

## “SHOULD I STAY OR SHOULD I GO?”

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### INTRODUCTION

This article will articulate the differences between filing an adjustment of status (AOS) application with U.S. Citizenship and Immigration Services (USCIS) using Form I-485 and pursuing Consular Processing (CP) through a participating consular post of the U.S. Department of State (DOS).

The first part of the article will set forth the advantages and disadvantages of each process and offer practice pointers on how to choose the best op-

tions for the client. The second part will analyze how AOS or CP will impact the client’s ability to take advantage of certain benefits, such as protecting a minor child from “aging out” and obtaining work authorization and travel permission. The third part will explore ways for the client to apply for AOS so as to avoid the statutory bars to re-entry into the United States. The fourth part will discuss strategies to overcome denial of the adjustment application.

### AOS VS. CP

#### Informing Both Clients

In approaching the crucial decision of whether to process a permanent residence application in the United States through AOS or abroad through CP, thoughtful practitioners will apprise their foreign national clients of the merits and challenges of each approach. In employment-based cases, where a U.S. business entity is the sponsor and the attorney has a dual representation role, it is essential that this dialogue include both the employer and the foreign national. In far too many instances, beneficiaries have been pushed toward one approach or another, and their attorneys have not given them or their U.S. sponsors the information needed to make informed decisions.

In employment-based cases, the decision to file a request via AOS or CP is generally articulated on Form I-140 filed with the USCIS regional service center. In family-based cases, it is generally articulated when Form I-130 is submitted.

#### Diagnostic Questions

At the beginning, certain diagnostic questions should be asked to trigger the dialogue necessary to determine whether the foreign national—and, in employment cases, the foreign national and the sponsor—would be best served by filing through AOS or through CP:

- Does the foreign national—or his or her dependents—wish to obtain an employment authorization document (EAD) or advance parole (AP)?
- How likely is it that the foreign national will seek I-485 portability?
- Is the foreign national maintaining a residence in the United States?

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- Even with a U.S. residence, will business or personal matters require the foreign national to be outside the United States for the foreseeable future?
- Does the foreign national/prime beneficiary have dependent family members who are resident and will immigrate from abroad?
- Would the foreign national face the three- or ten-year bars under IIRAIRA if he or she were to leave the United States?
- How important is it to you and your clients to preserve your rights to appeal and to file a motion to reopen?
- How important is it to the foreign national and the employer that the case be processed as speedily as possible?
- Will the U.S.-based employer permit the foreign national to spend the amount of time outside the United States necessary to complete consular processing at this particular post?

### Benefits of Adjustment of Status in a Nutshell

There are a number of benefits and rights that flow to the applicant with filing the I-485 but not with CP filing.

### Employment Authorization and Advance Parole

When the I-485 is filed, and in the same package, the applicant may also file Form I-765 to obtain an EAD and Form I-131 to obtain AP travel permission. The applicant's spouse and minor children are also eligible for these benefits. Often obtaining the EAD is in the employer's interest because it can obviate the need for costly extensions of the H-1B, L-1, or other nonimmigrant work visa. If the filings are timed correctly, particularly where the employer has several I-485s in process, the employer can find major cost savings.

### I-485 Portability

The importance of preserving eligibility for I-485 portability<sup>1</sup> will hinge on the foreign national's degree

<sup>1</sup> Section 204(j) of the Immigration and Nationality Act (INA), Pub. L. No. 82-414, 66 Stat. 163 (*codified as amended at 8 USC §§1101 et seq.*), preserves the validity of the underlying employment-based petition or labor certification if the I-485 application is pending for 180 days or more and the noncitizen applicant changes jobs or employers in the same or similar occupation. See also USCIS Memorandum, William R. Yates, Associate Director for Operations, "Interim Guidance for Processing Form I-140 Employment-Based Immigrant Petitions and Form I-485 and H-1B Petitions Affected by AC21"

*continued*

of job satisfaction, career prospects, and the perceived long-term strength of the company (*e.g.*, whether it is ripe for acquisition, bankruptcy, dissolution, or other changes that could make I-485 portability a "life-saver" for the beneficiary). If, for example, the beneficiary might face termination in the future, the company is likely to be acquired, or the company's current fortunes portend an uncertain future, it generally makes sense to file the I-485 at the earliest possible opportunity to trigger the ticking of the six-month portability "clock."<sup>2</sup> Absent a retrogression, if USCIS fails to process the I-485 within 180 days and the applicant secures a generically similar employment opportunity, he or she may obtain the Green Card in spite of a job change. This safety net is not available to applicants who pursue CP.

### Ability to Adjust Under §245(i) or §245(k)

Eligible applicants who file the I-485 can take advantage of the "forgiveness" provisions—§245(i) and §245(k) of the Immigration and Nationality Act (INA). For instance, §245(i) waives all disqualifying conditions to adjustment status under §245(a). A great number of applicants are still considered "grandfathered" under §245(i) due to the LIFE Act provisions<sup>3</sup> that sunset on April 30, 2001, and §245(k) protects employment-based applicants who either failed to maintain lawful status for 180 days or fewer, or who engaged in authorized employment or otherwise violated the terms and conditions of admission for 180 days or fewer.

### Benefits Locked In

Even if the processing queue should retrogress (*see* Visa Bulletin at [http://travel.state.gov/visa/frvi/bulletin/bulletin\\_1360.html](http://travel.state.gov/visa/frvi/bulletin/bulletin_1360.html)), the filing of an I-485 during a month when the priority date is *current* permits the applicant to continue to obtain benefits

(May 12, 2005), published on AILA InfoNet at Doc No. 05051810 (*posted* May 18, 2005) (hereinafter AC21 Memo).

<sup>2</sup> The offer of employment at the time of filing the employment-based I-140 petition and the I-485 must be bona fide, which means that at the time of the filing, the employer must have intended to employ the beneficiary and the beneficiary must have intended to undertake employment upon adjustment. See AC21 Memo, *supra* note 1.

<sup>3</sup> See LIFE Act Amendments, Pub. L. No. 106-554 (§§1502(a)(1)(B) and (D) Dec. 21, 2000), extended the protection of INA §245(i) to April 30, 2001, for persons who were present in the United States on Dec. 21, 2000, when the amendments were enacted. See also discussion of §245(i), *infra*.

such as EAD and AP. This is true even if the processing queue should *retrogress*.

