

**ADJUSTMENT OF STATUS AND  
WAIVERS OF INADMISSIBILITY**

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## **Adjustment of Status and Waivers of Inadmissibility**

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### **Objectives:**

**After this session, you should be able to:**

1. Describe the basic procedure for obtaining an employment based immigrant visa petition based on a labor certification.
2. Evaluate an alien's statutory eligibility for adjustment of status under sections 245(a) and 245(i) in removal proceedings.
3. Determine whether a waiver of inadmissibility is required for the alien to be eligible for AOS.
4. Identify the relevant factors in determining whether to grant a motion to continue proceedings based on a pending immigrant visa petition.
5. Identify the relevant factors in determining whether a motion to reopen for AOS should be granted.

### **Approach.**

Adjustment of status (AOS) requires, *inter alia*, a thorough understanding of numerous and varied immigrant visa classifications, the grounds of inadmissibility, as well as the corresponding waivers of inadmissibility. These written materials provide an overview of a very broad topic - adjustment of status and waivers of inadmissibility - with citations to applicable statutes and regulations as well as relevant case law. To make the best use of our limited time, we will focus on the core adjustment provision - section 245(a) of the Act - and analyze several of the more problematic issues presented when adjudicating these applications in removal proceedings.

### **Assignment**

To prepare for this session, please read the relevant statutory sections of the Immigration and Nationality Act of 1952, as amended, and these materials, including the appendices. Please bring your copy of the Act, Title 8 of the Federal Code of Regulations, and these materials.

## Adjustment of Status - Problems

**Problem 1:** The first respondent to appear before you at a master calendar hearing is **Carlos Ortiz**, a native and citizen of Mexico. He admits that he entered without inspection on 1-1-04. He concedes that he is inadmissible as charged under section 212(a)(6)(A)(i) of the Act. He informs you that he intends to apply for adjustment of status (AOS) as relief from removal. You ask him to state the basis of application.

1. Carlos reports that he is happily married to an USC & he has an approved I-130 filed on 1-1-05.

Is he eligible for 245(a)?

Is he eligible for 245(i) treatment?

2. Suppose Carlos tells you that his LPR wife filed an I-130 on 4-1-01. It is approved. He explains that he has been living in the U.S. since 1998 without status and he only returned to Mexico in late 2003 for 30 days to visit his sick mother.

Is he eligible for 245(a)? 245(i)?

Can he established visa eligibility & availability?

Statutorily barred under 245(c)?

Admissible?

3. Suppose during Carlos' previous stay in the U.S. (1998 - 2004) he had applied for asylum within 3 months of his arrival and the I-589 remained pending until he departed in 2004.

Inadmissible under 212(a)(9) of the Act?

4. Now suppose Carlos is eligible for 245(i) as an IR. He is 23 years old. He has not previously departed the US. He reveals on his I-485 (Part 3, Q 1) that he was convicted of petty larceny 7 years ago. As a result he received a 4-month sentence which he served.

Admissible?

If not, is he eligible for a waiver?

5. Carlos admits he was convicted twice of petty larceny.

Admissible?

If not, is he eligible for waiver?

6. Carlos admits he was convicted of forgery 2 years ago and sentenced to a 2-year term of imprisonment.

Admissible?

If not, is he eligible for a waiver?

7. Carlos admits he was convicted of unlawful possession of 40 grams of marijuana 10 years ago and received only a fine.

Admissible?

If not, is he eligible for a waiver?

8. Suppose Carlos is a returning LPR and is found inadmissible as he attempts to reenter the U.S. at Dulles International Airport due to a prior conviction for unlawful possession of 20 grams of marijuana.

Admissible?

If not, is he eligible for a waiver?

Does the fact that he is an arriving alien alter your answer?

9. Suppose Carlos reveals during the merits hearing that he claimed to be a USC when he completed an I-9 form in 2002.

Admissible?

If not, is he eligible for a waiver?

**Problem 2:** The next respondent in your master calendar is **Colleen Cotter**, an native and citizen of Ireland. She admits that she overstayed her visitor visa. She was last admitted as a visitor on 1-1-05 for 6 months. She concedes that she is present in the U.S. without a valid visa pursuant to section 237(a)(1)(B) of the Act. She informs you that she intends to apply for AOS as relief from removal. You ask her to state the basis of application.

1. Colleen informs you that she is 22-years-old and the beneficiary of an approved I-140 VP. She explains that she is a skilled worker, a foreign food specialty cook. Her priority date is 7-1-05. You could verify this information by asking for a copy of the approval notice (I-797) and a copy of the LC and an employer's letter.

Is she eligible for 245(a) adjustment?

If not, why not?

Would it make any difference if her approved visa petition showed that she qualifies for classification under section 203(b)(2) of the Act?

2. Colleen argues that she is in unlawful status at this time - through no fault of her own because she started the LC process while she was still in a valid NIV status.

What section of the Act is she invoking?  
Are you convinced by her argument?

3. Colleen informs you that she has an approved I-140 & that her father is the beneficiary of a family based fourth preference visa petition (I-130) filed on 1-1-98, when she was 15-years old.

Is she eligible to apply for AOS?

4. Colleen is applying for AOS on the basis of an approved immediate relative visa petition (I-130) filed on 1-1-06.

Eligible for 245(a)?  
Statutorily barred under 245(c)?

5. Colleen is placed in removal proceedings on the allegation that she is an alien smuggler. She admits that she helped smuggle her husband into the US. Until this incident, Colleen was in the US in valid NIV status and has not worked without authorization. She is eligible to apply for AOS as a beneficiary of an approved family based fourth preference visa petition (I-130) filed on 7-1-97.

Eligible for 245(a)?  
Admissible?  
If not, is she eligible for a waiver?

## Adjustment of Status & Waivers of Inadmissibility

Teresa Donovan, Esquire

### **Approach.**

Adjustment of status (AOS) requires, *inter alia*, a thorough understanding of numerous and varied immigrant visa classifications, 10 categories of grounds of inadmissibility, as well as the corresponding waivers of inadmissibility. In light of the all-inclusive topic and the limited time for training, these materials are based on the core adjustment provision in the Immigration and Nationality Act of 1952, as amended, namely, section 245 of the Act, 8 U.S.C. §1255. This document provides you with a 6-point checklist for determining whether a respondent in removal proceedings is eligible for AOS under section 245 of the Act. Also addressed is AOS eligibility under former section 245(i) of the Act and a proposed framework for adjudicating a motion to continue or reopen for purposes of applying for AOS.

### **Learning Objectives.**

After this session, you will be able to:

1. Determine an alien's adjustment eligibility employing the 6-point checklist.
2. Determine the effect of the Child Status Protection Act provisions a pending AOS application.
3. Determine whether an alien is eligible for a waiver under sections 212(a)(9) and 212(h) of the Act.
4. Identify the relevant factors in determining whether to grant a motion to continue or reopen proceedings to afford the alien an opportunity to apply for AOS.

## OUTLINE

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- II. **Inspection and Admission or Parole**
- III. **Visa Eligibility**
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    2. Employment based immigrants
    3. Diversity based immigrants
  - B. AOS without an immigrant visa
    1. Asylee/ refugee adjustment under section 209 of the Act
    2. Nationality based immigrants
    3. Special legislation
- IV. **Visa Availability**
  - A. Priority dates
  - B. Derivative beneficiaries
  - C. Automatic change of preference category & automatic revocation of approved visa petition
  - D. Child Status Protection Act (CSPA)
- V. **Statutory Bars to 245(a) AOS**
  - A. Section 245 bars
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- VI. **Admissibility & Waivers of Inadmissibility**
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  - B. Crime waiver: 212(h)
  - C. Fraud waiver: 212(i)
  - D. Document waiver: 212(k)
  - E. Alien smuggler waiver: 212(d)(11)
  - F. Aliens previously removed/ unlawfully present: 212(a)(9)(A), (B) and (C)
- VII. **Discretion**
- VIII. **Section 245(i) of the Act**
- IX. **Motions to Continue and Reopen for AOS**
- X. **Recommended Reading**

## I. The Adjustment Application and the 6-point Checklist

According to section 101(a)(20) of the Act, the term "lawfully admitted for permanent residence" means "the status of having been accorded the privilege of residing permanently" in this country. There are two procedures for acquiring lawful permanent resident (LPR) status: (1) an alien outside the United States (U.S.) can apply for an immigrant visa at a consular post and then apply for admission as an immigrant, OR (2) an alien in the U.S. can apply for adjustment of status (AOS) under section 245(a) of the Act. AOS is generally preferred over consular processing for a number of reasons. An alien avoids the time and expense of overseas travel and may avoid certain grounds of inadmissibility that are triggered by a departure from the U.S. Perhaps most important, the denial of an AOS application, unlike the denial of an immigrant visa overseas, is subject to administrative review.

Once an alien, except an arriving alien, is the subject of removal proceedings, he must apply for AOS before the Immigration Judge (IJ). Section 245(a) of the Act requires that the alien make an application for AOS. The adjustment application (Form I-485) instructions provide a useful checklist to ensure proper filing of the required supporting documentation. The I-485 must be filed with the following documentation:

1. evidence of criminal history, if applicable;
2. birth certificate or other qualifying record of birth;
3. copy of passport page with nonimmigrant visa;
4. photos;
5. evidence of biometric checks;
6. police clearances, if required;
7. medical examination (except for fiance(e)s and refugees who had exam in prior year and registry applicants);
8. Form G-235A (biographic information sheet);
9. a binding affidavit of support as specified under section 213A of the Act, 8 U.S.C. § 1183a, or employment letter; and
10. evidence of visa eligibility and availability (e.g. USCIS approval notice).

IJs may not grant adjustment until the DHS has completed the biometric and related security checks. See OPPM 05-03.

If an alien is inadmissible and needs to apply for a waiver of inadmissibility, the waiver form is filed simultaneously with the adjustment application. The appropriate form and supporting documentation will be dictated by the particular waiver sought. For example, a waiver under section 212(h)(criminal) or (i)(fraud) of the Act, is filed on Form



I-601. An alien seeking more than one waiver is permitted to file a single form and fee. See 8 C.F.R. § 1212.7.

In removal proceedings, an Immigration Judge (IJ) may grant an alien's application for AOS pursuant to section 245(a) of the Act, if the alien:

1. has been inspected and admitted or paroled into the U.S.;
2. is eligible to receive an immigrant visa;
3. has an immigrant visa is immediately available;
4. is not statutorily barred from AOS,
5. is admissible to the U.S., or, if inadmissible, eligible for a waiver of inadmissibility; and,
6. warrants a favorable exercise of discretion.

The burden of proof is on the alien to establish eligibility for such relief. See 8 C.F.R. § 1240.8(d). This paper develops this 6-point checklist.

## II. Inspected and Admitted or Paroled.

Sections 101(a)(13)(A) and 245(a) of the Act taken together require that an alien be lawfully admitted after inspection and authorization by an immigration officer to be eligible for AOS. [This requirement can be waived under section 245(i) of the Act.] The term "admission" is defined in section 101(a)(13)(A) of the Act as "the lawful entry of the alien into the United States after inspection and authorization by an immigration officer." Section 235(a)(3) of the Act requires that an applicant for admission be inspected by an immigration officer. The burden is on the respondent to establish that he did appear before the immigration inspector. Generally, the respondent will present an I-94 card and/or a passport stamp to establish inspection and admission to the U.S.

An *arriving alien*, defined at 8 C.F.R. § 1001.(q) (including an alien paroled into the U.S. under section 212(d)(5) of the Act), is ineligible to apply for AOS in deportation and removal proceedings. See 8 C.F.R. § 1245.2(a)(1). See also section 101(a)(13)(B) (an alien who is paroled into the U.S. under section 212(d)(5) of the Act has *not* been admitted to the United States) of the Act.

There is a narrow regulatory exception to this general rule. Pursuant to 8 C.F.R. § 1245.2(a)(1), an arriving alien, who is the subject of deportation or removal proceedings, may apply for adjustment if: (1) the alien filed for adjustment with the DHS's United States Citizenship and Immigration Services (USCIS) while in the U.S.; (2) the alien departed and returned pursuant to the terms of a grant of advance parole to pursue the adjustment application (I-512); (3) USCIS denied the application; and (4) the DHS placed the alien in removal proceedings either upon the alien's return to the U.S. or when it denied the application. See also 71 Fed. Reg. 27585 (May 12, 2006). These regulations do not address aliens in exclusion proceedings. *Matter of Castro*, 21 I&N Dec. 379 (BIA 1996).

After the promulgation of the May 2006, regulations, the Immigration Judges and the Board readily denied an arriving alien's motion to continue or reopen for AOS for lack of jurisdiction over the AOS application. The Eleventh Circuit concurred with this position. See *Scheerer v. U.S. Att'y Gen.*, 513 F.3d 1244 (11th Cir. 2008). Other circuits disagree. In *Gao Ni v. BIA*, 520 F.3d 125, 129-30 (2nd Cir. 2008), the Second Circuit found the Board's denial of such a motion unresponsive because it was simply a "rote recital of a jurisdictional statement." The Ninth Circuit had reached the same conclusion in *Kalilu v. Mukasey*, 548 F.3d 1215 (9th Cir. 2008). Both the Second and Ninth Circuits remanded the cases for the Board to determine if a continuance or reopening was warranted so that the arriving alien would have the time and opportunity to apply for AOS before the DHS without being deported. See also *Ceta v. Mukasey*, 535 F.3d 639 (7th Cir. 2008) (same).

There is nothing in the applicable regulations that would preclude an arriving alien who is the subject of removal proceedings from applying for AOS before the DHS. 8 C.F.R. §§ 245.2(a)(1), 1245.2(a)(1)(ii). The fact that an alien is the subject of a final order of removal does not preclude the DHS from adjudicating the application. See generally *Matter of C-H-*, 9 I&N Dec. 265 (BIA 1961) (alien with unexecuted exclusion order is eligible for adjustment of status before the district director if eligible for an immigrant visa and is otherwise admissible).

### III. Visa Eligibility

It is well established that IJs have no jurisdiction over the immigrant visa petition. However, because visa eligibility is a key requirement for adjustment of status, it is important to understand the petition process. Section 204 of the Act authorizes granting immigrant status to an alien on the basis of a qualifying relationship. Regulations at 8 C.F.R. Part 204 set out the visa petition filing process. Although our immigration system is premised on a visa requirement, there are certain classes of aliens who can adjust status without a visa. Part A below addresses those categories of aliens who must have an immigrant visa to apply for AOS. Part B identifies those classes of aliens who can apply for AOS without a visa.

An AOS application cannot be based on an approved visa petition that has already been used by the beneficiary to obtain adjustment of status or admission as an immigrant. *Matter of Villarreal-Zuniga*, 23 I&N Dec. 886 (BIA 2006). The fact that an alien is an LPR does not preclude him or her from readjusting status on the basis of a new immigrant visa. See e.g. *Matter of Mendez*, 21 I&N Dec. 296 (BIA 1996).

#### A. Immigrant visa classifications

Aliens can adjust their status based on a family-based visa petition (Form I-130) or an employment-based visa petition (Form I-140). These visa petition procedures are discussed below.

