

## **Adjustment of Status: Law and Practice**

*by William Stock\**

Adjustment of status has long been attorneys' favored route for obtaining permanent residence on behalf of their clients who are in the United States. Because processing happens at Citizenship and Immigration Services offices in the United States, attorneys can attend adjustment of status interview is scheduled; problems are more easily resolved, and review of denials can be sought in administrative and federal court proceedings. The alternative route through consular processing of an immigrant visa application requires a costly trip outside of the United States, where problems are more difficult to deal with and judicial review of denials is not available. The 1996 amendments to the Immigration and Nationality Act, which render certain foreign nationals ineligible to return to the United States after a trip abroad if they have been present unlawfully in the United States, make adjustment even more vital as the only available route to obtain permanent resident status.

The adjustment provisions are set forth in Section 245 of the Immigration and Nationality Act of 1952 ("INA" or "the Act"). Regulations detailing eligibility and procedure for adjustment of status applications are found at 8 CFR §§245.1 *et seq.* Section 245 sets forth three basic requirements for an alien to be eligible for adjustment of status: the applicant must have been inspected and admitted to the United States, or have been paroled into the United States, the most recent time he or she arrived;<sup>1</sup> the applicant must be admissible to the United States, or eligible for a waiver of any applicable grounds of inadmissibility;<sup>2</sup> and the applicant must have an immigrant visa immediately available to him or her.<sup>3</sup> In addition, the foreign national must make application for adjustment of status, and if the applicant qualifies, the statute provides that adjustment *may* be granted in the discretion of Citizenship and Immigration Services.

The characterization of adjustment of status as a discretionary, rather than mandatory, relief, means that it is not enough for an applicant to demonstrate that he or she meets all

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<sup>1</sup> For more details, see the article on inspection and admission of foreign nationals in this volume.

<sup>2</sup> For more details, see the article grounds of inadmissibility and waivers of inadmissibility in this volume.

<sup>3</sup> For more details, see the article on the immigrant visa preferences in this volume.

of the eligibility requirements for adjustment and is not barred from adjustment by any ground of ineligibility. In addition, the adjudicator must determine that the applicant merits the favorable exercise of discretion, and may deny the application in the exercise of discretion. While the adjudicator cannot abuse this grant of discretion, the existence of repeated violations of immigration law can be a factor used to deny an adjustment of status application in the exercise of discretion. An adjustment applicant with adverse factors, such as repeated immigration violations or criminal problems not causing inadmissibility, should address the discretionary issue by presenting evidence of positive factors and equities to offset the negative factor of the violations.<sup>4</sup> Such equities would include length of residence in the United States, hardship in traveling abroad (including triggering the unlawful presence bars), family ties in the U.S., and the good moral character of the applicant. These will be weighed against the nature and severity of the immigration violation(s).<sup>5</sup>

### **Bars to Adjustment of Status**

In addition to meeting the requirements set forth in Section 245(a) of the Act (inspection and admission or parole, admissibility, and a currently available immigrant visa petition), an applicant must demonstrate that he or she does not fall into one of the bars to adjustment contained in Section 245(c)(1) - (8) of the Act. Distilled to their essence, these are somewhat redundant provisions prohibiting adjustment of status in four instances: failure to maintain continuous lawful status, absence of lawful nonimmigrant status, engagement in unauthorized employment, and violation of the terms of a nonimmigrant visa.<sup>6</sup>

Applicants for adjustment of status as “immediate relatives” (spouses, children and parents of U.S. citizens) are relieved of most of the common bars to adjustment of INA §245(c), but not the threshold requirements of INA §245(a) that they be inspected and admitted or paroled. Applicants who qualify for immigrant visas as battered spouses and children of U.S. citizens under INA §204(2)(1)(A) and (B) may adjust status even if they were not inspected and admitted or paroled, and the grounds of ineligibility of INA §245(c) also do not apply to them.<sup>7</sup> In addition, special immigrants described in INA

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<sup>4</sup> See *Mamoka v. INS*, 43 F. 3d 184 (5<sup>th</sup> Cir. 1995), *Matter of X*, case number redacted (AAO Mar. 22, 2000) (holding that “where adverse factors are present in a given application for adjustment of status under section 245 of the act, it may be necessary for the application to offset these by a showing of unusually or even outstanding equities”).

