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Adjustment of Status

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Adjustment of Status

Chief Judge Irving R. Kaufman of the second circuit, once wrote “We have had occasion to note the striking resemblance between some of the laws we are called upon to interpret and King Minos's labyrinth in ancient Crete. The Tax Laws and the Immigration and Nationality Acts are examples we have cited of Congress's ingenuity in passing statutes certain to accelerate the aging process of judges.” *Lok v. INS*, 548 F.2d 37, 38 (2d Cir. 1977).

We now focus on one aspect of that labyrinth, adjustment of status.

A potential client enters your office. The client wants to Immigrate to the United States permanently. You have spent sufficient time to determine that adjustment of status is probably the way to go. You have gone through all the possible claims to U.S. citizenship. The quickest way to permanent residence (being 50% blood on the North American Indian Race born in Canada) does not apply. The client is aware of any potential tax consequences having met previous with a tax attorney with whom you are familiar.

You now look to the statute. You find the provisions relating to “adjustment of status of nonimmigrant to that of person admitted for permanent residence” at Immigration and Nationality Act (INA) § 245 [8 USC 1255]. There are subsections (a) through (m). Lets look at 245(a)

“(a) The status of an alien who was inspected and admitted or paroled into the United States or the status of any other alien having an approved petition for classification as a VAWA self-petitioner may be adjusted by the Attorney General, in his discretion and under such regulations as he may prescribe, to that of an alien lawfully admitted for permanent residence if

(1) the alien makes an application for such adjustment,

(2) the alien is eligible to receive an immigrant visa and is admissible to the United States for permanent residence, and

(3) an immigrant visa is immediately available to him at the time his application is filed.”

Lots of questions jump out at you right off the bat, “inspected and admitted or paroled” what does that mean? Is the VAWA exception the only one? What is “eligible to receive an immigrant visa?” What is “admissible?” Finally, for this first section, when is an immigrant visa immediately available?

Eligibility for Adjustment

The simplest way to show that someone has been inspected and admitted is to go to the Customs and Border Protection website and obtain and online copy of their I-94. Arrival-Departure Record. But what if the client hands you a small cardboard that says I-94 on it. That is one too, as is an old roughly 5” by 3” piece of paper with a date from many years ago. Another document might be an old I-444, a Mexican Border Visitor’s Permit. What if they were waved in driving in from Mexico? What if they are Canadian and came in back when I-94s were rarely given to Canadians? Just know that there various ways to prove this requirement. We will leave the in depth analysis for another day.

Making an application is a fairly straightforward requirement. Simply submit the form I-485 (Application to Register Permanent Residence or Adjust Status), proper edition, with proper fee, to the current address used for filing that form. What happens if the checks bounce? Again, we will leave the in depth analysis for another day.

Eligible to receive an immigrant visa and is admissible are two separate criteria. Lets look at the eligibility to receive an immigrant visa part first. This refers to the a petition having been filed to accord such eligibility to the alien, or to a spouse or parent when derivative eligibility is available.

Those for whom a petition may be filed and who may file such are found in INA § 203 [8 USC 1153].

They start out with Family based categories in INA § 203(a) [8 USC 1153(a)].

The Family first preference category is for “Unmarried sons and daughters of citizens.” A U.S. Citizen parent would need to file an I-130 petition to accord such status, if the petition is approved.

The Family second preference category is for “Spouses and unmarried sons and unmarried daughters of permanent resident aliens.” This is further broken down into F2A and F2B. F2A being those who are the spouses or children (under 21) of an alien lawfully admitted for permanent residence. What about a step-child? The marriage creating the step-child relationship must have taken place before the child’s 18th birthday. F2B are the unmarried sons or unmarried daughters (but are not the children) of an alien lawfully admitted for permanent residence. Again an I-130 petition would need to be filed and approved to accord such status.

The Family third preference category is for “Married sons and married daughters of citizens.” Again an I-130 petition would need to be filed and approved to accord such status.

The Family fourth preference category is “Brothers and sisters of citizens.” Again an I-130 petition would need to be filed and approved to accord such status.

Another “family” category, but outside the numerically limited categories mentioned above are "immediate relatives" defined as “the children, spouses, and parents of a citizen of the United States, except that, in the case of parents, such citizens shall be at least 21 years of age.” INA § 201(b)(2)(A)(i) [8 USC 1151(b)(2)(A)(i)]

The Employment based categories are found in INA § 203(b) [8 USC 1153(b)].

The Employment first preference category for Priority Workers include: A) “Aliens with extraordinary ability … in the sciences, arts, education, business, or athletics.” B) “Outstanding professors and researchers.” C) “Certain multinational executives and managers.” Each have extensive criteria for establishing eligibility of the particular category based upon the filing of an I-140 petition.

The Employment second preference category is for “members of the professions holding advanced degrees or aliens of exceptional ability.” In most instances an Application for Permanent Employment Certification, ETA (Employment and Training Administration) form 9089 must be filed and approved in this category before filing the I-140 petition, with certain

Title search: Adjustment of Status

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Can I Stay or Must I Go? Adjustment versus Consular Processing

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