## 1. Family based (FB) immigrants

Section 201(b)(2)(A)(i) of the Act defines an immediate relative (IR) as an alien who is the child, spouse or parent of United States citizen (USC). This category is **not** subject to annual numerical limitations so a visa is available when the visa petition is approved. A USC child must be at least 21 years of age in order to petition for his or her parent. For AOS purposes, a "child" is defined at section 101(b)(1) of the Act.

Section 203(a) of the Act authorizes four family based visa preferences: **FB-1** (unmarried sons and daughters of USCs); **FB-2A** (spouses and children of LPRs); **FB-2B** (unmarried sons and daughters of LPRs); **FB-3** (married sons and daughters of USCs); and, **FB-4** (brothers and sisters of USCs).

Pursuant to sections 204(a)(1)(A)(iii)-(iv) and 204(a)(1)(B)(ii)-(iii) of the Act, a battered spouse (a husband or wife), child, or parent can self-petition without the abusive USC/LPR spouse/parent's knowledge or help. See Violence Against Women Act of 1994 (**VAWA**). The petition (I-360) is filed with the USCIS. Aliens who entered without inspection are eligible to apply for adjustment. The statutory bars to adjustment set forth at section 245(c) of the Act do not apply. Nor does the public charge ground of inadmissibility. Also, an alien may apply for a waiver of inadmissibility under sections 212(g), (h), or (i) of the Act, without having a qualifying family member. *Important Note:* The record of proceeding is to be labeled battered spouse case and is subject to strict confidentiality provisions. A breach of confidentiality can result in a disciplinary action and fines.

A two step process underlies the family based adjustment application. The two steps are:

- a. obtain an approved visa petition (I-130) from the USCIS
- b. apply for AOS before the USCIS or the IJ.

This 2-step process can be summarized as follows.

First, the USC or LPR (petitioner) files a Petition for Alien Relative (I-130) on behalf of his or her qualifying family member (beneficiary) with the DHS. The petitioner must establish his or her own USC or LPR status, the *bona fides* of the claimed relationship to the beneficiary, and show that the family relationship meets the statutory requirements. A pending or approved I-130 does not entitle the beneficiary to work or reside in the United States.

Once the I-130 is approved and an immigrant visa is immediately available, the alien may apply for AOS. Because there is no limit on the number of visas issued to IRs, they can always establish visa availability. However, there is an annual limit on the number of visas issued to aliens in the preference categories under section 203(a) of the Act. The

Department of State (DOS) tracks visa availability in its monthly Visa Bulletin. A visa is immediately available when the alien's *priority date* is *earlier* than the specified allocation cut-off number shown on the current Visa Bulletin. See 8 C.F.R. § 1245.1(g)(1). The alien's *priority date* is fixed when the I-130 is *filed* with the DHS. See 8 C.F.R. § 1245.1(g)(2).

An alien may file the I-130 and the I-485 concurrently if an immigrant visa is immediately available at the time of filing the application. See 8 C.F.R. § 1245.2(a)(2)(B).

## 2. Employment based (EB) immigrants

Sections 203(b)(1) through (5) of the Act authorize five employment based visa preferences: **EB-1** (priority workers); **EB-2** (aliens who are members of the professions holding advanced degrees or aliens of exceptional ability); **EB-3** (skilled workers, professional, and other workers); **EB-4** (special immigrants (as described in sections 101(a)(27)(C) through (M) of the Act)); and, **EB-5** (investors). Each category has its own statutory and regulatory requirements.

A three step process underlies two of the employment based visa categories set forth at sections 203(b)(2)(aliens who are professionals with advanced degrees or who are of exceptional ability) (**EB-2**) and (3)(A)(i) (skilled workers) (ii) (professional) and (iii) (other workers) (**EB-3**) of the Act. The three steps are:

- a. obtain a labor certification from the Department of Labor
- b. obtain an approved visa petition (I-140) from the USCIS
- c. apply for AOS before the USCIS or the IJ.

This 3-step process is summarized below.

An alien seeking an immigrant visa as an EB-2 or EB-3 worker must have an employer who has extended an offer of employment and is willing to file an Application for Permanent Employment Certification (Form ETA 9098, formerly ETA-750) (labor certification) with the Department of Labor (DOL), and an Immigrant Petition for Alien Worker (I-140) with the DHS, on his or her behalf.

An alien's employer or prospective employer initiates the immigrant visa process by filing a labor certification with the DOL. The 10-page labor certification application details the job offered, the minimum job requirements, the offered wage, the recruitment information, and the alien's education and work experience. The alien must possess the minimum job requirements at the time the labor certification is *filed*. The education and experience required for the position (set forth at Part H of the application) determines the alien's immigrant visa classification (EB-2 or EB-3). For example, an alien seeking a labor certification for a job requiring two years of training or experience, will be classified as an EB-3 "skilled worker" under section 203(b)(3)(A)(i) of the Act. If less than two years of

training or experience is required, the alien will be classified as an EB-3 "other worker" under section 203(b)(3)(A)(iii) of the Act.

The DOL will only approve a labor certification when a test of the labor market shows that there are not sufficient United States (U.S.) workers available for the job and that the employment of the alien will not adversely affect similarly situated U.S. workers. See section 212(a)(5) of the Act, 8 U.S.C. §1182(a)(5). Therefore, before filing the labor certification, an employer is required to conduct a recruitment campaign to test the local labor market to determine if there is a minimally qualified U.S. worker for the position. If the employer finds even one minimally qualified U.S. worker who is willing to accept the job offer, the labor certification cannot be filed. When an employer files the labor certification he attests, *inter alia*, that he has advertised the job opportunity in compliance with DOL regulations, that the job has been and is open to any U.S. worker, and, that any U.S. workers who applied for the job were rejected for lawful job-related reasons. Although the employer does not submit evidence of his advertising and recruitment campaign to the DOL, he is required to retain such documentation in the event of a DOL audit. The DOL conducts random audits of employers' labor certifications for quality control purposes. A pending or approved labor certification does not entitle the alien to live or work in the U.S.

Until last year, employers could substitute the alien named in the labor certification with another alien while the labor certification or I-140 was pending. Employers are now prohibited from substituting alien workers. Labor certifications now have an expiration date. Employers have 180 days from the date a labor certification is approved to file the corresponding I-140. See 71 Fed. Reg. 27904 (May 17, 2007), codified at 20 C.F.R. §§ 656.11, 30(b).

Once the labor certification is approved, the employer (petitioner) files the I-140 with the DHS on the alien's (beneficiary) behalf. The alien's visa classification (EB-2 or EB-3) is specified on Part 2 of the I-140. The petitioner must provide documentation establishing that the employment relationship meets the statutory requirements. The petitioner must submit the approved labor certification as well as evidence showing that at the time the labor certification was filed he had the ability to pay the offered wage and the alien possessed the required education and experience for the job offered. See 8 C.F.R. §§ 204.5(a), (c), (g), (k) and (l). See also *Hoosier Care v. Chertoff*, 482 F.3d 987 (7<sup>th</sup> Cir. 2007) (J. Posner clarifying the division of responsibilities between DHS and DOL in adjudicating I-140s and labor certifications). A pending or approved I-140 does not entitle the alien to live or work in the United States.

Third, once the I-140 is approved and a visa is immediately available the alien can apply for adjustment of status. As with the family based immigrants, an I-140 may be filed concurrently with the I-485 if an immigrant visa number is immediately available at the time of filing the application. See 8 C.F.R. § 1245.2(a)(2)(B).

If the priority date is not current, then the I-140 is filed as a stand-alone petition (the I-485 can then be filed as soon as the alien's priority date has been reached, even if the

I-140 is still pending). Visa availability is determined in the same manner as the family based cases. All employment preference categories are subject to numerical restrictions. For EB-2 and EB-3 workers, the priority date is fixed when the labor certification is filed with the DOL. See 8 C.F.R. §§ 204.1(c), 204.5(d).

Because an employment based petition and AOS process can be a lengthy, Congress enacted section 204(j) of the Act, which gives aliens some flexibility to change jobs and employers during the process. This "portability" provision allows an I-140 visa petition for an alien whose I-485 application is filed and remains unadjudicated for 180 days or more to remain valid with respect to a new job if the alien changes jobs or employers so long as the new job is in the same or a similar occupational classification as the job for which the I-140 was filed.

In *Matter of Perez Vargas*, 23 I&N Dec. 829 (BIA 2005), the Board found that IJs have no authority to determine whether an alien's approved I-140 petition remains valid under section 204(j) of the Act, after an alien changes jobs or employers. In *Perez Vargas v. Gonzales*, 478 F.3d 191 (4th Cir. 2007), the Fourth Circuit reversed the Board's decision. The Fourth Circuit concluded that because IJs have exclusive jurisdiction over AOS applications for aliens in removal proceedings, they necessarily have jurisdiction over the application of section 204(j) of the Act. *Id.* 194. Moreover, section 204(j) does not distinguish between aliens applying for AOS before the IJ or the DHS. *Id.* 195. The Fifth and Sixth Circuits subsequently agreed with the Fourth Circuit. See *Sung v. Keisler*, 505 F.3d 372 (5th Cir. 2007) and *Matovski v. Gonzales*, 492 F.3d 722 (6th Cir. 2007).

Aliens applying for EB-4 classification are self-petitioners who file a Form I-360 with the USCIS along with evidence that they meet the statutory requirements. Of special interest to IJs in removal proceedings are EB-4 special immigrant juveniles. Pursuant to section 101(a)(27)(J) of the Act, an alien who is unmarried, under 21 years old, and is a ward of the state or in foster care (due to abuse, neglect, or abandonment) can self-petition for an immigrant visa. See generally 8 C.F.R. § 204.11. Juveniles who entered without inspection are eligible to apply for adjustment. The statutory bars to adjustment set forth at section 245(c) of the Act do not apply. Nor does the public charge ground of inadmissibility. Also, such juveniles may apply for a waiver of inadmissibility under section 212(g), (h), or (i) without having a qualifying family member. A juvenile in the custody of HHS must obtain the consent of DHS to apply for the required court order.

### 3. Diversity immigrants

Pursuant to section 203(c)(1) of the Act, aliens from specified countries can enter the annual diversity visa lottery. 110,000 alien applicants are selected by lottery every year who are given the chance to obtain one of the authorized 55,000 immigrant visas. A selected alien is issued a lottery number, the smaller the number the more likely that he will obtain a visa. The Visa Bulletin tracks the lottery rank numbers and specifies the cut-

off number. Qualifying family members are eligible to accompany the principle alien regardless of their nationality.

## **B. AOS without an immigrant visa**

### **1. Asylee/ refugee adjustment under section 209 of the Act**

Under section 209(a) of the Act, an alien who has been admitted to the United States as a refugee pursuant to section 207 of the Act (from outside the United States) may adjust his or her status after one year of continuous physical presence in the U.S. A spouse or child of a refugee is entitled to the same admission status as such refugee if accompanying, or following to join such refugee. See section 207(c)(2) of the Act. See also *Matter of H-N-*, 22 I&N Dec. 1039 (BIA 1999) (the IJ has jurisdiction to adjudicate a refugee's AOS application under section 209(a) of the Act).

Under section 209(b) of the Act, an alien granted asylum in the U.S. pursuant to section 208 of the Act is eligible for AOS if he: (1) has been physically present in the U.S. for one year after being granted asylum; (2) continues to be a refugee as defined in section 101(a)(42) of the Act; (3) is not firmly resettled in another country; and (4) is admissible to the U.S. (except as provided under section 209(c) of the Act). See also *Matter of K-A-*, 23 I&N Dec. 661 (BIA 2004) (the IJ has jurisdiction to adjudicate an asylee's AOS application under section 209(b) of the Act).

### **2. Nationality based immigrants**

Over the years, Congress has enacted various laws aimed at assisting nationals of certain countries by giving them the opportunity to apply for AOS without first obtaining an approved immigrant visa petition. For example, under the Cuban Adjustment Act of 1966 (CAA) (Pub. L. 89-732), a Cuban national can apply for AOS if he (1) was inspected and admitted or paroled after January 1, 1959; (2) has been physically present in the U.S. for one year after such admission; and (3) is eligible for an immigrant visa and admissible to the U.S. for permanent residence. This provision is applicable to the spouse and child of such Cuban alien, regardless of their citizenship, if they live with the Cuban alien in the U.S. See 8 C.F.R. § 1245.2(b); *Gonzalez v. McNary*, 765 F. Supp. 721; *aff'd* 980 F.2d 1418 (11<sup>th</sup> Cir. 1993) (concluding that the express language of section 1 of the Cuban Adjustment Act requires the spouse to reside with the Cuban national). See also *Matter of Artigas*, 23 I&N Dec. 99 (BIA 1999) (IJ has jurisdiction over AOS application under the CAA when the alien is charged as an arriving alien without a valid visa or entry document because AOS under CAA separate and apart from 245).

The following laws authorized aliens of specified nationalities to apply for AOS without having an immigrant visa. Each law has its own statutory and regulatory

requirements and application procedures. While the application period for all these programs has expired, it is useful to be familiar with these various special immigrant visa programs.

- Certain nationals of the Soviet Union, Vietnam, Laos, or Cambodia who were inspected and paroled into the U.S. between 8-15-88 and 9-30-90, after being denied refugee status. See *Foreign Operations Appropriations Act for 1990*, Pub. L. 101-167; section 245 of the Act, Note 3; 8 C.F.R. § 1245.7.
- Certain Chinese nationals who were in the U.S. at some time between 6-5-89 and 4-11-90. See *Chinese Student Protection Act*, Pub. L. No. 102-404; section 245 of the Act, Note 6; 8 C.F.R. § 1245.9.
- Certain Polish and Hungarian nationals who were inspected and paroled into the U.S. between 11-1-89 and 12-31-91, after being denied refugee status. See section 646(b) of the *Illegal Immigration Reform and Immigrant Responsibility Act of 1996* (IIRIRA), Division C of Pub. L. No. 104-208; section 245 of the Act, Note 8; 8 C.F.R. § 1245.12.
- Certain Cuban or Nicaraguan nationals who were continuously physically present in the U.S. beginning not later than 12-1-95. See section 202 of the *Nicaraguan Adjustment and Central American Relief Act*, Pub. L. No. 105-100 (NACARA); section 245 of the Act, Note 9; 8 C.F.R. § 1245.13.
- Certain Haitians who were continuously physically present in the U.S. beginning not later than 12-31-95. See the *Haitian Refugee Immigration Fairness Act of 1998* (HRIFA), Pub. L. No. 105-100; section 245 of the Act, Note 10; 8 C.F.R. § 1245.15.
- Certain Syrian Jews who arrived in the U.S. after 12-31-91, after being allowed to leave Syria by the government. See *Syrian Adjustment Act*, Pub. L. No. 106-378; section 245 of the Act, Note 11; 8 C.F.R. § 1245.20.
- Certain nationals from Vietnam, Cambodia, and Laos who were paroled into the U.S. before 10-1-97. See *Vietnam, Cambodia, and Laos Adjustment Act*, Pub. L. No. 106-429; section 245 of the Act, Note 12; 8 C.F.R. § 1245.21.

### 3. Special legislation

*Law Enforcement Visas.* An alien granted a nonimmigrant visa under section 101(a)(15)(S) (criminal informant), (T)(trafficking victim) or (U) (victims of criminal activity) of the Act, may apply for AOS under section 245(j), (l), or (m) of the Act, respectively.