### **Motions to Reopen/Ability To Litigate**

Filing the I-485 preserves the applicant's right to file a motion to reopen or to litigate the case in removal proceedings and thereafter on appeal. Generally, CP does not allow for appeal or review of the consular officer's decision.

### **Benefits of Consular Processing in a Nutshell**

The benefits of CP are certainly fewer, but many individuals choose to pursue it to save time. The decision will in part depend on what your clients value. If they value a quicker processing time, are willing to forego the opportunity to qualify for benefits such as the EAD/Advance Parole and I-485 portability, prefer the convenience of processing through their home country, or have dependent family members resident in the consular district, CP may well be the right choice.

### **Speed**

In almost all situations, filing for permanent residence through CP will take less time, often significantly less time, than processing the I-485. However, it is absolutely essential to be aware of the current as well as projected CP processing times at the post in question before committing to this option. It is also necessary to understand and factor in the interplay between USCIS, National Visa Center (NVC), and DOS. Processing times and actual filing protocols vary wildly among the posts, with severe backlogs particularly in high-population, high-fraud consular posts or posts subject to terrorist attacks. Consult the website, [www.travel.state.gov](http://www.travel.state.gov), for processing times, and if you are in any doubt, contact the post directly. You should also consult AILA's *Visa Processing Guide*, written by trusted and seasoned AILA members, as well as consular staff.

### **Convenience**

Even where the foreign national is maintaining a residence in the United States, if the foreign national beneficiary's main residence is abroad, it almost always makes sense to pursue CP. Also, if the prime beneficiary is living in the United States but has dependent residents abroad, it often makes sense to process the entire family via CP.

### **Dual Processing**

The visa petition forms (I-130 and I-140) require that the petitioner "elect" CP or AOS for the princi-

pal beneficiary. Is it possible for a client to pursue both CP and AOS at the same time by filing Form I-824, Application for Action on an Approved Application or Petition, to request CP when Form I-485 is already pending? The former Immigration and Naturalization Service (INS) said "no" in a revision to its *Adjudicator's Field Manual* issued in August 2000.<sup>4</sup> The revision reads in pertinent part as follows:

When an alien with a pending I-485 files a Form I-824 requesting that the visa petition be forwarded to a consulate, the alien or the attorney of record will be notified that the I-824 will be treated as a request to withdraw the I-485. In accordance with 8 CFR §103.2(b)(8) the notice will provide the alien a response time in which to advise the Service on how they wish to proceed. The I-485 is to be terminated by written notice if the alien chooses to pursue consular processing or fails to respond within the time granted. This notice will also advise the alien of the termination of any employment authorization granted under 8 CFR §274a.12(c)(9). The I-824 is then to be approved, and the visa petition forwarded to the NVC for processing.

Likewise, if the Service receives a *duplicate* immigrant visa petition requesting consular processing, and the alien has a pending I-485, the Service will notify the alien or the attorney of record that the duplicate petition will be treated as a request to withdraw the I-485, [and] as above, provide a response time in which to advise the Service on how they wish to proceed. The I-485 is to be terminated by written notice if the alien wishes to pursue consular processing or fails to timely respond. This notice will advise the alien of the termination of any employment authorization granted under 8 CFR §274a.12(c)(9). The visa petition along with the duplicate is then to be forwarded to the NVC for processing.<sup>5</sup>

<sup>4</sup> See INS Memorandum, Michael Cronin, Acting Exec. Assoc. Comm., HQ 70/23.IP, "Prohibition on Concurrent Pursuit of Adjustment of Status and Consular Processing (AD00-15)" (Aug. 8, 2000), published on AILA InfoNet at Doc. No. 00101803 (posted Oct. 18, 2000) (hereinafter INS Memorandum); see also INS Adjudications Liaison Minutes (03/01), published on AILA InfoNet at Doc. No. 01061932 (posted June 19, 2001).

<sup>5</sup> *Adjudicator's Field Manual* §23.2(2). The redacted version of the *Adjudicator's Field Manual* found on the USCIS website, <http://uscis.gov/lpbin/lpext.dll/inserts/afmredacted/afm95-redacted-1?f=templates&fn=document-frame.htm#afm-95-redacted-begin-95-redacted>, does not contain the August 2000 revision.

However, some practitioners challenge this conclusion, arguing that USCIS does not have jurisdiction over consular processing, rendering the *Field Manual* revision ultra vires.<sup>6</sup> With this interpretation, dual processing is at least theoretically possible. But even practitioners who proffer the interpretation acknowledge that “a number of practitioners . . . consider dual processing to be extremely risky,” due to USCIS’s treatment of such cases.<sup>7</sup>

While some posts will create an immigrant visa application file with a receipt notice for Form I-824, they will not adjudicate a visa application in such a case until they receive the petition from the NVC, thus, foreclosing the prospect of pursuing CP and AOS concurrently. However, a DOS cable encourages posts to process cases on the basis of an I-797 Notice of Approval, and the beneficiary must provide the original I-797 notice of approval of an I-140 petition, a copy of the I-140 petition, a receipt for the I-824, and evidence that the applicant was last resident in the host country of the post.<sup>8</sup>

## AOS/CP, CSPA, AND THE ABILITY TO WORK AND TRAVEL

### Child Status Protection Act

The Child Status Protection Act (CSPA)<sup>9</sup> was enacted to address the problem of children who “age out” as a result of USCIS delays in processing visa petitions and asylum and refugee applications. The INA defines a “child” as an unmarried individual under 21 years of age.<sup>10</sup> CSPA explains how to determine the age of a child for purposes of eligibility to adjust status or re-

ceive an immigrant visa at a consulate abroad. Application of CSPA to a given case can be complex, especially if the case involves the effective date of the INA.<sup>11</sup> The authors discuss CSPA briefly here as its application to a given case may weigh in favor of CP or AOS, depending on the circumstances.

Before CSPA was enacted, an application by a child for permanent residency as a direct or derivative beneficiary of a visa petition or grant of asylum/refugee status would be approved only if adjudicated before the child turned 21. Upon turning 21, a child would “age out,” losing the status of a child. Due to agency backlogs and other delays, many children aged out before their cases were complete. CSPA was enacted to “lock in” the age of the child at an earlier date in the process, thus preserving the status of “child” for those who otherwise would have aged out.

