigrate. Held: Reversed. It was error to deny extension on the basis that the applicant was not a bona fide nonimmigrant. "There was no evidence he intended to remain if that was not legally possible." *Following Choy* and *Matter of H-R.*).
Such courts are essentially applying the current test for H-1B, L, and O visas, and the agencies oppose such permissiveness for other visas. Still, nonimmigrant intent may exist despite a mere "hope" to immigrate. *Matter of Chartier,* 16 I. & N. Dec. 284 (BIA 1977) (stating in dictum that a adjustment of status may not be denied on the basis of preconceived intent to immigrate where an individual entering as a nonimmigrant merely "hoped" to become a permanent resident.); *Chryssikos v. Comm'r of Immigration, 3 F.2d 372, 375 (2d Cir. 1924)* ("[T]here is a great difference between wanting to stay and intending to stay and proof of a desire to stay is not proof of an intent to stay.").

3.3 Avoiding Misrepresentations

Also, it's critical that a nonimmigrant visa applicant not conceal from immigration authorities his or her engagement or marriage to a U.S. citizen or the fact that that immigration, K-1, or K-3 process has begun. This could amount to fraud or misrepresentation, which is a legal ground to deport a noncitizen and permanently prohibit readmission. For instance, if the DHS officer at the port of entry determines that an applicant is ineligible for admission to the U.S. on the basis of fraud or misrepresentation, the applicant may be "summarily removed," meaning that the applicant is deported from the U.S. with no hearing before a judge, is permanently prohibited readmission absent special circumstances. Similarly, a person physically present in the U.S. filing a Form I-485, Application to Adjust Status, to become a lawful permanent resident may be denied and placed in removal proceedings on the basis of a prior fraud or misrepresentation.[37]

If you tell the truth about your marital status and marriage-related immigration efforts, you may apply for a nonimmigrant visa. Denial on the basis that you lack nonimmigrant intent is without prejudice to your immigration efforts. Still, given the significant refusal rate for B1/B2 visa applicants with "dual intent" issues, it may be wise to hire an immigration attorney to advise you.

4. Rules for Specific Visa Categories

4.1 B-1/B-2 Visitors

B-1/B-2 visitors must both keep their residence abroad and be coming temporarily to the U.S.[38]

For a B visa applicant's trip to be considered temporary, the applicant must have specific and realistic plans for the entire period of the trip.[39] The period of time projected for the visit must be consistent with the stated purpose of the trip.[40]

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[37] *Cf. Matter of Cavazos*, 17 I. & N. Dec. 215 (BIA 1980) (Respondent was admitted as a nonimmigrant visitor for pleasure with a border crossing card. He married a U.S. citizen the same day. Assuming he had a preconceived intent to remain permanently at the time of entry as a nonimmigrant, it is INS policy per OI 245.3(b) that an adjustment applicant should not be denied as a matter of discretion solely on this basis where substantial equities are present in the case. Here, the U.S. citizen wife and child are substantial equities. Notably, the respondent was *not* charged with any fraud or misrepresentation.); *Matter of Ibrahim*, 18 I. & N. Dec. 55 (BIA 1981) (limiting *Cavazos'* holding to immediate relatives).

[38] INA § 101(a)(15)(B).
[39] 9 FAM § 41.31 N3.2 (Feb. 15, 2005).
[40] 9 FAM § 41.31 N3.1 (Feb. 15, 2005).

And the applicant must prove an intention to depart the U.S. upon completion of that purpose.[41]

For example, the temporariness requirement would be met where one "cohabiting partner" will accompany another for a two-year work assignment or a four-year degree program and then depart the U.S.[42]

4.2 F-1 Students

For F-1 student visas, the State Department notes that it is natural for a younger student to lack the property, employment, and family ties characteristic of an older visa applicant.[43] Consular officers are instructed to focus on whether the applicant has the "present intent to depart the U.S. at the conclusion of his or her studies."[44] That this intention is subject to change or even likely to change is not a sufficient reason to deny a visa.[45]

Consular officers are instructed not to focus on whether an applicant's proposed education would be "impractical" in his or her home country. For example, an applicant proposing to study philosophy shouldn't be denied a visa simply because it doesn't lead to a specific career.[46]

Nor should a visa be denied simply because the proposed education **is** available in the home country. The student may legitimately wish to study in the U.S. for various reasons, including a higher standard of education.[47]