Each nonimmigrant and AOS provision has its own eligibility requirements and application procedure.

*Health Care Workers.* Certain health care workers (H-1B nurses) may apply for adjustment of status. 8 C.F.R. § 1245.14.

*US Patriot Act.* Under section 421 of the Act, aliens whose preference immigrant visa petitions were revoked or terminated due to the events of 9/11 can apply for special immigrant status. Under section 423 of the Act, certain aliens can self-petition. Qualifying aliens file Form I-360 with the USCIS. Once the I-360 is approved such aliens can apply for AOS.

*Amnesty provisions.* Certain aliens were authorized to apply for AOS under legalization provisions at section 245A of the Act, and the special agricultural workers (SAW) under section 210 of the Act. The Immigration Courts and the Board have no jurisdiction to adjudicate these applications. 8 C.F.R. § 245a.11(b)(3).

#### IV. Visa Availability

##### A. Priority dates

All family and employment preference categories set forth at sections 203(a) and (b) of the Act are subject to annual numerical restrictions. As stated, the Department of State (DOS) tracks visa availability in its monthly Visa Bulletin. A visa is immediately available when the alien's *priority date* is *earlier* than the specified allocation cut-off number shown on the current Visa Bulletin. 8 C.F.R. § 1245.1(g)(1). The alien's *priority date* is fixed when the I-130 is *filed* with the DHS. 8 C.F.R. § 1245.1(g)(2). For employment based applicants, the *priority date* is fixed when the labor certification is filed with the DOL. 8 C.F.R. § 204.5(d). The alien's priority date and preference category are shown on the USCIS Notice of Action (Form I-797).

In certain cases, an alien who is the beneficiary of more than one approved I-140 visa petition, may retain the priority date from the first-filed visa petition. See 8 C.F.R. § 204.5(e) (an alien who is the beneficiary of more than one approved I-140 is entitled to the earliest priority date).

Sometimes visa numbers regress to such an extent that an immigrant visa is available when an alien filed the I-485, but not when the DHS or the IJ adjudicates the I-485. This situation highlights the difference between visa availability and the allocation of an immigrant visa. See *Hernandez v. Ashcroft*, 345 F.3d 824, 844 n. 21 (9<sup>th</sup> Cir. 2003). Pursuant to an INS Operating Instruction (OI) 245.4(a)(6), "applications for adjustment of status filed with visa availability, which cannot be approved solely because a visa number is not available at the time of processing, should be held in abeyance pending the allocation of a visa number." See *Matter of Torres*, 19 I&N Dec. 371 n.3 (BIA 1986). The

Board gave effect to this OI in the context of deportation proceedings and later in the context of removal proceedings. See *Matter of Ho*, 15 I&N Dec. 692 (BIA 1976); *Matter of Briones*, 24 I&N Dec. 355, 372 n. 3 (BIA 2007); *Merchant v. U.S. Att'y Gen.*, 461 F.3d 1375, 1379 n. 7 (11th Cir. 2006). In *Matter of Ko*, 15 I&N Dec. 695 (BIA 1976), the Board found that the respondent's adjustment application could not be held in abeyance pursuant to OI 245.4(a)(6), because his ineligibility for adjustment of status was not *solely* based on the lack of a visa number.

### **B. Derivative beneficiaries.**

Spouses and qualifying children (unmarried and under 21 years old) of aliens with approved visa petitions under sections 203(a) and (b) or a diversity visa under section 203(c) of the Act, may accompany or follow to join to the principal alien *provided* the relationship between the principal alien and the derivative beneficiary existed before the principal becomes an LPR *and* at the time the derivative beneficiary becomes a LPR. See section 203(d) of the Act. Derivative beneficiaries are eligible to adjust their status on the basis of the principal applicant's visa petition. They do not need their own petition. Spouse and children receive the same priority date as the principal alien. 8 C.F.R. § 204.2. Derivative beneficiaries must meet the same adjustment requirements and restrictions as the principal under section 245(a) of the Act. Alternatively, those derivative beneficiaries who are outside the U.S. may undergo consular processing once the principal alien has adjusted his or her status in the U.S.

This provision does *not* apply to IRs as defined in section 201(b)(2)(A)(i) of the Act. 8 C.F.R. § 204.2(a)(4). Therefore, the child of a person who marries a USC is not entitled to derivative status. This means that the USC parent or the step-parent must file an I-130 on behalf of his or her spouse and each child. Notably, the children of a self-petitioning widow and widowers and abused spouses of USCs are considered IRs. 8 C.F.R. §§ 204.2(b)(4) and (c)(4).

### **C. Automatic change of preference classification & automatic revocation of approved visa petition**

Changes in the beneficiary's marital status and age, or the petitioner's citizenship can alter the beneficiary's visa classification. 8 C.F.R. § 204.2(i). These automatic changes in the alien's classification alter visa availability. A change in the alien *beneficiary's marital status* can result in the automatic conversion of the alien's preference classification. For example, a currently valid I-130 classifying an unmarried son or daughter in **FB-1** status shall be regarded as having been approved for **FB-3** when the son or daughter marries. 8 C.F.R. § 204.2(i)(1)(i). The child of a USC who marries is automatically reclassified from an IR to **FB-3** status. 8 C.F.R. § 204.2(i)(1)(ii). A married child of a USC whose marriage is terminated shall be reclassified from **FB-3** to an IR or

F-2, depending on the child's age. 8 C.F.R § 204.2(i)(1)(iii). The unmarried child of a USC who turns 21-years-old is reclassified from an IR or F-1. 8 C.F.R § 204.2(i)(1)(iv).

Similarly, a change in the *petitioner's citizenship* can result in the automatic conversion of the alien beneficiary's preference classification. The naturalization of a parent petitioner will upgrade his or her unmarried children from **FB-2** classification to **IR** or **FB-1** status, depending on the age of the child. 8 C.F.R § 204.2(i)(3).

Certain changes can also result in the automatic revocation of the visa petition. See generally 8 C.F.R § 205. For example, a currently valid visa petition classifying an unmarried son or daughter for **FB-2** status shall be automatically revoked when the son or daughter marries. See 8 C.F.R § 205.1(a)(1)(i)(I). In the case of an employment based visa petition, the termination of the petitioner's business will result in the automatic revocation of the visa petition.

#### **D. Child Status Protection Act (CSPA)**

The Child Status Protection Act (CSPA), enacted on August 6, 2002, added several provisions to the Act to protect children from losing their visa eligibility by aging-out - by turning 21 years of age, while their visa petition or adjustment application was pending. See section 101(b) of the Act (defining a "child" as an unmarried person under 21 years of age). Prior to the enactment of the CSPA, an unmarried child of a USC who turned 21-years of age while the DHS was adjudicating his or her I-130 would be reclassified from an IR to FB-1. Or, an unmarried child of an LPR who turned 21 would be reclassified from FB-2A to FB-2B. An unmarried child who sought derivative status pursuant to 203(d) of the Act and who turned 21 during the pendency of the application would lose visa eligibility altogether.

Now, pursuant to the CSPA rules, for purposes of determining a child's visa classification, the child's age is fixed on the date of a specified event such as the filing of a visa petition, the child's divorce, or the parent's naturalization. The applicable rule depends on whether the child's parent is a USC, LPR, asylee, refugee or diversity immigrant. These provisions do **not** apply to children of HRIFA and NACARA applicants or to family unity beneficiaries or those applying for special immigrant juvenile status. Section 204(k) of the Act permits an alien to elect out of these special rules. These provisions are interpreted through USCIS and DOS memoranda (which are available on the DHS website) because regulations have not yet been promulgated.

Three rules apply to the children of **USCs** and are set forth at sections 201(f)(1), (2) and (3) of the Act. A child's age is fixed at the time the I-130 is filed. An I-130 filed by a USC for an unmarried child who later turns 21 will remain an IR, not a FB-1. See section 201(f)(1) of the Act.

A child's age is fixed on the date of a parent's naturalization. An LPR who files an I-130 for a child and who later naturalizes automatically converts the petition from FB-2A classification to IR or FB-1. Or an FB-2B petition will be reclassified to an FB-3. The child's age on the date the parent naturalizes will determine the visa classification. See section 201(f)(2) of the Act.

A child's age is fixed on the date of his or her divorce. A USC who files an I-130 for a married child and whose marriage is terminated automatically converts the petition from FB-3 classification to FB-1 or IR. See section 201(f)(3) of the Act. The child's age on the date of the divorce will determine the visa classification.

The rules governing the CSPA-age of children of LPRs are set forth at sections 203(h)(1) and (2) of the Act. Section 203(h)(1) of the Act sets forth the mathematical formula for determining the child's age. Basically, a child's CSPA-age is determined by subtracting the number of days the visa petition is pending (from receipt date to approval date) from the child's actual age on the date the I-130 is approved or a visa becomes available, whichever is later. A child must apply for LPR status within a year of acquiring visa availability.

Section 203(h)(3) is not an age-out provision, but allows for a child who aged out to keep his or her priority date as the date the original petition was filed.

The rules governing the children of **asylees** and **refugees** are set forth at sections 208(b)(3) and 207(c)(2) of the Act, respectively. The age of the child is fixed as of the date the asylum application (I-589) or the refugee petition (I-590) is filed.

These provisions are effective as of the date of enactment, August 6, 2002. In *Matter of Avila-Perez*, 24 I&N Dec. 78 (BIA 2007), the Board concluded that the respondent, whose I-130 was approved before August 6, 2002, but who applied for AOS after that date, retained his status as a child under section 201(f)(1) of the Act, because he was under 21 when the I-130 was filed.

## V. Statutory Bars to 245(a) AOS

### A. Section 245 bars

Sections 245(c) through (f) of the Act list certain categories of aliens who are ineligible to AOS. See also 8 C.F.R. § 1245.1(c) (list of aliens ineligible for AOS).

Section 245(c) of the Act enumerates eight classes of aliens who are ineligible for AOS. [VAWA self-petitioners are not subject to the 245(c) bars to AOS.] Most problematic for AOS applicants are the bars at sections 245(c)(2), (7) and (8) of the Act. Except for IRs and certain special immigrants, section 245(c)(2) of the Act precludes aliens

who have worked without authorization or who are not in lawful status from AOS. Section 245(c)(7) bars an employment based immigrant from AOS if he is not in lawful nonimmigrant status. This would bar certain parolees from AOS since they would not have a valid nonimmigrant status. Section 245(c)(8) bars aliens who have worked without authorization or who have violated their nonimmigrant status.

Pursuant to section 245(k) of the Act, the bars at 245(c)(2), (7) and (8) do *not* apply to certain employment based immigrants whose lawful status or unauthorized employment lasted less than an aggregate of 180 days.

Section 244(f)(4) of the Act specifies that those aliens with Temporary Protected Status (TPS) are maintaining lawful status as a nonimmigrant for AOS eligibility purposes.

Under sections 245(d) and (f) of the Act, an alien who is a conditional resident under section 216 or 216A (alien entrepreneurs) of the Act, may not adjust status under 245(a) of the Act. See 8 C.F.R. 1245.1(c)(5).

Under section 245(d) of the Act, a fiancée of a USC as defined at section 101(a)(15)(K) of the Act, may adjust on a *conditional* basis under section 216 of the Act, (but not under section 245(a) of the Act) as a result of alien's marriage to the USC who filed the fiancée petition. See 8 C.F.R. § 1245.1(c)(6). *But see Choin v. Mukasey*, 537 F.3d 1116 (9th Cir.2008) (finding that section 245(d) of the Act does not make a K visa holder automatically ineligible to adjust status under section 216 if he or she divorces before his or her I-485 is adjudicated).

Under section 245(e) of the Act, an alien who married while in proceedings is precluded from adjusting status based on that marriage unless he can establish by clear and convincing evidence that the marriage was entered into in good faith and not for immigration purposes. See 8 C.F.R. § 1245.1(c)(8). Only the DHS has the authority to determine if the alien has established that such marriage was entered into in good faith under section 245(e)(3) of the Act. 8 C.F.R. § 245.1(c)(8)(v) provides that other than the approved visa petition, "[t]he applicant will not be required to submit additional evidence to qualify for the bona fide marriage exemption ... unless the district director [who approves the petition] determines that such additional evidence is needed ...." In other words, the approved I-130 is sufficient to establish that the alien qualifies for the exemption. IJs are without authority to make this determination or to review the *bona fides* of the respondent's marriage.

#### **B. Other classes of aliens barred from 245(a)**

An alien who made a frivolous asylum application is permanently ineligible for AOS. See section 208(d)(6) of the Act.

An exchange visitor under section 101(a)(15)(J) of the Act who has not met the 2-year foreign residency requirement or obtained a waiver of that requirement is ineligible for AOS. See section 212(e) of the Act; 8 C.F.R. § 1245.1(c)(2).

Foreign diplomats and officials, treaty traders and investors, and employees of international organizations under sections 101(a)(15)(A), (E) and (G) of the Act, respectively, who have not executed and submitted a written waiver his or her privileges and immunities are ineligible for AOS. See section 247(b) of the Act; 8 C.F.R. § 1245.1(c)(3).

An alien who was ordered removed *in absentia* is ineligible for AOS for 10 years from the date the removal order is issued. See section 240(b)(7) of the Act.

An alien who was granted voluntary departure and failed to depart within the specified period is ineligible for AOS for a 10-year period. See section 240B(d) of the Act. Pursuant to *Dada v. Mukasey*, 128 S. Ct. 2307 (2008), when an alien submits a request to withdraw his or her voluntary departure and the request precedes the expiration of the voluntary departure period, the request must be given effect. The alien shall not be barred from discretionary relief under section 240B(d) of the Act.

## VI. Admissibility & Waivers of Inadmissibility

An alien must establish that he is admissible to the U.S. [that is, that he is not inadmissible within the meaning of section 212(a) of the Act] or, if inadmissible, is eligible for a waiver of inadmissibility, to adjust status under section 245(a) of the Act.

An alien must be admissible to the U.S. to be eligible for AOS. Sections 212(a)(1) through (10) of the Act specify 10 classes of aliens who are inadmissible from the U.S. These include aliens with certain communicable diseases, criminals, terrorists, those likely to become a public charge, those without the required visas or travel documents, alien smugglers, and other immigration violators. An alien is admissible if he is not subject to the grounds of inadmissibility under section 212(a) of the Act, or, if inadmissible, is eligible for a corresponding waiver of inadmissibility.

If the respondent is applying for AOS as a self-petitioner (e.g. VAWA, special immigrant juveniles) or pursuant to a nationality based or law enforcement provision, be on the alert for special waiver provisions. For example, VAWA applicants are eligible for AOS even if they entered without inspection or are otherwise barred under section 245(c) of the Act. VAWA applicants are also eligible to apply for an 212(h) waiver without having to establish extreme hardship to a qualifying family member. See section 212(h)(1)(C) of the Act. Aliens adjusting status pursuant to sections 245(j)(criminal informants), (l)(trafficking victim) or (m)(victims of criminal activity) of the Act, have additional waiver provisions.

Discussed below are the more commonly sought waivers of inadmissibility.