<sup>5</sup> See *Matter of Cavazos*, 17 I&N Dec. 215 (BIA 1980) (for an immediate relative whose only immigration violation was entry as a nonimmigrant with immigrant intent, it was an abuse of discretion to deny adjustment of status on this basis alone).

<sup>6</sup> While these four grounds are the most commonly applied, there are separately enumerated bars for adjustment for foreign nationals who last entered as crewmen, as travelers in transit without a visa, or as visitors using the Visa Waiver Program. In addition, Section 245(d) of the Act prohibits the adjustment of status of a foreign national holding a fiancé/e (K-1/K-2) nonimmigrant visa on any basis other than an immigrant petition filed by the same U.S. citizen who petitioned for the foreign national to be granted a K-1 or K-2 visa.

<sup>7</sup> INA §245(a) and (c).

§101(a)(27)(H), (I), (J), or (K) can adjust status even if they failed to continuously maintain lawful status.<sup>8</sup>

An applicant (other than an immediate relative, battered spouse/child, or certain “special immigrants”) who has failed to maintain continuous lawful status *at all times* after the applicant’s first entry is ineligible to adjust status, unless the provisions of INA §245(i) or (k) apply.<sup>9</sup> A foreign national fails to continuously maintain lawful status if he or she remains in the U.S. after the expiration date of his or her period of authorized stay.<sup>10</sup> Even one day of status violation since the applicant’s initial entry to the United States years or decades earlier can render an otherwise eligible foreign national ineligible for adjustment. Applicants should, therefore, be prepared to document the status they were granted each time they entered the United States and their timely departure.

Applicants should be aware that the adjudicator has available the records of their arrivals and departures through the Non-Immigrant Information System (NIIS). NIIS is the computer record of every nonimmigrant arrival and departure, as reflected by the Arrival/Departure Record (Form I-94) completed by each nonimmigrant who arrives in the United States. The top part of the form is processed as each nonimmigrant is inspected on arrival, and the bottom part is stapled into the arriving nonimmigrant’s passport. The bottom portion is then turned in when the nonimmigrant leaves the United States, and date of departure is entered into NIIS. While gaps in the record of entries and departures may be expected due to breakdowns in the airlines’ collection of Departure Records and delivery of those records to Immigration, the new US-VISIT entry-exit inspection system will require all nonimmigrants to check in with an Immigration Inspector or at a computer kiosk as part of departure, making it more difficult to claim that the absence of a record of departure should not be considered evidence of failure to depart in a timely manner.

According to INA §245(c)(7), a foreign-national is ineligible to adjust status through an employment-based immigrant visa petition if he or she is not in a lawful nonimmigrant status at the time of filing for adjustment. As a result of this provision, asylees, persons granted Temporary Protected Status, parolees, and other foreign-nationals who does not hold nonimmigrant status may not adjust status through one of the employment-based categories described in INA §203(b). It would be necessary to first change to a nonimmigrant status, if that were even possible, and only then proceed with the employment based adjustment.<sup>11</sup>

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<sup>8</sup> These provisions allow for special immigrant status to be granted to certain foreign medical graduates licensed to practice medicine prior to January 9, 1978; certain sons and daughters of international agency employees; juveniles declared dependent by a U.S. juvenile court; and certain immigrants who served in the U.S. military after overseas enlistment.

<sup>9</sup> 8 CFR §§245.1(b)(5), (6)(c)(1); *see also* Letter from R. Michael Miller, Deputy Asst. Comm. Adjudications to Gunnar A. Sievert, CO 245-C (Jan. 8, 1990) *reprinted in* 67 *Interpreter Releases* 151 (January 29, 1990). INA §245(i) and (k) are discussed *infra*.

<sup>10</sup> 8 CFR §245.1(d)(1).

