

# **A Former F-1 Student Obtained U.S. Green Card After Out of Status for Over 20 Years**

**F Status Violation-No unlawful Presence until Formal Finding of Violation of Status**

## Case Summary

Our client, Mr. Lau (name changed for confidentiality), a native of Hong Kong, and a British National (Overseas), filed an adjustment of status application (Form I-485) in early 2014, based on an approved relative immigrant visa petition filed by his father (Form I-130, F1 category- USC petition for unmarried child of over age of 21).

Our client was otherwise eligible to adjust/change his status under INA section 245 for having met the following conditions,

- 1) He was inspected and admitted to the U.S. by entering the U.S. from Hong Kong in 1992 with a F-1 student visa;
- 2) He was not in an exempt category such as a crew person, or a J1 (exchange scholar) who are not eligible to adjust status;
- 3) An immigration visa was immediately available to him as the priority date on his father's immigrant visa petition had become current , and
- 4) He was not subject to any other category of inadmissibility (i.e. criminal offence, health ground, financial ground, etc.)

The only issue was that he was out of status at the time of filing his I-485 application. A request to change or extend status is only considered properly filed if it is submitted while the individual is still in a valid nonimmigrant status. My client had violated his nonimmigrant F-1 student status by dropping out of school, and unlawfully stayed in the U.S. for over 20 years. As a result, his I-485 Application was denied by the USCIS on June 8, 2014. His father's relative immigrant visa petition (I-130) remains valid.

Generally, if a foreign national acquires any amount of unlawful presence, s/he is only permitted to apply for a new U.S. visa in her/his home country. After analyzing the case based on the facts that my client was initially admitted to the U.S. as an F-1 student with a D/S (duration of stay) status, our office advised that he should go through consulate processing, return to his home country, Hong Kong, to further pursue the case. The main hurdle that Mr. Lau had in order to successfully pursue his case at the Consulate was the 3-10 year

unlawful presence penalty under Section 212 of the Immigration and Nationality Act.

Unlawful presence carries penalties that are triggered upon one's departure from the United States. Unlawful presence of more than 180 days will result in a three (3) year inadmissibility bar once the foreign national departs the United States. A period of one year or more of unlawful presence results in a ten-year (10) bar upon departure from the U.S.

But the law says, a foreign national in F or J status, who is present in the United States for the duration of status, is typically considered in a period of authorized stay, even if s/he committed a status violation, and s/he does not begin to accrue unlawful presence until a formal finding of the violation of status is made.

In my client's case, he did violate his student visa status by dropping out of school in 1994, but a finding of his violation wasn't made formal until the USCIS denied his I-1485 application on June 8, 2014. This means our client didn't begin to accrue unlawful presence until June 8, 2014, and he would only begin to accrue 180 days and more unlawful presence should he depart the United States after December 4, 2014.

Following our office's advice, our client left the U.S. to Hong Kong in November 2014. In June, 2015, he was interviewed at the U.S. Consulate in Hong Kong and granted a U.S. immigrant visa without difficulty. He is now reunited with all of his relatives in the U.S. and now a U.S. green card holder after a long 20 years!

### **Conclusion**

This case overview covers only the situation when an F-1 student is out of status, but not necessarily accruing unlawful presence. A departure from the United States should not trigger the three or ten-year inadmissibility bar. Therefore, it is crucial to analyze the nuances between status violations and unlawful presence when evaluating immigration options and risks. When questions arise, our attorney at The Law Offices of Derek Lim is available to help in exploring the options that are related to the complex rules that govern the status of foreign nationals.