**A. Crime waiver: 212(c)**

Although the section 212(c) waiver was repealed over 10 years ago, it is available in certain circumstances. The current contours of this waiver of inadmissibility is beyond the scope of this outline.

**B. Crime waiver: 212(h)**

Section 212(h) of the Act provides 3 separate and distinct waivers - under sections 212(h)(1)(A), (B) and (C) - for certain criminal grounds of inadmissibility set forth at section 212(a)(2) of the Act. The most common waiver is under section 212(h)(1)(B) of the Act. In *Matter of Michel*, 21 I&N Dec. 1101 (BIA 1998), the Board addresses an alien's eligibility for adjustment of status in conjunction with a 212(h) waiver.

If the applicant is an LPR and has been convicted of an aggravated felony or has not resided in the U.S. for a period of not less than 7 years immediately preceding the date of initiation of removal proceedings - the alien is ineligible for a 212(h) waiver. See *Matter of Rotimi*, 24 I&N Dec. 567 (BIA 2008) (holding that an alien has not "lawfully resided" in the U.S. for 212(h) eligibility purposes during any periods in which the alien was an applicant for asylum or for adjustment of status and lacked other basis on which to claim lawful residence).

A returning LPR seeking to overcome a ground of inadmissibility is not required to apply for AOS in conjunction with a 212(h) waiver. He need only apply for the waiver. See *Matter of Abosi*, 24 I&N Dec. 204 (BIA 2007). See *Martinez v. Mukasey*, 519 F.3d 532 (5th Cir. 2008) (discussing the difference between admission and adjustment for 212(h) eligibility purposes).

In another case, the Board found that the exception under section 212(h) of the Act for an alien convicted of a single offense of simple possession of 30 grams or less of marijuana did not apply where an alien's conviction was enhanced by virtue of his possession of marijuana in a "drug-free zone." See *Matter of Martinez-Zapata*, 24 I&N Dec. 424 (BIA 2007).

Pursuant to 8 C.F.R. § 1212.7(d), a 212(h) waiver may not be granted in the exercise of discretion in cases involving "violent or dangerous crimes" except in extraordinary circumstances such as those involving national security or foreign policy considerations. See *Samuels v. Chertoff*, 2008 WL 5264987 (2nd Cir. Dec. 19, 2008) (upholding 8 C.F.R. § 1212.7(d)). This regulation codifies the Attorney General's decision in *Matter of Jean*, 23 I&N Dec. 373 (A.G. 2002).

**C. Fraud waiver: 212(i)**

Section 212(i) of the Act waives certain fraud-related grounds of inadmissibility listed in section 212(a)(6)(C)(i) of the Act. Notably, section 212(i) cannot waive an alien's inadmissibility under section 212(a)(6)(C)(ii) (falsely claiming U.S. citizenship) of the Act. This waiver is like the 212(h)(1)(B) waiver in that the alien must establish extreme hardship to a qualifying family member. To establish eligibility for a 212(i) waiver, an alien must show the requisite hardship to his or her USC/ LPR spouse, son or daughter. (Compare the 212(h) waiver which can be based on a showing of hardship to the alien's USC/ LPR parent as well as his spouse, son or daughter.) See generally *Matter of Cervantes*, 22 I&N Dec. 560 (BIA 1999), affirmed *Cervantes-Gonzales v. INS*, 244 F.3d 1001 (9th Cir. 2001).

**D. Document waiver: 212(k)**

Section 212(k) of the Act provides a narrow waiver for an alien who is inadmissible under section 212(a)(7) of the Act, because he lacks a proper visa or travel documentation. Under section 212(k), an alien may be admitted even though he lacks a properly issued visa if he can establish that he could not possibly have known or ascertained that the visa was improperly issued. In *Matter of Aurelio*, 19 I&N Dec. 458 (BIA 1987), the Board held that a 212(k) waiver was properly denied where the applicant for admission knew about her father's death prior to the issuance of her visa under section 203(a)(3) (married daughter of USC) of the Act, and she failed to exercise reasonable diligence in ascertaining the effect of her father's death on her immigration status.

**E. Alien smuggler waiver: 212(d)(11)**

There is a narrow waiver of inadmissibility under section 212(d)(11) of the Act for alien smugglers as described in section 212(a)(6)(E) of the Act. To establish 212(d)(11) waiver eligibility, the alien must be a lawful permanent resident or an immigrant seeking admission or AOS as an IR or immigrant under sections 203(a)(1), (2) or (3) (family based immigrants) of the Act. Also, to qualify for the waiver, the alien must have smuggled only a qualifying family member, in this case, the alien's spouse, parent, son or daughter. See generally *Matter of Compean*, 21 I&N Dec. 51 (BIA 1995).

**F. Aliens previously removed/ unlawfully present: 212(a)(9)**

Section 212(a)(9) of the Act is intended to prevent or curtail recidivist immigration violations. This section of the Act applies only to aliens who have been physically present in the U.S., depart, and are attempting to reenter, or are applying for admission or AOS. There are three separate grounds of inadmissibility under subsections (A) (aliens previously removed), (B) (aliens unlawfully present), and (C) (aliens unlawfully present after previous immigration violations). Each has its own waiver.



In *Matter of Rodarte*, 23 I&N Dec. 905 (BIA 2006), the Board analyzed section 212(a)(9)(B)(i)(II) of the Act in the context of an alien applying for AOS in removal proceedings, and found that the relevant period of inadmissibility begins when the alien departs the U.S. after a period of unlawful presence because it is the alien's departure triggers his or her inadmissibility. The Board remanded the case to the IJ finding the respondent admissible and eligible to apply for AOS.

## VII. Discretion

In addition to establishing statutory eligibility for AOS, the alien must demonstrate that he merits relief as a matter of discretion. Factors considered in the exercise of discretion include but are not limited to the following: existence of family ties in the U.S.; length of residence in the U.S.; hardship of traveling abroad; and, preconceived intent to immigrate at the time of entering as a nonimmigrant. *Matter of Arai*, 13 I&N Dec. 494 (BIA 1974); *Matter of Blas*, 15 I&N Dec. 626 (BIA 1974; A.G. 1976).

## VIII. Section 245(i) of the Act

While Congress decided not to extend 245(i) of the Act, it enacted a grandfather clause to allow certain aliens to continue to benefit from the provision. See generally 66 Fed. Reg. 16383 (March 26, 2001). Pursuant to section 245(i) of the Act, an alien (including a 203(d) derivative beneficiary) who is (1) ineligible for adjustment under section 245(a) of the Act because he entered without inspection, or (2) disqualified under section 245(c) of the Act, may nevertheless adjust status if he is the beneficiary of a visa petition or labor certification that was filed on or before April 30, 2001. For visa petitions or labor certifications filed after January 14, 1998, and before April 30, 2001, the alien must have been physically present in the United States on December 21, 2000. See section 245(i)(1)(C) of the Act.

To be eligible for grandfather status the alien's pre-April 30, 2001, filing must have been *approvable when filed* (that is, properly filed, meritorious in fact, and non-frivolous). See 8 C.F.R. § 1245.10(a)(3). In *Matter of Jara Riero*, 24 I&N Dec. 267 (BIA 2007), the Board analyzed the term *approvable when filed*, and concluded that the alien was ineligible for 245(i) treatment because the family based visa petition (I-130) was not meritorious in fact, and, consequently, that it was not approvable when filed. See *Huarcaya v. Mukasey*, 2008 WL 5191771 (2nd Cir. Dec. 12, 2008) (deferring to *Jara Riero*). The case demonstrates how an alien can use one VP for 245(i) treatment (I-130) and another VP (I-140) as the basis for the AOS application.

Derivative beneficiaries under section 203(d) are also grandfathered aliens even if they do not adjust with the principle alien. So aged out children and divorced spouses are grandfathered aliens so long as they were qualifying dependents at the time the qualifying

VP or LC was properly filed. Spouses and children acquired after the filing of the qualifying VP or LC can adjust under 245(i) with the principle alien, but they are not considered grandfathered aliens.

Another issue that arises is whether an alien who was substituted for (took the place of) another alien on a labor certification is eligible for 245(i) treatment. Pursuant to federal regulations at 8 C.F.R. § 1245.10(j), only an alien who was substituted *before* April 30, 2001, will be eligible for grand-fathering under section 245(i) of the Act. (Remember that substituting aliens on labor certifications is now prohibited.)

Section 245(i) does not apply to section 203(c) diversity immigrants because there is no visa petition or labor certification filing. Diversity lottery-winning letters do not qualify an alien for 245(i) treatment. However, an alien may use a winning diversity visa as the basis for the adjustment of status. See 8 C.F.R. § 1245.10(h).

The issues regarding the interplay between sections 245(i) and 212(a)(9) of the Act appear to have been resolved. The Board has consistently held that 245(i) does not waive the grounds of inadmissibility set forth in sections 212(a)(9)(B) and (C) of the Act.

In *Matter of Lemus*, 24 I&N Dec. 373 (BIA 2007), the Board held that an alien's inadmissibility under section 212(a)(9)(B)(i)(II) (departing the U.S. after more than 1 year of lawful presence) of the Act - renders the alien ineligible for 245(i) adjustment.

In *Matter of Briones*, 24 I&N Dec. 355 (BIA 2007), the Board found that an alien inadmissible under section 212(a)(9)(C)(i)(I) (alien who was unlawfully present for an aggregate period of more than 1 year who thereafter reenters or attempts to reenter without inspection) of the Act - was not eligible for 245(i) adjustment. See *Mora v. Mukasey*, 2008 WL 5220296 (2nd Cir. Dec. 16, 2008) (deferring to *Briones*); *Ramirez-Canales v. Mukasey*, 517 F.3d 904 (6th Cir. 2008) (deferred to *Briones*, but remanded for the Board to consider whether the alien was entitled to 245(i) adjustment, *nunc pro tunc*).

In *Matter of Torres-Garcia*, 23 I&N Dec. 866 (BIA 2006), the Board found that an alien, who was inadmissible under section 212(a)(9)(C)(i)(II) of the Act, and ineligible for a corresponding waiver of inadmissibility, is ineligible for adjustment under 245(i) of the Act. Several circuit courts have deferred to *Torres-Garcia*. See e.g. *Delgado v. Mukasey*, 516 F.3d 65, 74 (2nd Cir. 2008) (deferring to *Torres-Garcia*); *Gonzales v. DHS*, 508 F.3d 1227, 1242 (9th Cir 2007) (overruling a prior panel decision and deferring to *Torres-Garcia*).

## **IX. Motions to Continue and Reopen for AOS**

IJs are often presented with motions to continue or reopen to allow the USCIS time to adjudicate an underlying visa petition (I-130 or I-140) which, if approved, would render

the respondent eligible for AOS. A framework for analyzing these motions is set forth in the feature article in the August 2008 issue of *Immigration Law Advisor*. An IJ is advised to begin by ascertaining the respondent's place in the 2-step family based or the 3-step employment based adjustment application process. The IJ should then consider all the facts and circumstances of the case. He or she should consider and balance these factors: (1) the overall factual tone of the case including the respondent's criminal, immigration, and marital history; (2) the likelihood of success on the underlying visa petition or adjustment application; (3) statutory eligibility; (4) discretionary eligibility; (5) the Government's position; and (6) other relevant procedural factors. A decision which analyzes and articulates these relevant factors shows an understanding of the significant interest at stake and is likely to withstand judicial review.

#### **X. Recommended Reading**

1. Perry, Nicholas J., *The Breadth and Impact of the Terrorism-Related Grounds of Inadmissibility of the INA*, 10-06 *Immigr. Briefings* 1 (October 2006).
2. Berg, Royal F. and Ng, Ronald H., *Save the Children!! How to Stop Time with the Child Status Protection Act*, *Immigration and Nationality Law Handbook* 563 (2007-08 ed.) American Immigration Lawyers Association Publication.
3. O'Connor, Lee A., *Representing the Unlawfully Present, Part 1*, 08-09 *Immigr. Briefings* 1 (September 2008).

**Application of Section 212(a)(9) of the Act**  
(From Office of Immigration Litigation (OIL) Training Materials)

**Step 1:** Does section 212(a)(9) apply?

Has the alien previously departed the U.S.?

If not, 212(a)(9) does not apply.

If so, go to **step 2**.

**Step 2:** Does section 212(a)(9)(A) apply?

Did the alien's previous departure occur after the issuance of a removal or deportation order?

If not, **(A)** does not apply. Go to **step 4**.

If so, go to **step 3**.

**Step 3** Does section 212(a)(9)(A)(i) OR (ii) apply? (only one will apply)

Was the prior order issued to the alien when he was an arriving alien?

If so, 212(a)(9)(A)(i) applies. The alien is inadmissible for 5 years.

If not, 212(a)(9)(A)(ii) applies. The alien is inadmissible for 10 years.

**Except:** The AG may consent in advance to the alien applying for readmission under section 212(a)(9)(A)(iii).

**Step 4.** Does section 212(a)(9)(B)(i) OR (ii) OR 212(a)(9)(C)(i) apply?

Was alien unlawfully present [prior to a departure from the U.S.] for more than 180 days, but less than 1 year?

If so, **(B)(i)** applies - the alien is inadmissible for 3 years.

Was alien unlawfully present for more than 1 year?

If so, **(B)(ii)** applies - the alien is inadmissible for 10 years.

**Except:** The AG may waive inadmissibility under 212(a)(9)(B) in the case of an immigrant who can show extreme hardship to USC/LPR spouse or parent.

**Step 5:** Does section 212(a)(9)(C)(i) apply?

Has the alien attempted to reenter or entered the U.S. unlawfully AFTER having been (1) unlawfully present in the U.S. for more than 1 year OR (2) ordered removed.

If so, section 212(a)(9)(C)(i) applies - the alien is inadmissible.

**Except:** An alien who is inadmissible under 212(a)(9)(C) may apply for a waiver IF he is seeking admission more than 10 years after last departure from the U.S. and

AG consents to re-application. **Waiver:** under certain circumstances, section 212(a)(9)(C)(i) can be waived in the case of an alien who is a VAWA self-petitioner.

## Instructions for I-130, Petition for Alien Relative

### Instructions

Please read these instructions carefully to properly complete this form. If you need more space to complete an answer, use a separate sheet(s) of paper. Write your name and Alien Registration Number (A #), if any, at the top of each sheet of paper and indicate the part and number of the item to which the answer refers. If you do not follow the instructions, U.S. Citizenship and Immigration Services (USCIS) may have to return your petition, which may delay final action. The filing addresses provided on this form reflect the most current information as of the date this form was last printed. If you are filing Form I-130 more than 30 days after the latest edition date shown in the lower right-hand corner, please visit our website online at [www.uscis.gov](http://www.uscis.gov) before you file, and check the Immigration Forms page to confirm the correct filing address and version currently in use. Check the edition date located in the lower right-hand corner of the form. If the edition date on your Form I-130 matches the edition date listed for Form I-130 on the online Immigration Forms page, your version is current and will be accepted by USCIS. If the edition date on the online version is later, download a copy and use the online version. If you do not have Internet access, call the National Customer Service Center at 1-800-375-5283 to verify the current filing address and edition date. **Improperly filed forms will be rejected, and the fee returned, with instructions to resubmit the entire filing using the current form instructions.**

A citizen or lawful permanent resident of the United States may file this form with U.S. Citizenship and Immigration Services (USCIS) to establish the existence of a relationship to certain alien relatives who wish to immigrate to the United States.