<sup>11</sup> There is no specific procedural mechanism to change from asylee or TPS status to nonimmigrant status in the United States, other than through departing and obtaining a nonimmigrant visa (probably only an H-

INA §245(c)(2) makes ineligible for adjustment any alien who has ever worked without authorization prior to filing the application, and INA §245(c)(8) makes ineligible for adjustment any alien who has worked without authorization.<sup>12</sup> The language of paragraph (c)(8) does not specify the time frame during which unauthorized employment is prohibited. The INS has determined that this language refers to any time period before the adjustment of status application is granted.<sup>13</sup> Even one day of unauthorized employment may render an applicant ineligible to adjust under these provisions—including unauthorized employment after filing for adjustment of status application.<sup>14</sup> As noted above, a foreign national who qualifies for immediate relative status under INA §201(b) is exempt from this ground of ineligibility.<sup>15</sup>

A foreign national is also ineligible to adjust status if he or she has ever violated the terms of his or her nonimmigrant visa.<sup>16</sup> A foreign national is not deemed to have violated the terms of a nonimmigrant visa if (a) the violation occurred through no fault of the applicant or for technical reasons, (b) the alien filed an untimely request for an extension or change of non immigrant status that was excused and granted by CIS in its discretion, (c) the alien filed a timely request for an extension of nonimmigrant status that was approved after the alien's authorized nonimmigrant status expired, or (d) the alien was granted reinstatement to student status on the basis of circumstances beyond the student's control.<sup>17</sup> Thus, for example, a terminated H-1B nonimmigrant is out of status

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1B visa), so in most cases employment-based adjustment of status will not be a viable option for many who, although in a lawful status in the United States, are not in a nonimmigrant status. The alternative of consular post processing for an asylee or holder of TPS is also most likely not an option, since returning to the home country to process may not only be dangerous to the applicant but could also call into question the validity of the asylum claim based on fear of return. Only a beneficiary of a 245(i) grandfathered petition would be able to adjust through an employment based petition.

<sup>12</sup> INA §245(c)(8) in pertinent part provides, adjustment of status shall not be applicable to “any alien who was employed while the alien was an unauthorized alien, as defined in section 274A(h)(3).”

<sup>13</sup> 8 CFR §245.1(b)(10) “[A]lien is ineligible for adjustment of status if he ‘was ever’ employed in the U.S. without authorization of the Service.”

<sup>14</sup> 8 CFR §274a.12(c)(9) states “[A]n alien who works will not be deemed to be an ‘unauthorized alien’ while the adjustment of status application is pending provided that she has obtained permission from the Service to engage in employment during the period that the application is pending.”

<sup>15</sup> See Letter from Richard E. Norton, Assoc. Comm., Examinations to Brain K. Bates (Dec. 9, 1987), reprinted in 65 *Interpreter Releases* 149-150 (Feb. 8, 1988) (Bar does not apply where there is an immediate relative relationship, even though an immediate relative petition has not been filed). *But see* Legal Opinion, Cook, General Counsel, Co. 245-C (May 18, 1990) (Indicating that immediate relative status must be tested by obtaining an approved petition before beneficiary can rely on relationship for adjustment on other grounds).

<sup>16</sup> INA §245(c)(8) provides that adjustment of status shall not be applicable to “any alien who violated the terms of a nonimmigrant visa.”

<sup>17</sup> See INS Memorandum, “Processing of Section 245(i) Adjustment Applications on or After the October 1, 1997 Sunset Date; Clarification Regarding the Applicability of Certain New Grounds of Inadmissibility to 245(i) Applications” (May 1, 1997), reproduced in 74 *Interpreter Releases* 791-94, 793 (May 12, 1997); *but see* Letter from Jacquelyn A. Bednarz, Chief Non Immigrant Branch Adjudications to Lisa H. Enfield (undated), reprinted in 70 *Interpreter Releases* 1120 (Aug. 23, 1993) (reinstatement pursuant to 8 CFR §214.2(f)(16) is not considered and does not “erase” the period during which the alien may have been in violation of status). The apparent inconsistency in interpretations relating to reinstatement may result from the two different sections of §245(c) that they are interpreting. The Bednarz letter addresses the (c)(2) requirement that an applicant not have failed to continuously maintain lawful status. The Crocetti Memo

immediately upon termination, but a new employer may file a new H-1B petition with a request for an extension of status in spite of the violation of status. If CIS grants the petition and approves the extension of the H-1B nonimmigrant's status in its discretion and in spite of the violation of status,<sup>18</sup> that employee would not have violated the terms of his nonimmigrant visa for adjustment of status purposes.