### CSPA Age Calculation

Under CSPA, the age of an immediate relative child of a U.S. citizen will be calculated as of the date the parent files the I-130 Petition for Alien Relative. Thus, if a U.S. citizen mother files an I-130 petition for an unmarried daughter who is 20, the daughter will retain the status of a “child” even if the visa petition or adjustment of status application is not adjudicated until she is 24.<sup>12</sup>

In cases involving the child of a lawful permanent resident (LPR), or the derivative of a family-based, employment-based, or diversity visa, the beneficiary’s age will be locked in on the date that the priority date of the approved visa petition becomes current, less the number of days that the petition was pending—but only if the beneficiary seeks to acquire the status of an LPR within one year of the date the visa number became available. Thus, if an I-130 that was filed in 2002 when the beneficiary was 18 years old was approved in 2003, and the priority date became available in 2005 after she turned 21, the child’s age would be locked in at 20 years

<sup>6</sup> See J. Pederson and M. Funk, “Strategic Lawyering at Consular Posts,” *Immigration & Nationality Law Handbook* 649, 654–55 (AILA 2005–06 ed.).

<sup>7</sup> *Id.* at 655.

<sup>8</sup> See DOS Cable, 00 State 180792 (Sept. 2000), published on AILA InfoNet at Doc. No. 00092773 (posted Sept. 27, 2000). The cable indicates that attorney certification of the I-140 petition is not necessary, although it may still be a good idea to certify the copy of the I-140 petition at posts where fraud is high. It is also a good idea to check the procedures at specific posts. For example, the U.S. Consulate in Mumbai, India, <http://mumbai.usconsulate.gov>, allows beneficiaries of approved employment-based first preference (EB-1) and second preference (EB-2) petitions to request CP even if they have a pending AOS application in the United States.

<sup>9</sup> Pub. L. No. 107-208, 116 Stat. 927 (Aug. 6, 2002), published on AILA InfoNet at Doc. No. 02080740 (posted Aug. 7, 2002).

<sup>10</sup> INA §101(b)(1).

<sup>11</sup> See R. Berg & R. Ng, “Stopping Time and Ignoring the Reality of Aging: The Simple Beauty of the Child Status Protection Act,” elsewhere in this volume. See also Practice Advisory, M. Kenney, “Updated Practice Advisory on The Child Status Protection Act” (Mar. 8, 2004), published on AILA InfoNet at Doc. No. 04031261, and Practice Advisory, M. Kenney, “‘Aging Out’: Recent Developments Related to the Child Status Protection Act and Other Provisions” (Feb. 24, 2005), published on AILA InfoNet at Doc. No. 05022464 (posted Feb. 24, 2005).

<sup>12</sup> CSPA §2; INA §201(f).

(i.e., 21 less the one year the petition was pending) for eligibility for permanent resident status. If the LPR parent naturalizes after filing an I-130 for a child in the 2A preference category, the beneficiary's age will be locked in as of the date of naturalization. A child who is under age 21 on date of naturalization, the child will be protected.<sup>13</sup>

**AOS vs. CP for CSPA Cases**

A possible reason for recommending adjustment of status over consular processing for a derivative beneficiary may be the interpretation that USCIS has given to the date of availability of a visa number in cases of visa retrogression. According to the CSPA memoranda, if a visa availability date retrogresses after the beneficiary has filed an application for AOS (Form I-485) based upon an approved visa petition, USCIS will retain the I-485 and make a note of the visa availability date at the time the I-485 was filed. When a visa number again becomes available, USCIS will calculate the beneficiary's age by reference to the earlier visa availability date that it marked on the I-485.<sup>14</sup> The memo advised that the agency will not follow this practice where the I-485 had not been filed when the visa availability date retrogressed. The absence of similar guidance from DOS may be reason to recommend the AOS option where visa retrogression may be an issue.

The child's age will only lock in if the beneficiary has sought to acquire the status of a lawful permanent resident within one year of the date of visa availability. For a child beneficiary who is adjusting status, USCIS indicates that the date the child seeks to acquire LPR status is the date the I-485 is filed.<sup>15</sup>

DOS has advised that where the principal applicant was processed for a visa at a consular post, the date a child seeks to acquire LPR status is the date Form DS-

230, Part I is submitted by the child or a by the child's parent on the child's behalf. It is not enough, according to DOS, for the principal to have sought LPR status within one year of visa number availability.<sup>16</sup> Where no record of Part I of the visa packet for a derivative child exists at the post, DOS requires the derivative beneficiary to provide alternate proof.

When the principal is adjusting status in the United States and the derivative will be applying abroad for a follow-to-join visa, the derivative will be considered to have sought LPR status on the date the principal filed Form I-824 to initiate the child's follow-to-join application. Because filing Form I-824 is not the only way to initiate this process, a DOS revised cable instructs visa-issuing posts to seek an advisory opinion where some other "concrete" step was taken to initiate a child's follow-to-join application. DOS does not define what constitutes a "concrete" step. Accordingly, the authors recommend that Form I-824 be filed along with the principal's Form I-485 in these cases where a derivative child will apply for a "follow to join" visa abroad.

**Work Authorization and Travel**

**Work Authorization**

The desire to work in the United States will often drive the client's decision for AOS or CP.

The beneficiary of an immigrant visa petition who is residing legally in the United States may already have authorization to work. Examples of such authorization are a nonimmigrant employment visa (e.g., H or L status) or authorization as the result of temporary protected status (TPS).<sup>17</sup> These individuals will be able to continue working whether they opt for AOS or CP. However, if the independent manner through which work is authorized ceases, an EAD can only be secured if an AOS application is pending.<sup>18</sup> There is no avenue to seek work authorization if one has chosen to CP for an immigrant visa petition.

Even where the primary beneficiary of an employment-based immigrant visa petition has work authorization based on proper maintenance of H or L status, AOS over CP can create considerable advantages. Derivative family members can receive work

<sup>13</sup> CSPA §2; see also INS Memorandum, Johnny N. Williams, Exec. Assoc. Comm., HQADN 70/6.1.1, "Child Status Protection Act" (Sept. 20, 2002), published on AILA InfoNet at Doc. No. 02092732 (posted Sept. 27, 2003), and INS Memorandum, Johnny N. Williams, Exec. Assoc. Comm., HQADN 70/6.1.1, "The Child Status Protection Act—Memorandum Number 2," (Feb. 14, 2003), published on AILA InfoNet at Doc. No. 03031040 (posted Mar. 10, 2003) (hereinafter CSPA memoranda).