1. If you are a U.S. citizen you must file a separate Form I-130 for each eligible relative. You may file a Form I-130 for:

- A. Your husband or wife;
- B. Your unmarried child under age 21;
- C. Your unmarried son or daughter age 21 or older;
- D. Your married son or daughter of any age;
- E. Your brother(s) or sister(s) (you must be age 21 or older);
- F. Your mother or father (you must be age 21 or older).

2. If you are a lawful permanent resident of United States, you may file this form for:

- A. Your husband or wife;
- B. Your unmarried child under age 21;
- C. Your unmarried son or daughter age 21 or older.

#### NOTE:

1. There is no visa category for married children of permanent residents. If an unmarried son or daughter of a permanent resident marries before the permanent resident becomes a U.S. citizen, any petition filed for that son or daughter will be automatically revoked.
2. If your relative qualifies under paragraph 1(C), 1(D), or 1(E) above, separate petitions are not required for his or her husband or wife or unmarried children under 21 years of age.
3. If your relative qualifies under paragraph 2(B) or 2(C) above, separate petitions are not required for his or her unmarried children under 21 years of age.
4. The persons described in number 2 and 3 of the above NOTE will be able to apply for an immigrant visa along with your relative.

You may not file for a person in the following categories:

1. An adoptive parent or adopted child, if the adoption took place after the child's 16th birthday, or if the child has not been in the legal custody and living with the parent(s) for at least two years.
2. A natural parent, if the U.S. citizen son or daughter gained permanent residence through adoption.
3. A stepparent or stepchild, if the marriage that created the relationship took place after the child's 18th birthday.
4. A husband or wife, if you and your spouse were not both physically present at the marriage ceremony, and the marriage was not consummated.
5. A husband or wife, if you gained lawful permanent resident status by virtue of a prior marriage to a U. S. citizen or lawful permanent resident, unless:
  - A. A period of five years has elapsed since you became a lawful permanent resident; or
  - B. You can establish by clear and convincing evidence that the prior marriage through which you gained your immigrant status was not entered into for the purpose of evading any provision of the immigration laws; or
  - C. Your prior marriage through which you gained your immigrant status was terminated by the death of your former spouse.
6. A husband or wife, if you married your husband or wife while your husband or wife was the subject of an exclusion, deportation, removal, or rescission proceeding regarding his or her right to be admitted into or to remain in the United States, or while a decision in any of these proceedings was before any court on judicial review, unless:

You prove by clear and convincing evidence that the marriage is legally valid where it took place, and that you and your husband or wife married in good faith and not for the purpose of procuring the admission of your husband or wife as an immigrant, and that no fee or any other consideration (other than appropriate attorney fees) was given for your filing of this petition OR

Your husband or wife has lived outside the United States, after the marriage, for a period of at least two years.

7. A husband or wife, if it has been legally determined that such an alien has attempted or conspired to enter into a marriage for the purpose of evading the immigration laws.
8. A grandparent, grandchild, nephew, niece, uncle, aunt, cousin, or in-law.

### Step 1. Fill Out Form I-130

1. Type or print legibly in black ink.
2. If extra space is needed to complete any item, attach a continuation sheet, indicate the item number, and date and sign each sheet.
3. Answer all questions fully and accurately. State that an item is not applicable with "N/A." If the answer is none, write "none."

**Translations.** Any foreign language document must be accompanied by a full English translation that the translator has certified as complete and correct, and by the translator's certification that he or she is competent to translate the foreign language into English.

**Copies.** If these instructions state that a copy of a document may be filed with this petition, submit a copy. If you choose to send the original, USCIS may keep that original for our records. If USCIS requires the original, it will be requested.

### What Documents Do You Need to Show That You Are a U.S. Citizen?

1. If you were born in the United States, a copy of your birth certificate, issued by a civil registrar, vital statistics office, or other civil authority.
2. A copy of your naturalization certificate or certificate of citizenship issued by USCIS or the former INS.
3. A copy of Form FS-240, Report of Birth Abroad of a Citizen of the United States, issued by a U.S. Embassy or consulate.
4. A copy of your unexpired U.S. passport; or
5. An original statement from a U.S. consular officer verifying that you are a U.S. citizen with a valid passport.
6. If you do not have any of the above documents and you were born in the United States, see instructions under Page 3, "What If a Document Is Not Available?"

### What Documents Do You Need to Show That You Are a Permanent Resident?

If you are a permanent resident, you must file your petition with a copy of the front and back of your permanent resident card. If you have not yet received your card, submit copies of your passport biographic page and the page showing admission as a permanent resident, or other evidence of permanent resident status issued by USCIS or the former INS.

### What Documents Do You Need to Prove Family Relationship?

You have to prove that there is a family relationship between you and your relative. If you are filing for:

#### I. A husband or wife, submit the following documentation:

- A. A copy of your marriage certificate.
- B. If either you or your spouse were previously married, submit copies of documents showing that all prior marriages were legally terminated.
- C. A passport-style color photo of yourself and a passport-style color photo of your husband or wife, taken within 30 days of the date of this petition. The photos must have a white background and be glossy unretouched and not mounted. The dimensions of the full frontal facial image should be about 1 inch from the chin to top of the hair. Using pencil or felt pen, lightly print the name (and Alien Registration Number, if known) on the back of each photograph.
- D. A completed and signed Form G-325A, Biographic Information, for you and a Form G-325A for your husband or wife. Except for your name and signature you do not have to repeat on Form G-325A the information given on your Form I-130 petition.

**NOTE:** In addition to the required documentation listed above, you should submit one or more of the following types of documentation that may evidence that bona fides of your marriage:

- E. Documentation showing joint ownership or property; or
- F. A lease showing joint tenancy of a common residence; or
- G. Documentation showing co-mingling of financial resources; or
- H. Birth certificate(s) of child(ren) born to you, the petitioner, and your spouse together; or
- I. Affidavits sworn to or affirmed by third parties having personal knowledge of the bona fides of the marital relationship. (Each affidavit must contain the full name and address, date and place of birth of the person making the affidavit, his or her relationship to the petitioner or beneficiary, if any, and complete information and details explaining how the person acquired his or her knowledge of your marriage); or
- J. Any other relevant documentation to establish that there is an ongoing marital union.

**NOTE:** If you married your husband or wife while your husband or wife was the subject of an exclusion, deportation, removal, or rescission proceeding (including judicial review of the decision in one of these proceedings), this evidence must be sufficient to establish the bona fides of your marriage by clear and convincing evidence.

2. **A child and you are the mother:** Submit a copy of the child's birth certificate showing your name and the name of your child.
3. **A child and you are the father:** Submit a copy of the child's birth certificate showing both parents' names and your marriage certificate.
4. **A child born out of wedlock and you are the father:** If the child was not legitimated before reaching 18 years old, you must file your petition with copies of evidence that a bona fide parent-child relationship existed between the father and the child before the child reached 21 years. This may include evidence that the father lived with the child, supported him or her, or otherwise showed continuing parental interest in the child's welfare.
5. **A brother or sister:** Submit a copy of your birth certificate and a copy of your brother's or sister's birth certificate showing that you have at least one common parent. If you and your brother or sister have a common father but different mothers, submit copies of the marriage certificates of the father to each mother and copies of documents showing that any prior marriages of either your father or mothers were legally terminated. If you and your brother or sister are related through adoption or through a stepparent, or if you have a common father and either of you were not legitimated before your 18th birthday, see also 8 and 9 below.
6. **A mother:** Submit a copy of your birth certificate showing your name and your mother's name.
7. **A father:** Submit a copy of your birth certificate showing the names of both parents. Also give a copy of your parents' marriage certificate establishing that your father was married to your mother before you were born, and copies of documents showing that any prior marriages of either your father or mother were legally terminated. If you are filing for a stepparent or adoptive parent, or if you are filing for your father and were not legitimated before your 18th birthday, also see 4, 8, and 9.
8. **Stepparent/Stepchild:** If your petition is based on a stepparent-stepchild relationship, you must file your petition with a copy of the marriage certificate of the stepparent to the child's natural parent showing that the marriage occurred before the child's 18th birthday, copies of documents showing that any prior marriages were legally terminated and a copy of the stepchild's birth certificate.
9. **Adoptive parent or adopted child:** If you and the person you are filing for are related by adoption, you must submit a copy of the adoption decree(s) showing that the adoption took place before the child became 16 years old.

If you adopted the sibling of a child you already adopted, you must submit a copy of the adoption decree(s) showing that the adoption of the sibling occurred before that child's 18th birthday.

In either case, you must also submit copies of evidence that each child was in the legal custody of and resided with the parent(s) who adopted him or her for at least two years before or after adoption. Legal custody may only be granted by a court or recognized government entity and is usually granted at the time of the adoption is finalized. However, if legal custody is granted by a court or recognized government agency prior to the adoption, that time may count to fulfill the two-year legal custody requirement.

### What If Your Name Has Changed?

If either you or the person you are filing for is using a name other than shown on the relevant documents, you must file your petition with copies of the legal documents that effected the change, such as a marriage certificate, adoption decree or court order.

### What If a Document Is Not Available?

In such situation, submit a statement from the appropriate civil authority certifying that the document or documents are not available. You must also submit secondary evidence, including:

- A. **Church record:** A copy of a document bearing the seal of the church, showing the baptism, dedication or comparable rite occurred within two months after birth, and showing the date and place of the child's birth, date of the religious ceremony and the names of the child's parents.
- B. **School record:** A letter from the authority (preferably the first school attended) showing the date of admission to the school, the child's date of birth or age at that time, place of birth, and names of the parents.
- C. **Census record:** State or Federal census record showing the names, place of birth, date of birth, or the age of the person listed.
- D. **Affidavits:** Written statements sworn to or affirmed by two persons who were living at the time and who have personal knowledge of the event you are trying to prove. For example, the date and place of birth, marriage or death. The person making the affidavit does not have to be a U.S. citizen. Each affidavit should contain the following information regarding the person making the affidavit: his or her full name, address, date and place of birth, and his or her relationship to you, if any, full information concerning the event, and complete details explaining how the person acquired knowledge of the event.

If you reside in the United States, file the I-130 form at the Lockbox according to following instructions:

If you are the petitioner and you reside in Alaska, Arizona, California, Colorado, Guam, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Michigan, Minnesota, Missouri, Montana, Nebraska, Nevada, North Dakota, Ohio, Oregon, South Dakota, Utah, Washington, Wisconsin, or Wyoming and you are filing only Form I-130, mail the petition to the USCIS Lockbox Facility. The address is as follows:

USCIS  
P.O. Box 804625  
Chicago, IL 60680-1029



If you are the petitioner and you reside in Alabama, Arkansas, Connecticut, Delaware, Florida, Georgia, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Mississippi, New Hampshire, New Jersey, New Mexico, New York, North Carolina, Oklahoma, Pennsylvania, Puerto Rico, Rhode Island, South Carolina, Tennessee, Texas, Vermont, Virginia, U.S. Virgin Islands, West Virginia, or District of Columbia and you are filing only Form I-130, mail the petition to the USCIS Lockbox Facility. The address is as follows:

USCIS  
P.O. Box 804616  
Chicago, IL 60680-1029

**NOTE:** If the Form I-130 petition is being filed concurrently with Form I-485, Application to Register Permanent Residence or Adjust Status, submit both forms concurrently to:

U.S. Citizenship and Immigration Services  
P.O. Box 805887  
Chicago, IL 60680-4120

For private couriers (non USPS) deliveries:

U.S. Citizenship and Immigration Services  
Attn: FBASI  
427 S. LaSalle - 3rd Floor  
Chicago, IL 60605-1098

**Petitioners residing abroad:** If you live in Canada, file your petition at the Vermont Service Center. **Exception:** If you are a U.S. citizen residing in Canada, and you are petitioning for your spouse, child, or parent, you may file the petition at the nearest U.S. Embassy or consulate, except for those in Quebec City. If you reside elsewhere outside the United States file your relative petition at the USCIS office overseas or the U.S. Embassy or consulate having jurisdiction over the area where you live. For further information, contact the nearest U.S. Embassy or consulate.

The filing fee for a Form is \$355.

Use the following guidelines when you prepare your check or money order for Form I-130:

1. The check or money order must be drawn on a bank or other financial institution located in the United States and must be payable in U.S. currency; and
2. Make the check or money order payable to U.S. Department of Homeland Security, unless:
  - A. If you live in Guam and are filing your petition there, make it payable to **Treasurer, Guam.**
  - B. If you live in the U.S. Virgin Islands and are filing your petition there, make it payable to **Commissioner of Finance of the Virgin Islands.**
  - C. If you live outside the United States, Guam, or the U.S. Virgin Islands, contact the nearest U.S. Embassy or consulate for instructions on the method of payment.

**NOTE:** Please spell out U.S. Department of Homeland Security; do not use the initials "USDHS" or "DHS."

#### How to Check If the Fees Are Correct

The form fee on this form is current as of the edition date appearing in the lower right corner of this page. However, because USCIS fees change periodically, you can verify if the fees are correct by following one of the steps below:

1. Visit our website at [www.uscis.gov](http://www.uscis.gov), select "Immigration Forms," and check the appropriate fee;
2. Review the fee schedule included in your form package, if you called us to request the form, or
3. Telephone our National Customer Service Center at 1-800-375-5283 and ask for the fee information.

#### When Will a Visa Become Available?

When a petition is approved for the husband, wife, parent, or unmarried minor child of a United States citizen, these persons are classified as immediate relatives. They do not have to wait for a visa number because immediate relatives are not subject to the immigrant visa limit.

For alien relatives in preference categories, a limited number of immigrant visas are issued each year. The visas are processed in the order in which the petitions are properly filed and accepted by USCIS. To be considered properly filed, a petition must be fully completed and signed, and the fee must be paid.

For a monthly report on the dates when immigrant visas are available, call the U.S. Department of State at (202) 663-1541, or visit: [www.travel.state.gov](http://www.travel.state.gov).

If you change your address and you have an application or petition pending with USCIS, you may change your address online at [www.uscis.gov](http://www.uscis.gov), click on "Change your address with USCIS," and follow the prompts. Or you may complete and mail Form AR-11, Alien's Change of Address Card, to:

U.S. Citizenship and Immigration Services  
Change of Address  
P.O. Box 7134  
London, KY 40742-7134

For commercial overnight or fast freight services only, mail to:

U.S. Citizenship and Immigration Services  
Change of Address  
1084-I South Laurel Road  
London, KY 40744

#### Notice to Persons Filing for Spouses, If Married Less Than Two Years

Pursuant to section 216 of the Immigration and Nationality Act, your alien spouse may be granted conditional permanent resident status in the United States as of the date he or she is admitted or adjusted to conditional status by a USCIS officer. Both you and your conditional resident spouse are required to file Form I-751, Joint Petition to Remove Conditional Basis of Alien's Permanent Resident Status, during the 90-day period immediately before the second anniversary of the date your alien spouse was granted conditional permanent resident status.