### **Forgiveness Provisions: INA §§245(k) and (i)**

Qualified employment-based applicants are eligible to adjust under INA §245(k) even if they failed to maintain continuous lawful status, engaged in unauthorized employment, and violated the terms of a non immigrant visa. An applicant may take advantage of this section provided that none of the immigration violations exceeded 180 days since the applicant's last admission to the U.S., and that the applicant is present in the U.S. pursuant to a lawful admission at the time of filing the application. The language of this section appears to render violations taking place after filing an adjustment application irrelevant, for it specifies that this exemption applies if the "alien, *on the date of filing* an application for adjustment of status,"(emphasis added) meets the elements of INA §245(k).<sup>19</sup>

Although INA §245(c)(2) covers all violations since the initial entry, the more specific language INA §245(k) should be understood to supersede and waive those violations. The language of the statute and the INS General Counsel's opinion addressing the scope of this 245(k) provision support only considering status violations after the most admission.<sup>20</sup> This reading gives a 245(k)-eligible adjustment applicant a fresh start after the last admission, and allows adjustment as long as there has been unauthorized employment or status violation of 180 days or less since that admission. To date, unfortunately, there are no INS regulations or memoranda interpreting the provisions of INA §245(k), so practitioners still do not know whether INS will agree with this reading of the statute.<sup>21</sup>

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addresses the (c)(8) provision that the applicant not have violated the terms of the nonimmigrant status. Moreover, the Crocetti memorandum is limited to reinstatements resulting from circumstances beyond the student's control, and may not extend to reinstatements based on hardship. Therefore, the practitioner should be mindful that reinstatement may not provide a complete remedy which would allow for adjustment of status.

<sup>18</sup> See 8 CFR §214.1(c)(4).

<sup>19</sup> In the view of the INS General Counsel, only violations occurring after the latest admission and before the filing of the adjustment of status application should be considered. See Letter to H. Ronald Klasko, "INS General Counsel List of Resolved Issues," (December 10, 1999), posted on AILA InfoNet, December 22, 1999.

<sup>20</sup> *Id.*

<sup>21</sup> Possibly the best insight we can gain to the INS' current thinking and actual practice in the field on INA §245(k) is found in the Adjustment of Status Operating Procedures, Section 7-2.3, General Information Regarding §245(k), posted on AILA InfoNet on October 1, 2001. Neither the text of that document, nor a flow chart employed by INS adjudicators when they are evaluating an employment based I-485 applicant's eligibility under INA §245(k) and INA §245(i), clarifies that only violations in status that have occurred after the last admission to the United States should be considered.

The forgiveness of violations set forth in INA §245(a) and (c), including entry without inspection, is possible if an applicant is eligible to take advantage of INA §245(i) based on a qualifying visa petition or Labor Certification filed before April 30, 2001. This will involve a penalty payment of \$1000 above and beyond the regular INS filing fees, and it will require completion of a Supplement A form admitting immigration violations.<sup>22</sup> Although 245(i) can forgive INA §§245(a) and (c) immigration violations which would otherwise render an applicant ineligible to adjust, it does not forgive all grounds of ineligibility, since an adjustment applicant must not be inadmissible, and INA §245(i) does not waive inadmissibility by itself.<sup>23</sup>

Qualifying individuals are able to adjust status provided that they are a beneficiary of an immigrant visa petition or labor certification that was filed by April 30, 2001.<sup>24</sup> If the petition or labor certification was filed between January 14, 1998 and April 30, 2001, then the beneficiary must establish presence in the United States on December 21, 2000.<sup>25</sup> An immigrant visa petition filed by this date must be “approvable when filed”<sup>26</sup> and a labor certification application filed by this date must be “properly filed.”<sup>27</sup>

### Adjustment Procedure

The proper office for the filing of an application for adjustment of status is determined by the type of immigrant visa petition through which the foreign national is qualified to file for adjustment. The general rule is that a foreign national who is not in removal proceedings will file an application for adjustment with the Citizenship and Immigration Services office having jurisdiction over the type of adjustment and the applicant’s place of residence.<sup>28</sup> Applications based on an immediate relative petition (Form I-130) or certain “special immigrant” petitions (Form I-360) are filed with the CIS local district

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<sup>22</sup> 8 CFR §245.10(a).

