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Adjustment of Status Updates and Traps for the Unwary in the Trump Administration

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By Nicole Simon

Introduction

In just under four years since President Trump took office, his administration has implemented an unprecedented number of draconian measures to hinder a foreign national's ability to obtain legal permanent resident status (i.e. a green card) in the U.S. The policies and procedures that have gone into effect since January 2017 to limit legal immigration are unfortunately working. This article provides both an overview of adjustment of status eligibility and procedure as well as the significant ways the Trump Administration has tried to cut down on and/or delay the ability of eligible foreign nationals to obtain permanent residence. Knowing all the current tricks and turns awaiting you as the attorney of a potential applicant for permanent resident status will hopefully make the process that much smoother and successful for your client, although we can all expect even more hurdles depending on the results of the upcoming presidential election.

Adjustment of Status: Eligibility and Procedure

By way of background, a foreign national seeking to acquire permanent resident status (i.e. "adjust status") in the United States must establish that she or he is eligible under one of the immigrant classifications enumerated in the Immigration and Nationality Act ("INA" or "the Act"), which consist of family-based and employment-based sponsorship as well as other categories.¹ Assuming this eligibility has been established, the foreign national must show they are admissible to the U.S. as a legal permanent resident, and an immigrant visa number must be immediately available under the strict quota system.² Moreover, permanent residence is a discretionary benefit and the government adjudicator must determine whether the applicant merits the favorable exercise of discretion. In the absence of adverse factors, permanent residence is usually granted.³

The INA provides two main procedural routes to obtaining permanent resident status: adjustment of status or consular processing. If the foreign national is residing in the U.S. and has established the basis for permanent residence, they may apply for permanent residence, known as "adjustment of status," in the U.S. However, the foreign national may be barred from adjusting their status here in the U.S. due to unauthorized employment, entering without inspection or a failure to maintain valid non-immigrant status.

The adjustment of status application is Form I-485, Application to Register Permanent Residence or Adjust Status. This form, along with the necessary supporting documentation, is filed at the USCIS Chicago Lockbox facility if the underlying visa petition is family-based (Form I-130). For employment-based visa petitions (Form I-140), the Form I-485 adjustment of status application is filed at the USCIS Dallas Lockbox facility. For all other applications, the filing location is either the Dallas, Phoenix or Chicago Lockbox or a USCIS Service Center, depending on the specific eligibility category. Updated filing location instructions are posted on www.uscis.gov under "Forms."

The USCIS does not have jurisdiction over adjustment applications where the foreign national is currently in removal proceedings before an immigration judge, even if the proceedings have been administratively closed.⁴ In

¹ Immigration and Nationality Act of 1952, Pub. L. No. 82-414, 66 Stat. 163 (*codified as amended at* 8 U.S.C. § 1101 et seq. ("INA" or "the Act") § 203.

² INA § 245(a).

³ *Matter of Arai*, 13 I&N Dec. 494 (BIA 1970); *Matter of Cavazos*, 17 I&N Dec. 215 (BIA 1980) (finding abuse of discretion where the only immigration violation of an immediate relative of a U.S. citizen was entry as a nonimmigrant with immigrant intent).

⁴ 8 CFR § 245.2(a)(1).

that particular case, the foreign national must file their I-485 application at a specially designated Texas Service Center Lockbox.⁵ The applicant must be physically present in the U.S. when the application is filed with the USCIS.

After the initial processing is completed, the application is transferred to the National Benefits Center where it is either adjudicated (if no interview is required) or transferred to the local USCIS District Office of the applicant's place of residence for an interview. As a practical matter, virtually all marriage-based cases and any case in which the applicant is applying under the 245(i) forgiveness provision result in an interview being scheduled at the local office.⁶ As discussed below, under the Trump Administration, every single I-485 application filing is to be interviewed regardless of category.

The forms and documents needed to support the I-485 application include the following:

- Supplement A to Form I-485 (for 245(i) applications);
- 2 full frontal color passport-style photographs;
- Form I-693 (Report of Medical Examination and Vaccination Record) completed by an authorized physician and submitted in a sealed envelope (or submitted later in response to a Request for Evidence or at the scheduled interview);
- Form I-864 (Affidavit of Support) completed and signed by the petitioner for family-based cases, including copy of most recent Federal tax return and W-2 Form or Schedule A if self-employed as well as most recent pay statements or employment verification letter (if family-based case or certain employment-based cases). Petitioner may use Form I-864EZ if they are the only sponsor, if the sponsored immigrant is the only person immigrating based upon the underlying visa petition, and if the qualifying income is based entirely on the petitioner's salary as shown by her Form W-2;
- Form I-864 for the co-sponsor, if applicable, along with the required financial and employment documentation;
- Form I-944 (Declaration of Self-Sufficiency) now required for all adjustment of status applicants unless exempt from the public charge inadmissibility ground and to include myriad financial documents for both the petitioner and the beneficiary/applicant to meet the beneficiary/applicant's burden of demonstrating they are not likely to become a public charge;
- Copies of the applicant's passport, Form I-94, and visa to evidence maintenance of nonimmigrant status and current immigration status;
- Copies of any prior nonimmigrant petition approval notices for the applicant, evidencing continued maintenance of nonimmigrant status;
- Copy of birth certificate for each applicant with certified English language translation;
- Copies of marriage certificate and previous divorce decree(s) (if applicable) with certified English language translations;
- Copy of the approval notice of the underlying immigrant visa petition or, if filing concurrently, the immigrant visa petition with supporting evidence (see below);
- Application for any necessary waivers of inadmissibility;
- Application for employment authorization and/or advance parole (see below), if needed, with 2 full frontal color passport-style photos for each application; and
- Payment of the required filing fees.⁷

Practice Pointer: If your client fits within an adjustment of status category in which the public charge inadmissibility ground does not apply, including refugees, asylees, self-petitioners under the federal Violence Against Women Act, and certain T and U visa applicants, the I-944 is not required. However, to avoid erroneous rejections, a bright colored sheet on top of the filing that explains why your client is exempt would be advisable.

⁵ 8 CFR §§ 1003.31, 1003.47(b)(3).

⁶ 8 CFR § 245.6. See also Memo, Yates, Assoc. Dir. Operations, *Revised Interview Waiver Criteria for Form I-485 Application to Register Permanent Residence or Adjust Status* (Jan. 5, 2005), posted on AILA InfoNet (Doc. No. 05030262) on March 2, 2005.

⁷ See 8 CFR § 103.7 for a list of the current filing fees.

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