Otherwise, the rights, privileges, responsibilities, and duties that apply to all other permanent residents apply equally to a conditional permanent resident. A conditional permanent resident is not limited to the right to apply for naturalization, file petitions on behalf of qualifying relatives, or reside permanently in the United States as an immigrant in accordance with our Nation's immigration laws.

**NOTE:** Failure to file the Form I-751 joint petition to remove the conditional basis of the alien spouse's permanent resident status will result in the termination of his or her permanent resident status and initiation of removal proceedings.

**Acceptance.** Any I-130 petition that is not properly signed or accompanied by the correct fee will be rejected with a notice that the petition is deficient. You may correct the deficiency and resubmit the petition. However, a rejected petition does not retain a filing date. A petition is not considered properly filed until accepted by USCIS.

**Initial Processing.** Once the petition has been accepted, it will be checked for completeness, including submission of the required initial evidence. If you do not completely fill out the form or file it without the required initial evidence, you will not establish a basis for eligibility, and USCIS may deny your petition.

**Requests for More Information.** We may request more information or evidence, or we may request that you appear at a USCIS office for an interview. We may also request that you submit the originals of any copy. We will return these originals when they are no longer needed.

**Decision.** The decision on Form I-130 involves a determination of whether you have established eligibility for the requested benefit. You will be notified of the decision in writing.

To order USCIS forms, call our toll-free number at **1-800-870-3676**. You can also get USCIS forms and information on immigration laws, regulations, and procedures by telephoning our National Customer Service Center at **1-800-375-5283** or visiting our internet website at [www.uscis.gov](http://www.uscis.gov).

As an alternative to waiting in line for assistance at your local USCIS office, you can now schedule an appointment through our internet-based system, **InfoPass**. To access the system, visit our website. Use the **InfoPass** appointment scheduler and follow the screen prompts to set up your appointment. **InfoPass** generates an electronic appointment notice that appears on the screen.

If you knowingly and willfully falsify or conceal a material fact or submit a false document with this request, we will deny the benefit you are filing for, and may deny any other immigration benefit.

In addition, you will face severe penalties provided by law, and may be subject to criminal prosecution.

We ask for the information on this form, and associated evidence, to determine if you have established eligibility for the immigration benefit for which you are filing. Our legal right to ask for this information is in 8 U.S.C. 1255. We may provide this information to other government agencies. Failure to provide this information, and any requested evidence, may delay a final decision or result in denial of your request.

An agency may not conduct or sponsor an information collection, and a person is not required to respond to a collection of information unless it displays a currently valid OMB control number. The public reporting burden for this collection of information is estimated at 90 minutes per response, including the time for reviewing instructions and completing and submitting the form. Send comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden, to: U.S. Citizenship and Immigration Services, Regulatory Management Division, 111 Massachusetts Avenue, N.W., 3rd Floor, Suite 3008, Washington, DC 20529. OMB No. 1615-0012. **Do not mail your application to this address.**

**Checklist**

- Did you answer each question on the Form I-130 petition?
- Did you sign and date the petition?
- Did you enclose the correct filing fee for each petition?
- Did you submit proof of your U.S. citizenship or lawful permanent residence?
- Did you submit other required supporting evidence?

**If you are filing for your husband or wife, did you include:**

- His or her photograph?
- Your completed Form G-325A?
- His or her Form G-325A?

**I-130, Petition for Alien Relative**

**DO NOT WRITE IN THIS BLOCK - FOR USCIS OFFICE ONLY**

<b>A#</b>  <b>Section of Law/Visa Category</b> <input type="checkbox"/> 201(b) Spouse - IR-1/CR-1 <input type="checkbox"/> 201(b) Child - IR-2/CR-2 <input type="checkbox"/> 201(b) Parent - IR-5 <input type="checkbox"/> 203(a)(1) Unm S or D - F1-1 <input type="checkbox"/> 203(a)(2)(A) Spouse - F2-1 <input type="checkbox"/> 203(a)(2)(A) Child - F2-2 <input type="checkbox"/> 203(a)(2)(B) Unm. S or D - F2-4 <input type="checkbox"/> 203(a)(3) Married S or D - F3-1 <input type="checkbox"/> 203(a)(4) Brother/Sister - F4-1	<b>Action Stamp</b>  _____ _____ _____	<b>Fee Stamp</b>  Petition was filed on: _____ (priority date) <input type="checkbox"/> Personal Interview <input type="checkbox"/> Previously Forwarded <input type="checkbox"/> Pet. <input type="checkbox"/> Bas. "A" File Reviewed <input type="checkbox"/> I-485 Filed Simultaneously <input type="checkbox"/> Field Investigation <input type="checkbox"/> 204(g) Resolved <input type="checkbox"/> 203(a)(2)(A) Resolved <input type="checkbox"/> 203(g) Resolved
<b>Remarks:</b> _____ _____ _____		

**A. Relationship** You are the petitioner. Your relative is the beneficiary.

1. I am filing this petition for my: <input type="checkbox"/> Husband/Wife <input type="checkbox"/> Parent <input type="checkbox"/> Brother/Sister <input type="checkbox"/> Child	2. Are you related by adoption? <input type="checkbox"/> Yes <input type="checkbox"/> No	3. Did you gain permanent residence through adoption? <input type="checkbox"/> Yes <input type="checkbox"/> No
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**B. Information about you**

1. Name (Family name in CAPS) (First) (Middle) \_\_\_\_\_

2. Address (Number and Street) (Apt. No.) \_\_\_\_\_  
 (Town or City) (State/Country) (Zip/Postal Code) \_\_\_\_\_

3. Place of Birth (Town or City) (State/Country) \_\_\_\_\_

4. Date of Birth \_\_\_\_\_ 5. Gender  Male  Female  
 6. Marital Status  Married  Single  Widowed  Divorced

7. Other Names Used (including maiden name) \_\_\_\_\_

8. Date and Place of Present Marriage (if married) \_\_\_\_\_

9. U.S. Social Security Number (If any) \_\_\_\_\_ 10. Alien Registration Number \_\_\_\_\_

11. Name(s) of Prior Husband(s)/Wife(s) \_\_\_\_\_ 12. Date(s) Marriage(s) Ended \_\_\_\_\_

**C. Information about your relative**

1. Name (Family name in CAPS) (First) (Middle) \_\_\_\_\_

2. Address (Number and Street) (Apt. No.) \_\_\_\_\_  
 (Town or City) (State/Country) (Zip/Postal Code) \_\_\_\_\_

3. Place of Birth (Town or City) (State/Country) \_\_\_\_\_

4. Date of Birth \_\_\_\_\_ 5. Gender  Male  Female  
 6. Marital Status  Married  Single  Widowed  Divorced

7. Other Names Used (including maiden name) \_\_\_\_\_

8. Date and Place of Present Marriage (if married) \_\_\_\_\_

9. U.S. Social Security Number (If any) \_\_\_\_\_ 10. Alien Registration Number \_\_\_\_\_

11. Name(s) of Prior Husband(s)/Wife(s) \_\_\_\_\_ 12. Date(s) Marriage(s) Ended \_\_\_\_\_

**13. If you are a U.S. citizen, complete the following:**

My citizenship was acquired through (check one):  
 Birth in the U.S.  
 Naturalization. Give certificate number and date and place of issuance. \_\_\_\_\_

Parents. Have you obtained a certificate of citizenship in your own name?  
 Yes. Give certificate number, date and place of issuance. \_\_\_\_\_  No

**14. If you are a lawful permanent resident alien, complete the following:**

Date and place of admission for or adjustment to lawful permanent residence and class of admission. \_\_\_\_\_

**14b. Did you gain permanent resident status through marriage to a U.S. citizen or lawful permanent resident?**  
 Yes     No

**13. Has your relative ever been in the U.S.?**  Yes  No

**14. If your relative is currently in the U.S., complete the following:**

He or she arrived as a:  
 (visitor, student, stowaway, without inspection, etc.)

Arrival/Departure Record (I-94) \_\_\_\_\_ Date arrived \_\_\_\_\_

Date authorized stay expired, or will expire, as shown on Form I-94 or I-95 \_\_\_\_\_

**15. Name and address of present employer (if any)** \_\_\_\_\_

Date this employment began \_\_\_\_\_

**16. Has your relative ever been under immigration proceedings?**

No  Yes Where \_\_\_\_\_ When \_\_\_\_\_  
 Removal  Exclusion/Deportation  Rescission  Judicial Proceedings

INITIAL RECEIPT    RESUBMITTED    RELOCATED: Rec'd    Sent    COMPLETED: App'd    Denied    Ref'd

**C. Information about your alien relative (continued)**

17. List husband/wife and all children of your relative.

(Name) (Relationship) (Date of Birth) (Country of Birth)

18. Address in the United States where your relative intends to live.

(Street Address) (Town or City) (State)

19. Your relative's address abroad. (Include street, city, province and country)

Phone Number (if any)

20. If your relative's native alphabet is other than Roman letters, write his or her name and foreign address in the native alphabet.

(Name) Address (Include street, city, province and country):

21. If filing for your husband/wife, give last address at which you lived together. (Include street, city, province, if any, and country):

From: To:

22. Complete the information below if your relative is in the United States and will apply for adjustment of status.

Your relative is in the United States and will apply for adjustment of status to that of a lawful permanent resident at the USCIS office in:

If your relative is not eligible for adjustment of status, he or she will apply for a visa abroad at the American consular post in:

(City) (State) (City) (Country)

NOTE: Designation of an American embassy or consulate outside the country of your relative's last residence does not guarantee acceptance for processing by that post. Acceptance is at the discretion of the designated embassy or consulate.

**D. Other information**

1. If separate petitions are also being submitted for other relatives, give names of each and relationship.

2. Have you ever before filed a petition for this or any other alien?  Yes  No

If "Yes," give name, place and date of filing and result.

**WARNING:** USCIS investigates claimed relationships and verifies the validity of documents. USCIS seeks criminal prosecutions when family relationships are falsified to obtain visas.

**PENALTIES:** By law, you may be imprisoned for not more than five years or fined \$250,000, or both, for entering into a marriage contract for the purpose of evading any provision of the immigration laws. In addition, you may be fined up to \$10,000 and imprisoned for up to five years, or both, for knowingly and willfully falsifying or concealing a material fact or using any false document in submitting this petition.

**YOUR CERTIFICATION:** I certify, under penalty of perjury under the laws of the United States of America, that the foregoing is true and correct. Furthermore, I authorize the release of any information from my records that the U.S. Citizenship and Immigration Services needs to determine eligibility for the benefit that I am seeking.

**E. Signature of petitioner.**

Date Phone Number ( )

**F. Signature of person preparing this form, if other than the petitioner.**

I declare that I prepared this document at the request of the person above and that it is based on all information of which I have any knowledge.

Print Name Signature Date

Address G-28 ID or VOLAG Number, if any.



Please read and review the filing instructions before completing this form. A copy of the instructions can be found at <http://www.foreignlaborcert.doleta.gov/pdf/9089Inst.pdf>

Employing or continuing to employ an alien unauthorized to work in the United States is illegal and may subject the employer to criminal prosecution, civil money penalties, or both.

**A. Refiling Instructions**

1. Are you seeking to utilize the filing date from a previously submitted Application for Alien Employment Certification (ETA 750)?	<input type="checkbox"/> Yes	<input type="checkbox"/> No
1-A. If Yes, enter the previous filing date		
1-B. Indicate the previous SWA or local office case number OR if not available, specify state where case was originally filed:		

**B. Schedule A or Shepherder Information**

1. Is this application in support of a Schedule A or Shepherder Occupation?	<input type="checkbox"/> Yes	<input type="checkbox"/> No
If Yes, do NOT send this application to the Department of Labor. All applications in support of Schedule A or Shepherder Occupations must be sent directly to the appropriate Department of Homeland Security office.		

**C. Employer Information (Headquarters or Main Office)**

1. Employer's name			
2. Address 1			
Address 2			
3. City	State/Province	Country	Postal code
4. Phone number		Extension	
5. Number of employees		6. Year commenced business	
7. FEIN (Federal Employer Identification Number)			8. NAICS code
9. Is the employer a closely held corporation, partnership, or sole proprietorship in which the alien has an ownership interest, or is there a familial relationship between the owners, stockholders, partners, corporate officers, incorporators, and the alien?			<input type="checkbox"/> Yes <input type="checkbox"/> No

**D. Employer Contact Information (This section must be filled out. This information must be different from the agent or attorney information listed in Section E).**

1. Contact's last name	First name	Middle initial	
2. Address 1			
Address 2			
3. City	State/Province	Country	Postal code
4. Phone number		Extension	
5. E-mail address			



**E. Agent or Attorney Information (If applicable)**

1. Agent or attorney's last name	First name	Middle Initial	
2. Firm name			
3. Firm EIN	4. Phone number	Extension	
5. Address 1			
Address 2			
6. City	State/Province	Country	Postal code
7. E-mail address			

**F. Prevailing Wage Information (as provided by the State Workforce Agency)**

1. Prevailing wage tracking number (if applicable)	2. SOC/O*NET(OES) code
3. Occupation Title	4. Skill Level
5. Prevailing wage \$	Per: (Choose only one) <input type="checkbox"/> Hour <input type="checkbox"/> Week <input type="checkbox"/> Bi-Weekly <input type="checkbox"/> Month <input type="checkbox"/> Year
6. Prevailing wage source (Choose only one) <input type="checkbox"/> OES <input type="checkbox"/> CBA <input type="checkbox"/> Employer Conducted Survey <input type="checkbox"/> DBA <input type="checkbox"/> SCA <input type="checkbox"/> Other	
6-A. If Other is indicated in question 6, specify:	
7. Determination date	8. Expiration date

**G. Wage Offer Information**

1. Offered wage From: \$	To: (Optional) \$	Per: (Choose only one) <input type="checkbox"/> Hour <input type="checkbox"/> Week <input type="checkbox"/> Bi-Weekly <input type="checkbox"/> Month <input type="checkbox"/> Year
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**H. Job Opportunity Information (Where work will be performed)**

1. Primary worksite (where work is to be performed) address 1		
Address 2		
2. City	State	Postal code
3. Job title		
4. Education: minimum level required: <input type="checkbox"/> None <input type="checkbox"/> High School <input type="checkbox"/> Associate's <input type="checkbox"/> Bachelor's <input type="checkbox"/> Master's <input type="checkbox"/> Doctorate <input type="checkbox"/> Other		
4-A. If Other is indicated in question 4, specify the education required:		
4-B. Major field of study		
5. Is training required in the job opportunity? <input type="checkbox"/> Yes <input type="checkbox"/> No	5-A. If Yes, number of months of training required:	



H. Job Opportunity Information Continued

5-B. Indicate the field of training:	
6. Is experience in the job offered required for the job? <input type="checkbox"/> Yes <input type="checkbox"/> No	6-A. If Yes, number of months experience required:
7. Is there an alternate field of study that is acceptable? <input type="checkbox"/> Yes <input type="checkbox"/> No	
7-A. If Yes, specify the major field of study:	
8. Is there an alternate combination of education and experience that is acceptable? <input type="checkbox"/> Yes <input type="checkbox"/> No	
8-A. If Yes, specify the alternate level of education required: <input type="checkbox"/> None <input type="checkbox"/> High School <input type="checkbox"/> Associate's <input type="checkbox"/> Bachelor's <input type="checkbox"/> Master's <input type="checkbox"/> Doctorate <input type="checkbox"/> Other	
8-B. If Other is indicated in question 8-A, indicate the alternate level of education required:	
8-C. If applicable, indicate the number of years experience acceptable in question 8:	
9. Is a foreign educational equivalent acceptable? <input type="checkbox"/> Yes <input type="checkbox"/> No	
10. Is experience in an alternate occupation acceptable? <input type="checkbox"/> Yes <input type="checkbox"/> No	10-A. If Yes, number of months experience in alternate occupation required:
10-B. Identify the job title of the acceptable alternate occupation:	
11. Job duties - If submitting by mail, add attachment if necessary. Job duties description must begin in this space.	
12. Are the job opportunity's requirements normal for the occupation? <i>If the answer to this question is No, the employer must be prepared to provide documentation demonstrating that the job requirements are supported by business necessity.</i>	<input type="checkbox"/> Yes <input type="checkbox"/> No
13. Is knowledge of a foreign language required to perform the job duties? <i>If the answer to this question is Yes, the employer must be prepared to provide documentation demonstrating that the language requirements are supported by business necessity.</i>	<input type="checkbox"/> Yes <input type="checkbox"/> No
14. Specific skills or other requirements - If submitting by mail, add attachment if necessary. Skills description must begin in this space.	