<sup>23</sup> INA §245(i) waives only the ineligibility provisions of (a) and (c). The listed examples are two of the other grounds of ineligibility in INA §§245(d)-(f) and inadmissibility grounds in INA §212 which will still prevent an applicant from adjusting status.

<sup>24</sup> A legacy INS Memo indicates that an immigrant visa petition must have either been physically received or postmarked (rather than physically received) on or before April 30, 2001. See INS Memorandum, “Field Guidance for Adjustment of Status Applications Filed Under Section 245(i), As Amended by the Legal Immigration Family Equity Act Amendments of 2000” (April 6, 2001), *posted on AILA InfoNet* (Apr. 13, 2001). Labor certifications must have been physically received by the appropriate state-level office on or before April 30, 2001.

<sup>25</sup> See INS Memorandum, “Adjustment of status under section 245(i), as amended by the Legal Immigration Family Equity Act Amendments of 2000” (January 26, 2001) *posted on AILA InfoNet* (Jan. 30, 2001).

<sup>26</sup> 66 Federal Register 16384 (March 26, 2001).

<sup>27</sup> Although the regulations required that the labor certification be “approvable when filed,” 8 CFR §245.10(a)(3), a subsequent INS clarification indicates that a labor certification will be met that standard “provided that the labor certification is ‘properly filed.’” See INS letter of May 15, 2001, *reprinted in 78 Interpreter Releases* 982 (June 4, 2001). A “properly filed” labor certification, according to the INS, means simply filing Form ETA 750 with the appropriate state-level office (unless the INS has evidence of a fraudulent or otherwise non-meritorious employment relationship). *Id.*

<sup>28</sup> Applicants in removal proceedings may be eligible to file an application for adjustment in removal proceedings before the immigration judge, or have a previously-denied adjustment application reviewed *de novo* by the immigration judge, except for certain “arriving aliens.” See 8 CFR §1245.1 *et seq.*

office with jurisdiction over the place of residence of the applicant. Adjustment applications based on employment-based petitions (Form I-140 or Form I-360) must be mailed to the CIS regional service center with jurisdiction over the applicant's residence. If the applicant is eligible for an immediately-available immigrant visa petition (for example, an immediate relative or most employment-based immigrant visa petitions), the application for adjustment may be filed concurrently with the immigrant visa petition, may be filed once the immigrant visa petition is approved, or may be filed while the immigrant visa petition is still pending.<sup>29</sup> If the applicant is the beneficiary of a petition that seeks classification in a non-current immigrant visa category, the applicant may file for adjustment only once the visa petition is current.<sup>30</sup>

While each district office and service center has its own procedure for filing adjustment of status applications, generally an applicant must file:

1. Form I-485, Application to Adjust Status or Register Permanent Residence
2. Supplement A to Form I-485 (for 245(i) cases)
3. Form G-325A, Biographic Information Form (for applicants 14 and older)
4. 2 passport-style photos
5. INS Form I-693 and Supplement (Medical Exam) (Completed by an authorized physician)
6. INS Form I-864, Affidavit of Support (for I-130-based cases) (Completed by the petitioning relative)
7. Evidence of employment, or of an offer of employment if the adjustment is granted
8. Copy of applicant's passport and Form I-94 to evidence admission to the United States
9. Copies of prior approval notices for nonimmigrant status, to evidence maintenance of nonimmigrant status
10. Applicant's birth certificate
11. Evidence of the approval of an immigrant visa petition, or the immigrant visa petition with supporting evidence (for concurrently filed cases)
12. Application for any necessary waivers of inadmissibility
13. Application for employment authorization and/or advance parole (see below), if needed
14. Payment of the required Filing Fees.<sup>31</sup>

Timeframes for processing adjustment of status applications vary by office. Applications based on family petitions are generally interviewed by an immigration adjudication officer, while most employment-based applications are approved without an interview.

