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Adjustment of Status vs. Consular Processing

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Adjustment of Status vs. Consular Processing

Once the U.S. Citizenship and Immigration Service (USCIS) approves a petition for immigrant visa classification and there is visa availability[1], your client, and his or her spouse and/or unmarried children under 21, can seek permanent resident status based on this approval[2]. Permanent resident status can be acquired in two ways: (1) by applying to the USCIS to change status from nonimmigrant to immigrant (called an "adjustment of status" application (abbreviated "AOS") or "Form I-485" application), or (2) by applying to the consular section of the U.S. Embassy in the individual's home country (called "consular processing"). An individual legally present in the United States typically files an AOS application. However, if USCIS is experiencing backlogs, the appeal of consular processing grows. While it is best to decide before submitting the immigrant visa petition if you want to consular process, so as to alert the USCIS of this choice, it is still possible, if you have elected AOS on the Form I-140, to ask the USCIS after approval of the immigrant visa petition to alert the appropriate U.S. Embassy of your clients' intention to consular process. This application, called the Form I-824, Application for Action on an Approved Application or Petition, can take an additional several months.

In an employment-based case, the time frames for AOS or consular processing are important because your client usually must continue the employment until completion of the process. If the green card sponsor is a company (not an individual seeking a green card), then your client must hold his/her employment with that particular company until permanent resident status is obtained unless the client takes advantage of "portability[3]."

Visa Availability

To either file the AOS or to initiate the consular processing, an immigrant visa must be available. The Visa Bulletin is published monthly by the U.S. Department of State. The Visa Bulletin is issued about 2-3 weeks ahead of the beginning of the month (for example, the October 2013 Visa Bulletin was published on September 9, 2013). When you read the Visa Bulletin, you must know the country of chargeability, the priority date and the correct Family-Based (FB) or Employment-Based (EB) or Diversity Visa (DV) category.

It is important to determine exactly what the priority date is – do not rely on the receipt notice for the Form I-140 if it was based on a labor certification approval – go straight to the Form ETA 9035 or ETA 750, Part I. For the country of chargeability – the place of birth controls[4], not the nationality. The main exception to this is a concept called Cross Chargeability. If your client is married and his/her spouse is also seeking permanent residence, the entire family can be charged to either spouse's country of birth. This can make a huge difference in the ability to file the AOS when the priority date for one spouse is not current. So, make sure to ask your clients where they were born and where their spouse was born –

1 Both of which are discussed herein.

2 Concurrent filing of the immigrant visa petition and adjustment of status application is also possible in many cases where there is current visa availability for the applicant.

3 The American Competitiveness in the Twenty-first Century Act of 2000 (or AC21) (Public Law 106-313) allows that once an application for adjustment of status has been pending for 180 days at the USCIS, the green card is "vested" in employment-based cases and an individual is entitled to continue his/her green card case as long as he/she is still employed in the same or similar job or occupation, but not necessarily with the same employer. See AC21 Section 106(c).

4 Chargeability is defined at INA Section 202.

do not assume anything! The other exceptions are: a child may be charged to foreign state of either parent (where accompanying or following to join parent); a United States citizen who lost citizenship may be charged to a country of current citizenship or, if citizenship is non-existent, to country of last residence; or an alien born in location where neither parent was born or had their residence may be charged to the foreign state of either parent.

Excerpts from the October 2013 Visa Bulletin:

Family-Sponsored	**All Charge-ability Areas Except Those Listed**	**CHINA-mainland born**	**INDIA**	**MEXICO**	**PHILIPPINES**
F1	01OCT06	01OCT06	01OCT06	22SEP93	01JUN01
F2A	08SEP13	08SEP13	08SEP13	01SEP13	08SEP13
F2B	01MAR06	01MAR06	01MAR06	08MAR94	08FEB03
F3	22JAN03	22JAN03	22JAN03	22MAY93	01JAN93
F4	08AUG01	08AUG01	08AUG01	15OCT96	22MAR90

Employment-Based	**All Chargeability Areas Except Those Listed**	**CHINA-mainland born**	**INDIA**	**MEXICO**	**PHILIPPINES**
1st	C	C	C	C	C
2nd	C	15SEP08	15JUN08	C	C
3rd	01JUL10	01JUL10	22SEP03	01JUL10	15DEC06
Other Workers	01JUL10	22SEP04	22SEP03	01JUL10	15DEC06
4th	C	C	C	C	C
Certain Religious Workers	C	C	C	C	C
5th Targeted EmploymentAreas/ Regional Centers and Pilot Programs	C	C	C	C	C

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