<sup>14</sup> For an argument that the same rationale should be applied to lock in the age of the child when I-140 and I-485 are filed concurrently even before approval of the I-140, see T. Fox-Isicoff & H. R. Klasko, "The Child Status Protection Act—Is Your Child Protected?," 80 *Interpreter Releases* 973 (July 21, 2003).

<sup>15</sup> See CSPA memoranda, *supra* note 13.

<sup>16</sup> See "DOS Issues Revised Cable on Child Status Protection Act," published on AILA InfoNet at Doc. No. 03020550 (posted Feb. 5, 2003).

<sup>17</sup> See INA §244(a)(1)(B).

<sup>18</sup> 8 CFR §§274a.12(c)(9), 1274a.12(c)(9).

authorization while their cases are being processed. Also, the ability to receive an EAD after filing the AOS application can significantly decrease the costs of maintaining and extending the nonimmigrant status of the primary beneficiary.

An individual who is in lawful H or L status while the I-485 is pending will not lose non-immigrant status by filing Form I-765, Application for Work Authorization.<sup>19</sup> However, using an EAD to leave the employer who sponsored the H or L visa would violate that non-immigrant status.<sup>20</sup> Using the EAD for employment with a separate employer while the individual is on H-1B status through another employer would also violate nonimmigrant status; a derivative spouse will not be able to maintain H-4 status while working on an EAD.<sup>21</sup> Though an individual is considered to be maintaining lawful status while an adjustment application is pending, he or she is protected during this time only if the adjustment is approved. If nonimmigrant status lapses while the I-485 is pending, the individual will be considered out of status as of the date the nonimmigrant visa lapsed if the adjustment application is denied and will not be able to file for extension of the H or L visa status that had previously lapsed.<sup>22</sup> Hence, there is always an incentive to maintain the client's underlying nonimmigrant status rather than relying solely on an EAD while the adjustment application is pending.

If the client opts to rely on work authorization through AOS, it is important to advise him or her about delays in obtaining and renewing the EAD. An application for an EAD, Form I-765, may be filed with the adjustment application or at any time after the government receives the adjustment application. USCIS is required to adjudicate the I-765 within 90 days of receipt.<sup>23</sup> After 90 days, USCIS

must issue the applicant an interim EAD valid for up to 240 days.<sup>24</sup> The applicant may request the interim EAD at a local USCIS office.<sup>25</sup> Since USCIS can take over three months to process an EAD request, the applicant must carefully strategize the filing of the initial EAD and extension applications to avoid any gaps in permission to work. Continued employment is not authorized until an EAD is issued.

### Travel

The client's need to travel in and out of the United States can further affect whether it is more prudent to pursue AOS or CP. Unless the beneficiary has an independent ability to travel in and out of the United States (such as an H or L visa), permission to travel will only be granted during AOS through AP, and there is no independent basis for travel permission during CP.

An individual who has filed an adjustment application under INA §245 will be considered to have abandoned the application upon leaving the United States unless he or she was granted AP before leaving the United States<sup>26</sup> or otherwise has the legal ability to travel while in H or L status (*see below*). Note, however, that an individual who enters the United States on advance parole is not considered *admitted* under the INA.<sup>27</sup> An applicant whose last entry into the United States was on AP will be treated as seeking admission and therefore subject to the grounds of inadmissibility found in INA §212 at the time of the adjustment adjudication.<sup>28</sup> For example, if departure from the United States caused the unlawful presence bars to trigger,<sup>29</sup> the individual will be found inadmissible; to adjust status, he or she must either qualify for a waiver of the three- or ten-year bar or wait for three or ten years to pass to seek admission.<sup>30</sup> Although the individual might be able to gain entry into the United States upon AP, he or she will be found inadmissible at the time of adjudication.<sup>31</sup>

<sup>19</sup> See INS Memorandum, Michael Cronin, Acting Assoc. Comm., Office of Programs, "Amended INS Memo on H/Ls Traveling on Advance Parole," published on AILA InfoNet at Doc. No 00052603 (posted May 26, 2000) (hereinafter Cronin Memo).

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

<sup>21</sup> An L-2 spouse can obtain an EAD under INA §212(c)(2)(E) and should work under this EAD to preserve L-2 status. For application procedure, see INS Memorandum, William R. Yates, Deputy Exec. Comm. Field Operations, HQ 70/6.2.5, 6.2.12 (Feb. 22, 2002), reprinted in 79 *Interpreter Releases* 338, 343–46 (Mar. 4, 2002).

<sup>22</sup> It may be possible for the employer to file a new nonimmigrant visa petition for CP if the noncitizen client does not face the three- or ten-year bars; *see infra*.

<sup>23</sup> 8 CFR §§274a.13(d), 1274a.13(d).

<sup>24</sup> *Id.*

<sup>25</sup> It is important to request an appointment for an EAD through the InfoPass system well in advance of the 90 days because some offices are unable to issue appointments soon enough.

<sup>26</sup> 8 CFR §§245.2(a)(4)(ii)(B), 1245(a)(4)(ii)(B). Applicants for Advance Parole must file Form I-131, 8 CFR §223.2(a).

<sup>27</sup> INA §101(a)(13)(B).

<sup>28</sup> 8 CFR §§245(a)(4)(ii)(B), 1245(a)(4)(ii)(B).

<sup>29</sup> See INA §§212(a)(9)(B)(i)(I)–(II).

<sup>30</sup> *Id.*

<sup>31</sup> See INS Memorandum, Paul W. Virtue, Acting Exec. Assoc. Comm., Office of Programs, "Advance Parole for  
*continued*

To qualify for a waiver of the unlawful presence bars under INA §212(a)(9)(B)(v), the applicant must be the spouse, son, or daughter of a U.S. citizen or lawful permanent resident who would suffer extreme hardship if the individual is denied admission into the United States.<sup>32</sup>

An applicant who is subject to the bars may not need to spend the three or ten years outside the United States; it could be argued that the applicant could spend this time within. Specifically, the language of both prongs of INA §212(a)(9)(B)(i) states that an alien will be inadmissible if he or she "seeks admission within 3 (or 10) years of the date of such alien's departure or removal from the United States."<sup>33</sup> Nothing in the language of this section suggests that one has to wait the three or ten years outside the United States. Thus, if an applicant has triggered the three-year bar after leaving the United States on AP, and the adjustment interview occurs after three years, it can be argued that he or she will not be inadmissible under INA §212(a)(9)(B)(i)(I).