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<sup>29</sup> In cases where there is no approved immigrant visa petition, CIS will "screen" the immigrant visa petition for approvability before granting any interim benefits to an adjustment applicant (employment authorization and "advance parole" travel permission).

<sup>30</sup> In some of the family-based categories, such as the family-based first preference, the CIS processing time for I-130s exceeds the length of the priority date backlog for the category. In those cases, CIS recently began allowing the adjustment to be filed even though the immigrant visa petition has not yet been approved.

<sup>31</sup> See 8 CFR §103.7 for a list of the current filing fees.

## Travel and Work by Adjustment of Status Applicants

Applicants for adjustment of status to permanent residence have the ability to apply for employment authorization during the time that their application for permanent residence is pending.<sup>32</sup> Their ability to travel outside of the United States, however, is restricted until they are approved for permanent residence.

Applicants for adjustment of status who leave the United States during the pendency of the adjustment of status application are considered to have abandoned that application and need to wait outside the United States for consular immigrant visa processing, unless they first obtain an advance parole travel document or unless they maintain valid H or L status.<sup>33</sup> Advance parole travel documents can be issued for any bona fide travel need. The time period to obtain such travel documents varies from one day to several months, depending on the jurisdiction in which the application is pending. Although travel with advance parole is usually safe, assuming that the individual returns prior to the expiration of the advance parole document, if the foreign national had accumulated 180 days of unlawful presence prior to filing the application for permanent residence, any departure from the U.S. - even with advance parole - triggers a three year or 10 year period of inadmissibility, which could result in the denial of the application for permanent residence unless the applicant qualifies for a waiver.<sup>34</sup>

Most applicants have no choice—if they want to travel internationally, they must apply for and obtain an advance parole travel document. Applicants for permanent residence who maintain valid H-1B, L-1, H-4 or L-2 status have a choice: they may either travel on their valid H or L visas, or they may obtain advance parole travel documents and employment authorization documents. The analysis below is only relevant to adjustment of status applicants maintaining valid H or L status.

There are advantages to using advance parole and employment authorization instead of one's H or L visa. Advance parole travel document eliminates the need to obtain a visa while the applicant is traveling outside of the United States (very important to avoid lengthy delays in visa processing while awaiting the completion of security clearances). Further, unlike the H-1B or L-1 alien, an applicant with advance parole and an employment authorization document is able to work for any employer (or multiple employers). With advance parole and employment authorization, it is not necessary to extend H or L status, which can save significant fees. Finally, Foreign nationals are limited to a period of five to seven years in the United States (depending upon whether they are H-1B, L-1A or L-1B) in H or L status. If the alien decides to work with employment authorization and relinquish H or L status, any remaining time in H or L status is not lost in the event there are problems in completing the permanent residence process.

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<sup>32</sup> 8 CFR §274a.12(c)(9).

<sup>33</sup> 8 CFR §245.2(a)(4)(ii).

<sup>34</sup> INA §212(a)(9)(B).

Because of these advantages, it is good to obtain advance parole and employment authorization so that the applicant has it in case it is needed. Obtaining advance parole and employment authorization does not preclude the foreign national from being employed or traveling with the H or L visa and obtaining some of the advantages that relate to such travel and employment authorization. It is important to note, as well, that CIS takes the position that a person cannot maintain H-4 status once that person begins employment using employment authorization, and thereafter must travel with advance parole rather than with an H-4 visa.

With regard to the other option, maintaining H or L nonimmigrant status, the most important advantage is the effect of a denial of the adjustment of status application on an applicant who maintains H or L status. If the adjustment of status application is denied or abandoned, the applicant who maintains H or L status continues to have legal status following the denial or abandonment. Other applicants are subject to removal from the United States.<sup>35</sup> Another important distinction is that applicants maintaining H or L status are able to extend status while the adjustment application is pending. In addition, they are able to work during the pendency of the extension application.<sup>36</sup> An adjustment applicant whose employment authorization document expires is not able to work during the pendency of the extension application and until the new employment authorization document is approved.