4.3 J-1 Exchange Visitors

A J-1 exchange visitor may be in the U.S. for a prolonged period. Still, "the consular officer must be satisfied at the time of the" visa application that the applicant has a "present intent to depart the U.S. at the conclusion of his or her program." Also, consular officers should not "automatically assume" that the applicant will return to a residence abroad merely because the applicant is subject to the two-year foreign residence requirement. A factor to consider is whether the skills that the alien expects to acquire in the United States can be readily and effectively utilized in the country to which he or she is returning.[48]

Filing a request for a waiver of the two-year home residency requirement will not, in and of itself, bar an extension of J-1 status, but approval of the waiver will be a bar.[49]

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41 9 FAM § 41.31 N3.1 (Feb. 15, 2005).
42 9 FAM § 41.31 N3.4 (Feb. 15, 2005).
43 9 FAM 41.61 N5.2.
44 9 FAM 41.61 N5.2.
45 9 FAM 41.61 N5.2.
46 9 FAM 41.61 N5.3.
47 9 FAM 41.61 N5.4.
48 9 FAM § 41.62 N5.
49 Letter, Jin, USIA G.C. (Dec. 18, 1995), reprinted in 69 *Interpreter Releases* 47, 51 (Jan. 9, 1998).

4.4 H-1B Temporary Workers and L-1 Intracompany Transferees

H-1B temporary workers and L-1 intracompany transferees needn't keep a residence abroad but must be coming temporarily to the U.S.[50]

Approval of labor certification or the filing of an immigrant visa petition does not preclude granting proving that one's stay will be temporary.[51] The officer must, however, be satisfied that the applicant will depart the U.S. voluntarily when his or her authorized nonimmigrant stay expires if not granted permanent resident status.[52] So, for example, past immigration violations may be evidence that the applicant isn't coming merely temporarily.

4.5 H-2 Workers and H-3 Trainees

The approval of a permanent labor certification or the filing of a preference petition for a foreign national currently employed by or in a training position with the same petitioner in H-2 or H-3 status, shall be a reason, by itself, to deny the foreign national's extension of stay.[53]

4.6 TN Professionals

TN status doesn't require the holder to maintain a foreign residence. But a TN must be making a "temporary entry."[54]

For a TN visa, a "temporary entry" means "entry without the intent to establish permanent residence. The alien must satisfy the inspecting immigration officer that the proposed stay is temporary.

A temporary period has a reasonable, finite end that does not equate to permanent residence. In order to establish that the alien's entry will be temporary, the TN applicant must demonstrate to the satisfaction of the inspecting immigration officer that his or her work assignment in the United States will end at a predictable time and that he or she will depart upon completion of the assignment.[55]

Having applied for permanent resident status may make it difficult for a TN applicant to prove he or she is coming to the U.S. temporarily. According to

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[50] The statutory requirements for the visas don't include an unabandoned foreign residence. INA § 101(a)(15)(h), (*l*). Interestingly, however, a separate statutory section seems to presume this is a requirement. INA § 214(h) ("The fact that an alien is the beneficiary of an [immigrant petition] … shall not constitute evidence of an intention to abandon a foreign residence for purposes of obtaining" an H-1B or L-1 visa.).
[51] INA § 214(h); 8 C.F.R. § 214.2(h)(16)(i).
[52] 8 C.F.R. §§ 214.2(h)(16)(i).
[53] 8 C.F.R. § 214.2(h)(16)(ii).
[54] 8 C.F.R. § 214.6(a).
[55] 8 C.F.R. § 214.6(b).

DHS, the filing of an immigrant petition (Form I-130 or Form I-140) is a negative factor but is not necessarily fatal:

> The fact that an alien is the beneficiary of an approved I-140 petition may not be, in and of itself, a reason to deny an application for [TN status] if the alien's intent is to remain in the United States temporarily. Nevertheless, because the Service must evaluate each application on a case-by-case basis with regard to the alien's intent, this factor may be taken into consideration along with other relevant factors every time that [an application is filed.][56]

DOS has made similar pronouncements: an applicant can have the required intent to make a "temporary" trip now despite an intent to immigrate in the future.[57]

However, DHS has stated that filing of a Form I-485, Application for Adjustment of Status, or application for an immigrant visa is fatal to a subsequent TN application: "once a TN files" one of these applications "then the TN would no longer be eligible for admission or an extension of stay as a TN."[58]

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[56] Letter, LaFleur, Business and Trade Services, Benefits Branch, INS, HQ 1815-C (June 18, 1996).
[57] 9 FAM § 41.59 N5.
[58] Letter from Paul M. Morris, Exec. Dir., Admissibility and Passenger Programs, CBP, to attorney Charles D. Herrington, Apr. 21, 2008, AILA Infonet Doc. # 09021280.