An individual with a pending adjustment application will not need AP to travel if he or she is in lawful H-1 or L-1 status, is returning to same employer authorized by the H or L visa, and is in possession of a valid visa.<sup>34</sup> However, an individual with an H or L visa is also eligible to seek AP, and entry as a parolee does not preclude the individual from later receiving an extension of H or L status; the grant of an extension will have the effect of admitting the alien and terminating his or her status as a parolee.<sup>35</sup> An individual who has both a grant of AP and a valid H or L visa has the option to choose the status under which to be admitted.<sup>36</sup> Given the delays in obtaining nonimmigrant visas at most posts, an individual in valid H or L status may quickly travel back to the United States on AP without jeopardizing nonimmigrant status. Presumably, a derivative of such an applicant could still seek an H-4 or L-2 visa at a

consular post. Spouses and dependants of an H or L beneficiary are eligible for the same period of admission in H-4 or L-2 status as the principal beneficiary;<sup>37</sup> the fact that the applicant entered on AP should still allow him or her to retain nonimmigrant status. It is hoped that consular officials will recognize the Cronin Memo.

### AOS AND UNLAWFUL STATUS

It is vital for a noncitizen who is not in status to be able to adjust status to permanent residence within the United States. Unless that can be done, the individual would have to leave the United States to pursue an immigrant visa at an overseas consular post. That could trigger either the three- or ten-year bar of inadmissibility.<sup>38</sup> Thus, it would make no sense for that person to initiate the Green Card process through a labor certification or some other family- or employment-based petition if he or she would not be able to adjust status here and would have to leave and trigger the bars. An individual who cannot avoid CP must be carefully advised whether the bars would trigger, and if so, the possibility of obtaining a waiver against the bars.

INA §245 governs eligibility for adjusting status to permanent residence within the United States.<sup>39</sup> Essentially, the noncitizen must have been "inspected and admitted or paroled into the United States" and must also be the beneficiary of an approved immigrant visa petition under INA §204(a)(1). This would include a family, employment, religious worker, or investor petition and a diversity visa (from the Green Card lottery).

Furthermore, status cannot be adjusted if the applicant has accepted unauthorized employment, been in unlawful status, or failed to maintain continuously

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Alien Unlawfully Present in the United States for More than 180 days" (Nov. 26, 1997), published on AILA InfoNet at Doc. No. 97120290 (posted Dec. 2, 1997); see also INS Advisory, "INS on Travel While Change/Adjustment is Pending," published on AILA InfoNet at Doc. No. 00112902 (posted Nov. 29, 2000).

<sup>32</sup> INA §212(a)(9)(B)(v).

<sup>33</sup> *Id.*

<sup>34</sup> 8 CFR §245.2(a)(4)(ii)(C).

<sup>35</sup> See Cronin Memo, *supra* note 19.

<sup>36</sup> *Id.*

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<sup>37</sup> 8 CFR §§214.2(h)(9)(iv), (l)(7)(ii).

<sup>38</sup> As noted, INA §212(a)(9)(B)(i) imposes a three-year bar on a person who has been unlawfully in the United States for more than 180 days and a ten-year bar to a person who has accrued unlawful presence in the United States for more than one year. A noncitizen is unlawfully present in the United States "after the expiration of the period of stay authorized by the Attorney General or is present in the United States without being admitted or paroled." INA §212(a)(9)(B)(ii). For details on which status constitutes "unlawful presence," see INS Memorandum, Paul W. Virtue, Acting Exec. Assoc. Comm, "INS on Unlawful Presence" (Sept. 19, 1997), published on AILA InfoNet at Doc. No. 97092240 (posted Sept. 22, 1997).

<sup>39</sup> See also 8 CFR §§245.1, 1245.1.

a lawful status since entry into the United States.<sup>40</sup> There are other bars to adjustment of status. For instance, alien crewmen or aliens admitted in transit without a visa also cannot adjust status.<sup>41</sup>

On the other hand, there are several exceptions, particularly for those who are in violation of their status in the United States:

### **Immediate Relatives**

Immediate relatives who have been sponsored by U.S. citizen relatives—spouses, minor children, and parents<sup>42</sup>—may still be able to adjust status even if they have failed to maintain lawful status or have taken unauthorized employment. However, even this group of individuals must have been “inspected and admitted or paroled” into the United States to be eligible for adjustment of status despite subsequently violating their status. An immediate relative of a U.S. citizen who originally entered the United States without inspection would still not be eligible to adjust status.

Note that a fiancée or fiancé of a U.S. citizen on a K-1 visa or a spouse of a U.S. citizen on a K-3 visa, pursuant to INA §101(a)(15)(K), can only adjust status through the citizen who filed the K visa petition.<sup>43</sup> Hence, that individual could not adjust status based on a marriage to a U.S. citizen who was not the sponsor of the K visa petition.

Crewmen and aliens on transit visas are ineligible even if they are immediate relatives of U.S. citizens.

### **Battered Immigrants**

Battered spouses and children who are beneficiaries of approved Form I-360 self-petitions are eligible for adjustment of status regardless of any violations of their status and of the manner of entry.<sup>44</sup> This exception applies to battered immigrants applying under both the immediate relative category and the family second preference.<sup>45</sup>

### **Technical Exceptions**

INA §245(c) excuses status violations “through no fault of his own or for technical reasons.” The

regulations of USCIS limit the technical exceptions to the following:

- Inaction of another individual or organization designated by regulation to act on behalf of an individual and over whose actions the individual has no control, if the inaction is acknowledged by that individual or organization (as, for example, where a designated school official or an exchange program sponsor did not notify USCIS of continuation of status as required, or did not forward a request for continuation of status to USCIS);
- A technical violation resulting from inaction of USCIS (as, for example, where an applicant establishes that he or she properly filed a timely request to maintain status that USCIS has not yet acted on that request);
- A technical violation caused by the physical inability of the applicant to request an extension of nonimmigrant stay from USCIS either in person or by mail (as, for example, an individual who is hospitalized with an illness at the time nonimmigrant stay expires and that is verified by a letter from the physician or hospital);
- A technical violation resulting from USCIS’s application of the maximum five/six-year period of stay for certain H-1 nurses only if the applicant was reinstated to H-1 status in accordance with the terms of Public Law 101-656 (Immigration Amendments of 1988).<sup>46</sup>

These exceptions have been construed narrowly. The first does not apply if the sponsor delayed in filing the documents, the Department of Labor did not approve the labor certification in time, or the noncitizen was unable to file the adjustment application in time because the priority date was not current. It would only apply if the school or exchange visitor sponsor did not take timely action, which resulted in the F or J visa-holder’s violation, and the designated official acknowledged that.