**H. Job Opportunity Information Continued**

15. Does this application involve a job opportunity that includes a combination of occupations?	<input type="checkbox"/> Yes <input type="checkbox"/> No
16. Is the position identified in this application being offered to the alien identified in Section J?	<input type="checkbox"/> Yes <input type="checkbox"/> No
17. Does the job require the alien to live on the employer's premises?	<input type="checkbox"/> Yes <input type="checkbox"/> No
18. Is the application for a live-in household domestic service worker?	<input type="checkbox"/> Yes <input type="checkbox"/> No
18-A. If Yes, have the employer and the alien executed the required employment contract and has the employer provided a copy of the contract to the alien?	<input type="checkbox"/> Yes <input type="checkbox"/> No <input type="checkbox"/> NA

**I. Recruitment Information**

**a. Occupation Type – All must complete this section.**

1. Is this application for a professional occupation, other than a college or university teacher? Professional occupations are those for which a bachelor's degree (or equivalent) is normally required.	<input type="checkbox"/> Yes <input type="checkbox"/> No
2. Is this application for a college or university teacher? If Yes, complete questions 2-A and 2-B below.	<input type="checkbox"/> Yes <input type="checkbox"/> No
2-A. Did you select the candidate using a competitive recruitment and selection process?	<input type="checkbox"/> Yes <input type="checkbox"/> No
2-B. Did you use the basic recruitment process for professional occupations?	<input type="checkbox"/> Yes <input type="checkbox"/> No

**b. Special Recruitment and Documentation Procedures for College and University Teachers – Complete only if the answer to question I.a.2-A is Yes.**

3. Date alien selected:
4. Name and date of national professional journal in which advertisement was placed:
5. Specify additional recruitment information in this space. Add an attachment if necessary.

**c. Professional/Non-Professional Information – Complete this section unless your answer to question B.1 or I.a.2-A is YES.**

6. Start date for the SWA job order	7. End date for the SWA job order
8. Is there a Sunday edition of the newspaper in the area of intended employment?	<input type="checkbox"/> Yes <input type="checkbox"/> No
9. Name of newspaper (of general circulation) in which the first advertisement was placed:	
10. Date of first advertisement identified in question 9:	
11. Name of newspaper or professional journal (if applicable) in which second advertisement was placed:	
<input type="checkbox"/> Newspaper <input type="checkbox"/> Journal	





**I. Recruitment Information Continued**

12. Date of second newspaper advertisement or date of publication of journal identified in question 11:

**d. Professional Recruitment Information - Complete if the answer to question I.a.1 is YES or if the answer to I.a.2-B is YES. Complete at least 3 of the items.**

13. Dates advertised at job fair From: To:	14. Dates of on-campus recruiting From: To:
15. Dates posted on employer web site From: To:	16. Dates advertised with trade or professional organization From: To:
17. Dates listed with job search web site From: To:	18. Dates listed with private employment firm From: To:
19. Dates advertised with employee referral program From: To:	20. Dates advertised with campus placement office From: To:
21. Dates advertised with local or ethnic newspaper From: To:	22. Dates advertised with radio or TV ads From: To:

**e. General Information - All must complete this section.**

23. Has the employer received payment of any kind for the submission of this application?	<input type="checkbox"/> Yes <input type="checkbox"/> No
23-A. If Yes, describe details of the payment including the amount, date and purpose of the payment :	
24. Has the bargaining representative for workers in the occupation in which the alien will be employed been provided with notice of this filing at least 30 days but not more than 180 days before the date the application is filed?	<input type="checkbox"/> Yes <input type="checkbox"/> No <input type="checkbox"/> NA
25. If there is no bargaining representative, has a notice of this filing been posted for 10 business days in a conspicuous location at the place of employment, ending at least 30 days before but not more than 180 days before the date the application is filed?	<input type="checkbox"/> Yes <input type="checkbox"/> No <input type="checkbox"/> NA
26. Has the employer had a layoff in the area of intended employment in the occupation involved in this application or in a related occupation within the six months immediately preceding the filing of this application?	<input type="checkbox"/> Yes <input type="checkbox"/> No
26-A. If Yes, were the laid off U.S. workers notified and considered for the job opportunity for which certification is sought?	<input type="checkbox"/> Yes <input type="checkbox"/> No <input type="checkbox"/> NA

**J. Alien Information (This section must be filled out. This information must be different from the agent or attorney information listed in Section E).**

1. Alien's last name	First name	Full middle name	
2. Current address 1			
Address 2			
3. City	State/Province	Country	Postal code
4. Phone number of current residence			
5. Country of citizenship		6. Country of birth	
7. Alien's date of birth		8. Class of admission	
9. Alien registration number (A#)		10. Alien admission number (I-84)	
11. Education: highest level achieved relevant to the requested occupation:			
<input type="checkbox"/> None <input type="checkbox"/> High School <input type="checkbox"/> Associate's <input type="checkbox"/> Bachelor's <input type="checkbox"/> Master's <input type="checkbox"/> Doctorate <input type="checkbox"/> Other			



**J. Alien Information Continued**

11-A. If Other indicated in question 11, specify			
12. Specify major field(s) of study			
13. Year relevant education completed			
14. Institution where relevant education specified in question 11 was received			
15. Address 1 of conferring institution			
Address 2			
16. City	State/Province	Country	Postal code
17. Did the alien complete the training required for the requested job opportunity, as indicated in question H.5?		<input type="checkbox"/> Yes <input type="checkbox"/> No <input type="checkbox"/> NA	
18. Does the alien have the experience as required for the requested job opportunity indicated in question H.6?		<input type="checkbox"/> Yes <input type="checkbox"/> No <input type="checkbox"/> NA	
19. Does the alien possess the alternate combination of education and experience as indicated in question H.8?		<input type="checkbox"/> Yes <input type="checkbox"/> No <input type="checkbox"/> NA	
20. Does the alien have the experience in an alternate occupation specified in question H.10?		<input type="checkbox"/> Yes <input type="checkbox"/> No <input type="checkbox"/> NA	
21. Did the alien gain any of the qualifying experience with the employer in a position substantially comparable to the job opportunity requested?		<input type="checkbox"/> Yes <input type="checkbox"/> No <input type="checkbox"/> NA	
22. Did the employer pay for any of the alien's education or training necessary to satisfy any of the employer's job requirements for this position?		<input type="checkbox"/> Yes <input type="checkbox"/> No	
23. Is the alien currently employed by the petitioning employer?		<input type="checkbox"/> Yes <input type="checkbox"/> No	

**K. Alien Work Experience**

List all jobs the alien has held during the past 3 years. Also list any other experience that qualifies the alien for the job opportunity for which the employer is seeking certification.

**a. Job 1**

1. Employer name			
2. Address 1			
Address 2			
3. City	State/Province	Country	Postal code
4. Type of business		5. Job title	
6. Start date	7. End date	8. Number of hours worked per week	



**K. Alien Work Experience Continued**

9. Job details (duties performed, use of tools, machines, equipment, skills, qualifications, certifications, licenses, etc. Include the phone number of the employer and the name of the alien's supervisor.)

**b. Job 2**

1. Employer name			
2. Address 1			
Address 2			
3. City	State/Province	Country	Postal code
4. Type of business		5. Job title	
6. Start date	7. End date	8. Number of hours worked per week	
9. Job details (duties performed, use of tools, machines, equipment, skills, qualifications, certifications, licenses, etc. Include the phone number of the employer and the name of the alien's supervisor.)			

**c. Job 3**

1. Employer name			
2. Address 1			
Address 2			
3. City	State/Province	Country	Postal code
4. Type of business		5. Job title	
6. Start date	7. End date	8. Number of hours worked per week	



**K. Alien Work Experience Continued**

9. Job details (duties performed, use of tools, machines, equipment, skills, qualifications, certifications, licenses, etc. Include the phone number of the employer and the name of the alien's supervisor.)

**L. Alien Declaration**

*I declare under penalty of perjury that Sections J and K are true and correct. I understand that to knowingly furnish false information in the preparation of this form and any supplement thereto or to aid, abet, or counsel another to do so is a federal offense punishable by a fine or imprisonment up to five years or both under 18 U.S.C. §§ 2 and 1001. Other penalties apply as well to fraud or misuse of ETA immigration documents and to perjury with respect to such documents under 18 U.S.C. §§ 1546 and 1621.*

*In addition, I further declare under penalty of perjury that I intend to accept the position offered in Section H of this application if a labor certification is approved and I am granted a visa or an adjustment of status based on this application.*

1. Alien's last name	First name	Full middle name
2. Signature		Date signed

*Note - The signature and date signed do not have to be filled out when electronically submitting to the Department of Labor for processing, but must be complete when submitting by mail. If the application is submitted electronically, any resulting certification MUST be signed immediately upon receipt from DOL before it can be submitted to USCIS for final processing.*

**M. Declaration of Preparer**

1. Was the application completed by the employer? If No, you must complete this section.	<input type="checkbox"/> Yes	<input type="checkbox"/> No
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*I hereby certify that I have prepared this application at the direct request of the employer listed in Section C and that to the best of my knowledge the information contained herein is true and correct. I understand that to knowingly furnish false information in the preparation of this form and any supplement thereto or to aid, abet, or counsel another to do so is a federal offense punishable by a fine, imprisonment up to five years or both under 18 U.S.C. §§ 2 and 1001. Other penalties apply as well to fraud or misuse of ETA immigration documents and to perjury with respect to such documents under 18 U.S.C. §§ 1546 and 1621.*

2. Preparer's last name	First name	Middle initial
3. Title		
4. E-mail address		
5. Signature		Date signed

*Note - The signature and date signed do not have to be filled out when electronically submitting to the Department of Labor for processing, but must be complete when submitting by mail. If the application is submitted electronically, any resulting certification MUST be signed immediately upon receipt from DOL before it can be submitted to USCIS for final processing.*



**N. Employer Declaration**

*By virtue of my signature below, I HEREBY CERTIFY the following conditions of employment:*

1. The offered wage equals or exceeds the prevailing wage and I will pay at least the prevailing wage.
2. The wage is not based on commissions, bonuses or other incentives, unless I guarantee a wage paid on a weekly, bi-weekly, or monthly basis that equals or exceeds the prevailing wage.
3. I have enough funds available to pay the wage or salary offered the alien.
4. I will be able to place the alien on the payroll on or before the date of the alien's proposed entrance into the United States.
5. The job opportunity does not involve unlawful discrimination by race, creed, color, national origin, age, sex, religion, handicap, or citizenship.
6. The job opportunity is not:
  - a. Vacant because the former occupant is on strike or is being locked out in the course of a labor dispute involving a work stoppage; or
  - b. At issue in a labor dispute involving a work stoppage.
7. The job opportunity's terms, conditions, and occupational environment are not contrary to Federal, state or local law.
8. The job opportunity has been and is clearly open to any U.S. worker.
9. The U.S. workers who applied for the job opportunity were rejected for lawful job-related reasons.
10. The job opportunity is for full-time, permanent employment for an employer other than the alien.

I hereby designate the agent or attorney identified in section E (if any) to represent me for the purpose of labor certification and, by virtue of my signature in Block 3 below, I take full responsibility for the accuracy of any representations made by my agent or attorney.

I declare under penalty of perjury that I have read and reviewed this application and that to the best of my knowledge the information contained herein is true and accurate. I understand that to knowingly furnish false information in the preparation of this form and any supplement thereto or to aid, abet, or counsel another to do so is a federal offense punishable by a fine or imprisonment up to five years or both under 18 U.S.C. §§ 2 and 1001. Other penalties apply as well to fraud or misuse of ETA immigration documents and to perjury with respect to such documents under 18 U.S.C. §§ 1546 and 1621.

1. Last name	First name	Middle Initial
2. Title		
3. Signature	Date signed	

**Note** – The signature and date signed do not have to be filled out when electronically submitting to the Department of Labor for processing, but must be complete when submitting by mail. If the application is submitted electronically, any resulting certification MUST be signed immediately upon receipt from DOL before it can be submitted to USCIS for final processing.

**O. U.S. Government Agency Use Only**

Pursuant to the provisions of Section 212 (a)(5)(A) of the Immigration and Nationality Act, as amended, I hereby certify that there are not sufficient U.S. workers available and the employment of the above will not adversely affect the wages and working conditions of workers in the U.S. similarly employed.

\_\_\_\_\_  
Signature of Certifying Officer

\_\_\_\_\_  
Date Signed

\_\_\_\_\_  
Case Number

\_\_\_\_\_  
Filing Date

OMB Approval: 1205-0451  
Expiration Date: 03/31/2008

Application for Permanent Employment Certification

ETA Form 9089  
U.S. Department of Labor



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**P. OMB Information**

*Paperwork Reduction Act Information Control Number 1205-0451*

Persons are not required to respond to this collection of information unless it displays a currently valid OMB control number.

Respondent's reply to these reporting requirements is required to obtain the benefits of permanent employment certification (Immigration and Nationality Act, Section 212(a)(5)). Public reporting burden for this collection of information is estimated to average 1½ hours per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding this burden estimate to the Division of Foreign Labor Certification \* U.S. Department of Labor \* Room C4312 \* 200 Constitution Ave., NW \* Washington, DC \* 20210.

**Do NOT send the completed application to this address.**

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**Q. Privacy Statement Information**

In accordance with the Privacy Act of 1974, as amended (5 U.S.C. 552a), you are hereby notified that the information provided herein is protected under the Privacy Act. The Department of Labor (Department or DOL) maintains a System of Records titled Employer Application and Attestation File for Permanent and Temporary Alien Workers (DOL/ETA-7) that includes this record.

Under routine uses for this system of records, case files developed in processing labor certification applications, labor condition applications, or labor attestations may be released as follows: in connection with appeals of denials before the DOL Office of Administrative Law Judges and Federal courts, records may be released to the employers that filed such applications, their representatives, to named alien beneficiaries or their representatives, and to the DOL Office of Administrative Law Judges and Federal courts; and in connection with administering and enforcing immigration laws and regulations, records may be released to such agencies as the DOL Office of Inspector General, Employment Standards Administration, the Department of Homeland Security, and the Department of State.