There are practical advantages to maintaining H or L status, as well. Upon arrival at an airport or land port of entry, foreign nationals traveling with advance parole are usually referred to a second BCIS inspector for a more careful review of their documents. This is far less likely to happen to the applicant with a valid H or L visa. The applicant maintaining H or L status is able to travel immediately after the filing of the adjustment application, while advance parole applications may be delayed two or three months, during which time the applicant is unable to travel internationally. If a spouse or child is overseas at the time the principal applicant files for adjustment of status, the spouse or child should be able to obtain an H-4 or L-2 visa to enter the United States and ultimately apply for adjustment of status either concurrently with the principal applicant or as a following to join family member. This may not be possible if the applicant has failed to maintain H or L status.

If the spouse and child are not working, they can enter on their visas or with advance parole.

If the H-1 or L-1 principal is working for an employer in addition to or other than the H or L petitioning employer, the spouse should obtain advance parole. If the principal is in valid H-1 or L-1 status but entered with advance parole, the spouse can still enter with the H-4 or L-2 visa and does not need to obtain advance parole.

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<sup>35</sup> Note, however, that the adjustment application may be renewed in those removal proceedings. 8 CFR §245.2(c).

<sup>36</sup> 8 CFR §274a.12(b)(20).

If the L-2 is working in the United States, he can enter on the L-2 visa (assuming he has an employment authorization document) or with advance parole and employment authorization. If the H-4 is working in the United States, she should have an employment authorization document and enter on advance parole.

### **Administrative and Judicial Review of Denied Applications**

There is no administrative appeal from a CIS denial of adjustment.<sup>37</sup> The administrative options available to the applicant are limited to filing a motion to reopen or reconsider with CIS, and reinitiating the adjustment application if the CIS refers the matter to Immigration and Customs Enforcement to begin removal proceedings against the applicant.<sup>38</sup> Of course, it is the government which must elect to serve a Notice to Appear (NTA), so the denied applicant may be thrown into a legal limbo, unable to renew employment authorization and waiting for the immigration agencies to initiate proceedings. In that situation, persistence in requesting initiation of proceedings may be the only strategy to move the application for adjustment forward.

As with an affirmative application for adjustment of status, an alien who applies for adjustment in removal proceedings must meet the threshold requirements of INA §245.<sup>39</sup> That is, the respondent must have been inspected and admitted or paroled into the U.S. or fall within the ambit of INA §245(i); have an immigrant visa immediately available; and not be statutorily ineligible.<sup>40</sup> The visa petition underlying the application for adjustment must have been approved by CIS, as the immigration judges have no jurisdiction over visa petitions.<sup>41</sup> The application for adjustment is formally filed with the IJ after the allegations in the NTA are proved or admitted and alien is found removable from the U.S.<sup>42</sup> The IJ may, after a hearing on the merits of the application, grant or deny adjustment as a matter of discretion.<sup>43</sup>

Both ICE and the foreign national may appeal an adverse decision of an IJ to the Board of Immigration Appeals.<sup>44</sup> While an applicant for adjustment whose application is denied by the BIA may file a petition for review of the final removal order with a circuit court of

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<sup>37</sup> 8 C.F.R. §245(a)(5)(ii).

<sup>38</sup> *Id.* The alien also has the option of filing a new application for adjustment if s/he still meets the requirements of INA §245. However, if the alien files a new adjustment application after having been paroled under INA §212(d)(5) s/he will be unable to renew the second application in removal proceedings. 8 C.F.R. §245.2(a)(1). See, *infra*.

<sup>39</sup> 8 C.F.R. §240.11(a).

<sup>40</sup> *Id.*

<sup>41</sup> *Matter of Velarde-Pacheco*, 23 I&N Dec. 253 (BIA 2002).

<sup>42</sup> Practitioners are well advised to consult local immigration litigators, INS district counsel and the EOIR operating procedures prior to filing an application for adjustment on behalf of a client in removal proceedings.