It may, however, be possible for a V-2 or V-3 visa-holder to assert the first exception, if the person was earlier not able to extend his or her status beyond the age of 21 but can now do so as a result of a reversal in USCIS policy.<sup>47</sup>

<sup>40</sup> INA §245(c)(2).

<sup>41</sup> INA §§245(c)(1), (c)(3).

<sup>42</sup> INA §201(b)(2)(A)(i).

<sup>43</sup> INA §245(d).

<sup>44</sup> INA §§245(a), (c).

<sup>45</sup> *Id.*

<sup>46</sup> 8 CFR §§245.1(d)(2), 1245.1(d)(2).

<sup>47</sup> In *Akhtar v. Burzynski*, 384 F.3d 1193 (9th Cir. 2004), the court held that 8 CFR §214.15(g), terminating V-2 or V-3 nonimmigrant status before the child’s 21st birthday, was

The second exception applies when a noncitizen files an asylum application before his or her visitor visa expires and then files for adjustment of status while the asylum application is pending.<sup>48</sup> Even if the asylum application is denied, the individual can still adjust status so long as the application was filed before the denial.<sup>49</sup> This is true even if the asylum application is not granted at a USCIS Asylum Office, the noncitizen is placed in removal proceedings, and applies for adjustment of status before an immigration judge (IJ).<sup>50</sup> On the other hand, the exception may not apply if an adjustment application was filed while a timely request for extension of nonimmigrant status was pending.<sup>51</sup>

The third exception is self-explanatory, and the fourth no longer applies.

**INA §245(i)**

INA §245(i), on the other hand, allows a person to apply for adjustment of status even if he or she entered without inspection, overstayed, or worked without authorization. Under this provision, a person who has violated immigration status would still be able to adjust to permanent residence if a fee of \$1,000 accompanied the filing and as long as this person (including the spouse and children) is the

beneficiary of a labor certification or petition filed under INA §204 on or before April 30, 2001.

INA §245(i) previously sunset on January 14, 1998, but was revived under the LIFE Act amendments to cover any application filed on or before April 30, 2001.<sup>52</sup> Under the latest amendment, if a person filed after January 14, 1998 and before April 30, 2001, he or she had to be physically present in the United States on or before December 21, 2000, to take advantage of §245(i).

Interestingly, INA §245(i) waives all the disqualifying conditions to adjusting status in §245(a), requiring an entry with inspection or parole, and §245(c). Thus, under §245(i), a person who entered without inspection can still adjust status if he or she meets all of the other conditions. Moreover, the disqualifications in §245(c) are also not relevant, such as being an alien crewman or on a transit visa, if an individual is eligible under §245(i). But a K visa-holder would still not be able to take advantage of §245(i) if he or she is adjusting through a citizen spouse who was not the sponsor of the K visa.

Although the latest version of §245(i) again sunset on April 30, 2001, it still can be a boon for non-citizens who are considered grandfathered under this provision.<sup>53</sup> For a person to be grandfathered, the labor certification or petition should have been "approvable as filed," which means "that, as of the date of the filing of the qualifying immigrant visa petition under INA §204 or qualifying application for labor certification, the qualifying petition or application was properly filed, meritorious in fact, and non-frivolous ['frivolous' being defined herein as patently without substance]."<sup>54</sup> If a petition or application that was approvable as filed is later withdrawn, denied, or revoked due to circumstances that arose after the time of filing, it would still preserve the noncitizen's eligibility to adjust status under a different application or petition.<sup>55</sup>

On March 9, 2005, USCIS issued an important memo<sup>56</sup> clarifying who can be grandfathered under

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contrary to congressional intent to reunite families when it enacted the LIFE Act. See also USCIS Press Release, "USCIS Announces New Policy Regarding V Status Extensions" (Mar. 16, 2005), which announced that *Akhtar* would be applied nationwide and those whose extension requests had been denied solely because they were over 21 could file new V extension applications.

<sup>48</sup> See *Matter of [name and file number not provided]* (AAU Dec. 23, 1993), digested in 71 *Interpreter Releases* 257 (Feb. 14, 1994).

<sup>49</sup> See Letter from Edward H. Skerrett, Chief, Immigration Branch, INS Adjudications, to attorney Ronald J. Tasoff, HQ 245-C (Apr. 6, 1994), reproduced at 71 *Interpreter Releases* 634, 641 (May 9, 1994).

<sup>50</sup> One of the authors, Cyrus D. Mehta, was able to successfully argue this over the government's objections before an IJ in New York.

<sup>51</sup> See Memorandum, Janice Podolny, Chief, Inspections Law Division, Office of General Counsel, HQCOU 90/15, "Interpretation of 'Period of Stay Authorized by the Attorney General' in determining 'unlawful presence' under INA section 212(a)(9)(B)(ii)" (Mar. 27, 2003), published on AILA InfoNet at Doc. No. 03042140 (posted Apr. 21, 2003) (noncitizen is not considered to be in lawful status while timely extension or change of status application is pending even though he or she may not be unlawfully present).

<sup>52</sup> Pub. L. No. 106-554, 114 Stat. 2763.

<sup>53</sup> 8 CFR §§245.10, 1245.10.

<sup>54</sup> 8 CFR §§245.10(a)(3), 1245.10(a)(3).

<sup>55</sup> *Id.*

<sup>56</sup> See USCIS Memorandum, William R. Yates, Assoc. Dir. for Operations, HQOPRD 70/23.1, "Clarification of Certain Eligibility Requirements Pertaining to an Application to Adjust Status under Section 245(i) of the Immigration and Nationality Act" (Mar. 9, 2005), published on AILA InfoNet at Doc. No. 05031468 (posted Mar. 14, 2005).

§245(i). It is noteworthy because it clarifies that there is no restriction on the number of times a non-citizen may seek to adjust status under §245(i). In the past, USCIS often took the position that a non-citizen could file under §245(i) only once.