<sup>43</sup> 8 C.F.R. §240.11(3). See also, *Matter of Ibrahim*, 18 I & N Dec. 55 (BIA 1981); *Matter of Cavazos*, 17 I & N Dec. 215 (BIA 1980); *Matter of Arai*, 13 I & N Dec. 494 (BIA 1970); *Matter of Huey*, 13 I & N Dec. 5 (BIA 1968); *Mamoka v INS*, 43 F.Supp. 184 (5<sup>th</sup> Cir. 1995); and *Kurzban's Immigration Sourcebook*, 7<sup>th</sup> Ed., 580-581.

<sup>44</sup> 8 C.F.R. §3.1(b)(3).

appeals, the review statute provides that the BIA's discretionary decision to deny an adjustment application may not be reviewed.<sup>45</sup>

Before the 1996 amendments to the Immigration and Nationality Act, the courts were divided over whether an adjustment applicant could seek direct judicial review of a CIS decision denying adjustment (*i.e.*, review of the denied adjustment in district court before or instead of waiting for the government to initiate a removal proceeding). Such judicial review is particularly important if the adjustment was denied, but the person was not deportable, for example, because they were maintaining a nonimmigrant status. The courts remain divided, but a clear majority of courts deciding the issue have held that the issue was not ripe for review, as the applicant could still renew his or her application in removal proceedings, if they were ever brought.<sup>46</sup> Some courts permit review of those adjustment applications that were denied during removal proceedings while withholding review of those applications that were filed before removal proceedings, in spite of the statutory language meant to preclude such review.<sup>47</sup> The leading commentary on this issue explains,

[t]his bar, contained in a section entitled 'Judicial Review of Orders of Removal,' seeks only to prevent district court review of an adjustment denial made in the course of removal proceedings; it does not inhibit review of an INS administrative denial. On its face, this provision could extend the jurisdictional bar to the petition for review in the court of appeals. There seems tacit agreement however that, as a denial of adjustment in the course of a removal proceeding is part of the final order of removal and barred from review in the district court, it is subject to review in a court of appeals.<sup>48</sup>

## V. CONCLUSION

Eligibility for adjustment of status must be considered by every practitioner at the outset of a case, and will impact decisions made throughout the course of a representation. In advising a client of the effects of failing to extend a temporary visa status, or of travel prior to a grant of permanent residence, or whether to proceed with a labor certification or family-based immigrant petition at all, the client's ultimate eligibility for adjustment should be a primary concern. While eligibility for adjustment has become increasingly complicated, the provisions which provide that complexity also provide opportunities to advocate on behalf of clients to obtain their immigration goals.

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<sup>45</sup> INA §242(a)(2)(B).

<sup>46</sup> See *Cardoso v. Reno*, 216 F.3d 512 (5<sup>th</sup> Cir. 2000); *McBrearty v. Perryman*, 212 F.3d 985, 987 (7<sup>th</sup> Cir. May 11, 2000); *Massignani v. INS*, 438 F.2d 1276,1277 (7<sup>th</sup> Cir. 1971); *Randall v. Meese*, 854 F.2d 472 (D.C. Cir. 1988) *cert. denied*, 491 U.S. 904 (1989); *Che-Li Shen v. INS*, 749 F.2d 1469, 1472 (10<sup>th</sup> Cir. 1984); *Jain v. INS*, 612 F.2d 683, 689-90 (2d Cir. 1979) *cert. denied*, 446 U.S. 937 (1980); *Tang v. Reno*, 77 F.3d 1194, 1196 (9<sup>th</sup> Cir. 1996); *Jaa v. INS*, 779 F.2d 569, (9<sup>th</sup> Cir. 1986); *Mart v. Beebe*, 94 F. Supp 2d 1120, (D. Oregon 2000); *Galvez v. Howerton*, 503 F. Supp. 35 (C.D. Cal. 1980).

<sup>47</sup> INA §242(a)(2)(B)(i) ("no court shall have jurisdiction to review...any judgment regarding the granting of relief under section...245").

<sup>48</sup> 4 Gordon, Mailman & Yale-Loehr, *Immigration Law and Procedure*, § 51.06[2][f] (2000). The treatise provides a comprehensive review of the conflicting court decisions. See also, Legomsky, *Immigration and Refugee Law and Policy*, 3<sup>rd</sup> Ed. (2001) at 465.