The memo also clarifies the circumstances under which a derivative spouse or child can grandfather under §245(i). If a spouse was already married to an alien who was the beneficiary of a labor certification or immigrant visa petition filed on or before April 30, 2001, the spouse would be independently grandfathered under §245(i) even if the marriage was later terminated. Thus, the derivative spouse could file an adjustment application on a wholly independent basis separate from the spouse's immigrant visa petition. The same principle applies to a derivative child. The memo, on the other hand, distinguishes between a spouse who was married to a grandfathered alien before April 30, 2001, and one who marries such an alien after April 30, 2001. In the latter situation, the spouse cannot independently grandfather and is limited to filing an adjustment of status application under §245(i) as a derivative of the spouse who has been grandfathered. The memo notes that the qualifying relationship must continue to exist at the time the principal alien adjusts status in order for the spouse or child to obtain the derivative benefit.

According to the memo, if an “after-acquired” spouse—one who married a grandfathered alien after April 30, 2001—subsequently divorces, such a spouse is not considered to be grandfathered and may not file for adjustment of status under §245(i) either independently or as a dependent of the principal alien.

#### **INA §245(k)**

Another useful, though limited exception is INA §245(k). This provision may only be used by a beneficiary of an employment-based petition under the first, second, and third preferences, or the beneficiary of a religious worker petition who is seeking to adjust status. Unlike §245(i), which waives all disqualifications under §245(a) and (c), §245(k) only waives the disqualifications listed in §§245(c)(2), (c)(7), and (c)(8).<sup>57</sup> Section 245(k) triggers if:

- (1) the alien on the date of filing an application for adjustment of status, is present in the United States pursuant to a lawful admission;
- (2) the alien, subsequent to such lawful admission has not, for an aggregate period exceeded 180 days—
  - (A) failed to maintain, continuously, a lawful status;
  - (B) engaged in unauthorized employment; or
  - (C) otherwise violated the terms and condition of the alien's admission.<sup>58</sup>

A noncitizen who is present in the United States “pursuant to a lawful admission” and “on the date of filing an application for adjustment of status” has not violated status or engaged in unauthorized employment for more than 180 days would be eligible to adjust status.

Although there has not been much interpretation on §245(k), it has now been confirmed that the 180-day period starts running after the last “lawful admission.”<sup>59</sup> Prior violations of status would therefore not count toward the 180 days that begin after the “lawful admission.”

It is debatable whether §245(k) trumps any violations that occur after the adjustment application has been filed or whether the 180 days continue to run after the adjustment application has been filed. Suppose the adjustment application is filed 170 days after the noncitizen has violated status. Then, subsequent to the filing, the noncitizen continues to work without authorization for 11 more days. If the 11 days were to be added to the 170 days, §245(k) would no longer protect the noncitizen.

There is a strong basis for arguing that the 180-day period stops running when the application is filed based on the statutory language “on the date of filing an application for adjustment of status is present in

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the application is pending, INA §245(c)(8) would disqualify him or her from adjusting to permanent residence.

<sup>58</sup> INA §§245(k)(1), (k)(2).

<sup>59</sup> The USCIS Chief Counsel advised AILA that for purposes of §245(k), an adjustment applicant needs to demonstrate maintenance of status only from his or her last entry up to the date the adjustment application is filed. However, the question of maintenance of status after the filing and the applicability of §245(k) were not addressed. See “USCIS Chief Counsel Addresses Maintenance of Status Under 245(k),” published on AILA InfoNet at Doc. No. 04060767 (posted June 7, 2004).

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<sup>57</sup> INA §245(c)(7) disqualifies a noncitizen who seeks adjustment of status under the employment-based preferences and is not in a lawful nonimmigrant status. INA §245(c)(8) disqualifies a noncitizen who was employed in an unauthorized capacity or who has otherwise violated the terms of a nonimmigrant visa. These provisions apply to a noncitizen even after the filing of an adjustment of status application. For example, if the individual works without an EAD while

*continued*

the United States."<sup>60</sup> As noted earlier,<sup>61</sup> unauthorized employment after the adjustment application is filed would disqualify the noncitizen pursuant to §245(c)(8)—but §245(k) explicitly exempts the application of (c)(7) and (8), which triggers even after the filing of the application. In sum, one could argue that the 180-day period stops at the point the application is filed, and if there is a violation after the filing, §245(k) waives that as well.

Unfortunately, USCIS has not agreed with this interpretation. In an AILA/USCIS liaison meeting on October 28, 2004, USCIS advised that any unauthorized employment post-filing due to a gap in the issuance of the EAD would count toward the 180 days; thus, an applicant who goes over the 180-day period could still be precluded from adjusting status.<sup>62</sup>

### ***CP Despite Facing the Bars***

In the event that a noncitizen who has accumulated unlawful presence is not eligible for the statutory exceptions or the waivers under §245(i) or §245(k), he or she should only be advised to CP if the three- or ten-year bars are not applicable. If they are applicable, a waiver is available for the three- and ten-year bars under §212(a)(9)(B).

First, the statute provides that the period of unlawful presence shall not accrue while the noncitizen is a minor, has a bona fide application for asylum pending and has not been employed without authorization, or is a beneficiary of family unity protection.<sup>63</sup> Time spent by battered women and children in violation of the terms of a nonimmigrant visa shall not accrue as unlawful presence if there is a substantial connection between the violation and the abuse.<sup>64</sup> Section 212(a)(9)(B)(iv) further provides that a noncitizen who has been lawfully admitted or paroled and who filed a nonfrivolous application for a change or extension of status before the expiration of the valid period of stay will have the period of unlawful presence tolled for 120 days while the application is pending, as long as

the noncitizen was not employed without authorization before or during the pendency of the application.<sup>65</sup>

Second, §212(a)(9)(v) provides for waiver of the three- and ten-year bars for the spouse, son, or daughter of a U.S. citizen or permanent resident, based on extreme hardship to the citizen or lawful permanent resident spouse or parent. Note that extreme hardship to a U.S. citizen *child* cannot serve as the basis for waiver. The waiver is available at the sole discretion of the Attorney General, whose decision is not subject to judicial review.

Finally, a client facing a three-year bar under INA §212(a)(9)(B)(i)(I) and unable to file for AOS, can try to initiate removal proceedings so as to make it a voluntary departure<sup>66</sup> and, thus, escape the three-year bar. That person can CP and re-enter the United States as an LPR. INA §212(a)(9)(B)(i)(I) only applies to the individual who voluntarily departs *before* proceedings commence. Thus, one who voluntarily departs after proceedings begin will not be subject to the three-year bar.<sup>67</sup>

## **REMEDIES UPON DENIAL OF APPLICATION FOR AOS**

This section will summarize the options for relief if the I-485 application is denied before the client has to resort to CP. Although federal court litigation through declaratory judgments and mandamus actions may also be an option, a discussion on that is beyond the scope of this article.<sup>68</sup>

<sup>60</sup> INA §245(k)(1).

<sup>61</sup> 8 CFR §§245.10(a)(3), 1245.10(a)(3).

<sup>62</sup> See Question 3 of the October 28, 2004, AILA/USCIS Liaison Minutes, published on AILA InfoNet at Doc. No. 05012163 (posted Jan. 21, 2005).

<sup>63</sup> INA §§212(a)(9)(B)(iii)(I)–(III).

<sup>64</sup> INA §212(a)(9)(B)(iii)(IV). As noted, a battered spouse can also adjust status without using the INA §245(i) waivers, because battered spouses are exempt from the bars to adjustment of §§245(a) and (c).

<sup>65</sup> This provision has been interpreted to mean that a timely application for extension or change of status will toll unlawful presence until the application is denied. See INS Memorandum, Michael A. Pearson, Exec. Assoc. Comm. Office of Field Operations, HQADN70/21.1.24-P, "Period of Stay Authorized by the Attorney General after 120-day tolling period for purposes of Section 212(a)(9)(B) of the Immigration and Nationality Act" (Mar. 3, 2000), published on AILA InfoNet at Doc. No. 00030774 (posted Mar. 7, 2000).

<sup>66</sup> INA §240B.

<sup>67</sup> See Letter from Pearl Chang, Branch Chief, Residence and Status Services Branch, to attorney Elliot Lichtman, HQ 70/21.1.16 (Mar. 23, 1998), published on AILA InfoNet at Doc. No. 98032490 (posted Mar. 24, 1998). The same reasoning does not apply to the ten-year bar, INA §212(a)(9)(B)(i)(II), because it does not have similar language with respect to departure before the proceedings begin. The ability to escape the three-year bar but not the ten-year bar has been upheld in *Cervantes-Ascencio v. INS*, 326 F.3d 83 (2d Cir. 2003).

<sup>68</sup> See AILF Practice Advisories on Federal Court Review at [www.aifl.org](http://www.aifl.org).

### **Motions to Reopen or Reconsider**

There is no right to appeal if the adjustment application is denied, although it is possible to file a motion to reopen or reconsider. Upon denial, the applicant has 30 days to file a motion to reopen or reconsider.<sup>69</sup> If the applicant can show that the delay was reasonable and beyond his or her control, USCIS has discretion to accept motions to reopen beyond the 30 days.<sup>70</sup> The motion to reopen or reconsider should be filed at the office that made the last decision on the application. In support of a motion to reopen, the applicant must demonstrate facts not previously available that support approval.<sup>71</sup> A motion to reconsider must establish that the denial was based on an incorrect application of the law or USCIS policy with regard to the evidence in the record at the time of the denial.<sup>72</sup>

Since a motion to reopen or reconsider could take over a year in some USCIS districts, the applicant may also opt file a new I-485 application. Though filing both a motion to reopen or reconsider and re-filing the I-485 application can be burdensome, it is the only way to receive continuing work extensions and travel authorization. A pending I-485 may also help prevent further accrual of unlawful presence. If, on the other hand, the motion to reopen or reconsider leads to approval of the originally filed I-485, the subsequent application can be withdrawn.

A good example for filing such a motion is where the district adjudications officer failed to consider a financial document such as a tax return to support the Affidavit of Support, Form I-864, or where such a document has only become available since denial.

### **Renewal Before an Immigration Judge**

The adjustment application can also be renewed before an IJ during removal proceedings.<sup>73</sup> Removal proceedings are initiated after an application is de-

nied, although some districts do not have the resources to bring removal proceedings. Although the IJ has exclusive jurisdiction over an I-485 application and accompanying waivers, he or she has no jurisdiction over the immigrant visa petition.<sup>74</sup> The Board of Immigration Appeals (BIA) has recently held that this lack of jurisdiction extends to the application of INA §204(j),<sup>75</sup> dealing with I-485 portability.

### **Consular Processing**

Finally, an applicant who is unsuccessful in AOS will want to explore the CP option. He or she will need to file Form I-824 requesting that USCIS notify the consulate in his or her home country of the approved immigrant visa petition. CP may be considered if the applicant was found to be in violation of status and is unable to seek the protection of §§245(i) or 245(k). Of course, if the applicant also faces other grounds of inadmissibility, the practitioner should consider whether the client is eligible for waivers. For instance, if the applicant was denied for fraud or misrepresentation under §212(a)(6)(C)(i) during AOS and he or she does not have a qualifying relative to apply for the waiver,<sup>76</sup> CP will be futile. It would be best to contest the charge of fraud or misrepresentation in removal proceedings before an IJ if there is an arguable basis for doing so.

## **CONCLUSION**

The practitioner must take a comprehensive view of CP and AOS when advising the client, including possible remedies if the application is denied. If the client can only CP or AOS, the practitioner's job becomes that much easier. The challenge is far greater when the client can both CP and AOS; it is hoped that this article offers insight on how the practitioner can best advise a client. Finally, if the client is unable to readily AOS or CP, the insightful practitioner may still be able to find ways to make AOS or CP a reality, while cautioning the client about the attendant pitfalls and risks.

<sup>69</sup> 8 CFR §103.5(a)(1)(i).

<sup>70</sup> *Id.*

<sup>71</sup> 8 CFR §103.5(a)(2). The motion to reopen must be supported by affidavits or other documentary evidence.

<sup>72</sup> 8 CFR §103.5(a)(3).

<sup>73</sup> 8 CFR §§245.2(a)(1)(i)–(ii), 1245.2(a)(1)(i)–(ii). Denial of the application of a paroled alien allows for the renewal of the application during removal proceedings only if the application was properly filed after the applicant's inspection and admission into the United States, and the later absence from and return to the United States was under the terms of advance parole. *Id.*

<sup>74</sup> *Matter of Velarde-Pacheco*, 23 I&N Dec. 253 (BIA 2002).

<sup>75</sup> *In re Perez Vargas*, 23 I&N Dec. 829 (BIA 2005).

<sup>76</sup> INA §212(i) allows the applicant to waive inadmissibility under INA §212(a)(6)(C)(i) upon a showing of extreme hardship to a spouse or parent who is either a U.S. citizen or a lawful permanent resident.