Further relevant disclosures may be made in accordance with the Privacy Act and under the following circumstances: in connection with federal litigation; for law enforcement purposes; to authorized parent locator persons under Pub. L. 93-647; to an information source or public authority in connection with personnel, security clearance, procurement, or benefit-related matters; to a contractor or their employees, grantees or their employees, consultants, or volunteers who have been engaged to assist the agency in the performance of Federal activities; for Federal debt collection purposes; to the Office of Management and Budget in connection with its legislative review, coordination, and clearance activities; to a Member of Congress or their staff in response to an inquiry of the Congressional office made at the written request of the subject of the record; in connection with records management; and to the news media and the public when a matter under investigation becomes public knowledge, the Solicitor of Labor determines the disclosure is necessary to preserve confidence in the integrity of the Department, or the Solicitor of Labor determines that a legitimate public interest exists in the disclosure of information, unless the Solicitor of Labor determines that disclosure would constitute an unwarranted invasion of personal privacy.

### Instructions

Please read these instructions carefully to properly complete this form. If you need more space to complete an answer, use a separate sheet(s) of paper. Write your name and Alien Registration Number (A #), if any, at the top of each sheet of paper and indicate the part and number of the item to which the answer refers.

This form is used to petition U.S. Citizenship and Immigration Services (USCIS) for an immigrant visa based on employment.

#### A U.S. employer may file this petition for:

1. An outstanding professor or researcher, with at least three years of experience in teaching or research in the academic area, who is recognized internationally as outstanding:
  - A. In a tenured or tenure-track position at a university or institution of higher education to teach in the academic area; or
  - B. In a comparable position at a university or institution of higher education to conduct research in the area; or
  - C. In a comparable position to conduct research for a private employer that employs at least three persons in full-time research activities and which achieved documented accomplishments in an academic field.
2. An alien who, in the three years preceding the filing of this petition, has been employed for at least one year by a firm or corporation or other legal entity and who seeks to enter the United States to continue to render services to the same employer, or to a subsidiary or affiliate, in a capacity that is managerial or executive.
3. A member of the professions holding an advanced degree or an alien with exceptional ability in the sciences, arts, or business who will substantially benefit the national economy, cultural or educational interests, or welfare of the United States.
4. A skilled worker (requiring at least two years of specialized training or experience in the skill) to perform labor for which qualified workers are not available in the United States.
5. A member of the professions with a baccalaureate degree.

6. An unskilled worker (requiring less than two years of specialized training or experience) to perform labor for which qualified workers are not available in the United States.

In addition, a person may file this petition on his or her own behalf if he or she:

1. Has extraordinary ability in the sciences, arts, education, business, or athletics demonstrated by sustained national or international acclaim, whose achievements have been recognized in the field; or
2. Is a member of the profession holding an advanced degree or is claiming exceptional ability in the sciences, arts, or business, and is seeking an exemption of the requirement of a job offer in the national interest (NIW).

#### Step 1. Fill Out the Form I-140

1. Type or print legibly in black ink.
2. If extra space is needed to complete any item, attach a continuation sheet, indicate the item number, and date and sign each sheet.
3. Answer all questions fully and accurately. State that an item is not applicable with "N/A." If the answer is none, write "none."

#### Step 2. General requirements

##### Initial Evidence.

1. *If you are filing for an alien of extraordinary ability in the sciences, arts, education, business or athletics:*

You must file your petition with evidence that the alien has sustained national or international acclaim and that the achievements have been recognized in the field of expertise.

- A. Evidence of a one-time achievement (i.e., a major, internationally recognized award); or

**B. At least three of the following:**

1. Receipt of lesser nationally or internationally recognized prizes or awards for excellence in the field of endeavor;
2. Membership in associations in the field which require outstanding achievements as judged by recognized national or international experts;
3. Published material about the alien in professional or major trade publications or other major media;
4. Participation on a panel or individually as a judge of the work of others in the field or an allied field;
5. Original scientific, scholarly, artistic, athletic, or business-related contributions of major significance in the field;
6. Authorship of scholarly articles in the field, in professional or major trade publications or other major media;
7. Display of the alien's work at artistic exhibitions or showcases;
8. Evidence that the alien has performed in a leading or critical role for organizations or establishments that have distinguished reputations;
9. Evidence that the alien has commanded a high salary or other high remuneration for services;
10. Evidence of commercial successes in the performing arts, as shown by box office receipts or record, cassette, compact disk, or video sales.

**C.** If the above standards do not readily apply to the alien's occupation, you may submit comparable evidence to establish the alien's eligibility; and

**D.** Evidence that the alien is coming to the United States to continue work in the area of expertise. Such evidence may include letter(s) from prospective employer(s), evidence of prearranged commitments such as contracts, or a statement from the alien detailing plans on how he or she intends to continue work in the United States.

**2. A U.S. employer filing for an outstanding professor or researcher must file the petition with:**

- A.** Evidence that the professor or researcher is recognized internationally as outstanding in the academic field specified in the petition. Such evidence shall consist of at least two of the following:
  1. Receipt of major prizes or awards for outstanding achievement in the academic field;

2. Membership in associations in the academic field, which require outstanding achievements of their members;

3. Published material in professional publications written by others about the alien's work in the academic field;

4. Participation on a panel, or individually, as the judge of the work of others in the same or an allied academic field;

5. Original scientific or scholarly research contributions to the academic field; or

6. Authorship of scholarly books or articles, in scholarly journals with international circulation, in the academic field.

**B.** Evidence the beneficiary has at least three years of experience in teaching and/or research in the academic field; and

**C.** If you are a university or other institution of higher education, a letter indicating that you intend to employ the beneficiary in a tenured or tenure-track position as a teacher or in a permanent position as a researcher in the academic field; or

**D.** If you are a private employer, a letter indicating that you intend to employ the beneficiary in a permanent research position in the academic field, and evidence that you employ at least three full-time researchers and have achieved documented accomplishments in the field.

**3. A U.S. employer filing for a multinational executive or manager must file the petition with a statement which demonstrates that:**

**A.** If the worker is now employed outside the United States, that he or she has been employed outside the United States for at least one year in the past three years in an executive or managerial capacity by the petitioner or by its parent, branch, subsidiary or affiliate; or, if the worker is already employed in the United States, that he or she was employed outside the United States for at least one year in the three years preceding admission as a nonimmigrant in an executive or managerial capacity by the petitioner or by its parent, branch, subsidiary or affiliate;

**B.** The prospective employer in the United States is the same employer or a subsidiary or affiliate of the firm or corporation or other legal entity by which the alien was employed abroad;



- C. The prospective United States employer has been doing business for at least one year; and
- D. The alien is to be employed in the United States in a managerial or executive capacity. A description of the duties to be performed should be included.

**4. A U.S. employer filing for a member of the professions with an advanced degree or a person with exceptional ability in the sciences, arts or business must file the petition with:**

- A. A labor certification (see **General Evidence**), or a request for a waiver of a job offer because the employment is deemed to be in the national interest, with documentation provided to show that the beneficiary's presence in the United States would be in the national interest; and either:
  1. An official academic record showing that the alien has a U.S. advanced degree or an equivalent foreign degree, or an official academic record showing that the alien has a U.S. baccalaureate degree or an equivalent foreign degree and letters from current or former employers showing that the alien has at least five years of progressive post-baccalaureate experience in the specialty; or
  2. At least three of the following:
    - a. An official academic record showing that the alien has a degree, diploma, certificate, or similar award from an institution of learning relating to the area of exceptional ability;
    - b. Letters from current or former employers showing that the alien has at least ten years of full-time experience in the occupation for which he or she is being sought;
    - c. A license to practice the profession or certification for a particular profession or occupation;
    - d. Evidence that the alien has commanded a salary, or other remuneration for services, which demonstrates exceptional ability;
    - e. Evidence of membership in professional associations; or
    - f. Evidence of recognition for achievements and significant contributions to the industry or field by peers, governmental entities, or professional or business organizations.
  3. If the above standards do not readily apply to the alien's occupation, you may submit comparable evidence to establish the alien's eligibility.

**5. A U.S. employer filing for a skilled worker must file the petition with:**

- A. A labor certification (see **General Evidence**); and
- B. Evidence that the alien meets the educational, training, or experience and any other requirements of the labor certification (the minimum requirement is two years of training or experience).

**6. A U.S. employer filing for a professional must file the petition with:**

- A. A labor certification (see **General Evidence**);
- B. Evidence that the alien holds a U.S. baccalaureate degree or equivalent foreign degree; and
- C. Evidence that a baccalaureate degree is required for entry into the occupation.

**7. A U.S. employer filing for an unskilled worker must file the petition with:**

- A. A labor certification (see **General Evidence**); and
- B. Evidence that the beneficiary meets any education, training, or experience requirements required in the labor certification.

**General Evidence.**

**1. Labor certification.**

Petitions for certain classifications must be filed with a certification from the U.S. Department of Labor or with documentation to establish that the alien qualifies for one of the shortage occupations in the Department of Labor's Labor Market Information Pilot Program or for an occupation in Group I or II of the Department of Labor's Schedule A.

A certification establishes that there are not sufficient workers who are able, willing, qualified, and available at the time and place where the alien is to be employed and that employment of the alien, if qualified, will not adversely affect the wages and working conditions of similarly employed U.S. workers. Application for certification is made on Form ETA-750 and is filed at the local office of the State Employment Service. If the alien is in a shortage occupation, or for a Schedule A/Group I or II occupation, you may file a fully completed, uncertified Form ETA-750 in duplicate with your petition for determination by the USCIS that the alien belongs to the shortage occupation.

**NOTE:** When filing for a Schedule A/Group I or II occupation, the petitioner must include evidence of having complied with the Department of Labor regulations at 20 CFR 656.222(b)(2), which require that the position or positions be properly posted for a minimum of ten consecutive days.

**2. Ability to pay wage.**

Petitions which require job offers must be accompanied by evidence that the prospective U.S. employer has the ability to pay the proffered wage. Such evidence shall be in the form of copies of annual reports, federal tax returns, or audited financial statements.

In a case where the prospective U.S. employer employs 100 or more workers, a statement from a financial officer of the organization which establishes ability to pay the wage may be submitted. In appropriate cases, additional evidence, such as profit/loss statements, bank account records, or personnel records, may be submitted.

**Translations.** Any document containing foreign language submitted to the Service shall be accompanied by a full English language translation which the translator has certified as complete and accurate, and by the translator's certification that he or she is competent to translate from the foreign language into English.

**Copies.** Unless specifically required that an original document be filed with an application or petition, an ordinary legible photocopy may be submitted. Original documents submitted when not required will remain a part of the record, even if the submission was not required.

**Updated filing Address Information**

The filing addresses provided on this form reflect the most current information as of the date this form was last printed. If you are filing Form I-140 more than 30 days after the latest edition date shown in the lower right-hand corner, please visit us online at [www.uscis.gov](http://www.uscis.gov) before you file, and check the Forms and Fees page to confirm the correct filing address and version currently in use. Check the edition date located in the lower right-hand corner of the form. If the edition date on your Form I-140 matches the edition date listed for Form I-140 on the online Forms and Fees page, your version is current and will be accepted by USCIS. If the edition date on the online version is later, download a copy and use the online version. If you do not have Internet access, call Customer Service at 1-800-375-5283 to verify the current filing address and edition date. **Improperly filed forms will be rejected, and the fee returned, with instructions to resubmit the entire filing using the current form instructions.**

**Where to File**

**E-Filing Form I-140**

Certain Form I-140 filings may be electronically filed (E-Filed) with USCIS. Please view our website at [www.uscis.gov](http://www.uscis.gov) for a list of who is eligible to e-file this form and instructions.

**Premium Processing**

If you are requesting Premium Processing Services for Form I-140, you **must** also file Form I-907, Request for Premium Processing Service. Send the Forms I-140 and I-907 together to the address listed in the [Form I-907 filing instructions](#).

**NOTE:** Before you file the I-907/I-140 package, please check the Premium Processing Service page, a link to which can be found on the "Services & Benefits" page, on the USCIS website at [www.uscis.gov](http://www.uscis.gov) to determine whether you may request Premium Processing for the requested classification.

For Form I-140 filed alone, mail the form to:

USCIS Nebraska Service Center  
P.O. Box 87140  
Lincoln, NE 68501-7140

For Form I-140 filed concurrently with Form I-485,  
Application to Register Permanent Residence or Adjust  
Status, mail your forms package to:

USCIS Nebraska Service Center  
P.O. Box 87485  
Lincoln, NE 68501-7485

### **Texas Service Center Filings**

File Form I-140 with the Texas Service Center if the  
beneficiary will be employed permanently in:

Alabama, Arkansas, Connecticut, Delaware, the District of  
Columbia, Florida, Georgia, Kentucky, Louisiana, Maine,  
Maryland, Massachusetts, Mississippi, New Hampshire,  
New Jersey, New Mexico, New York, North Carolina,  
South Carolina, Oklahoma, Pennsylvania, Puerto Rico,  
Rhode Island, Tennessee, Texas, Vermont, Virginia, U.S.  
Virgin Islands or West Virginia.

For Form I-140 filed alone, or concurrently with Form I-485,  
Application to Register Permanent Residence or Adjust  
Status, mail your forms package to:

USCIS Texas Service Center  
P.O. Box 852135  
Mesquite, TX 75185

### **Note on E-Filing**

If you are e-filing this application, it will automatically be  
routed to the appropriate Service Center, and you will receive  
a receipt indicating the location to which it was routed. This  
location may not necessarily be the same center shown in the  
filing addresses listed above. For e-filed applications, it is  
very important to review your filing receipt and make specific  
note of the receiving location. All further communication,  
including submission of supporting documents, should be  
directed to the receiving location indicated on your e-filing  
receipt.

The filing fee for a Form I-140 is \$475.00.

Use the following guidelines when you prepare your check or  
money order for the Form I-140 fee:

1. The check or money order must be drawn on a bank or  
other financial institution located in the United States and  
must be payable in U.S. currency; and
2. Make the check or money order payable to U.S.  
Department of Homeland Security, unless:
  - A. If you live in Guam and are filing your petition  
there, make it payable to **Treasurer, Guam.**
  - B. If you live in the U.S. Virgin Islands and are filing  
your petition there, make it payable to  
**Commissioner of Finance of the Virgin Islands.**

**NOTE:** Please spell out U.S. Department of Homeland  
Security; do not use the initials "USDHS" or "DHS."

**Notice to Those Making Payment by Check.** If you send us  
a check, it will be converted into an electronic funds transfer  
(EFT). This means we will copy your check and use the  
account information on it to electronically debit your account  
for the amount of the check. The debit from your account will  
usually take 24 hours, and will be shown on your regular  
account statement.

You will not receive your original check back. We will  
destroy your original check, but we will keep a copy of it. If  
the EFT cannot be processed for technical reasons, you  
authorize us to process the copy in place of your original  
check. If the EFT cannot be completed because of  
insufficient funds, we may try to make the transfer up to two  
times.

### **How to Check If the Fees Are Correct.**

The form fee on this form is current as of the edition date  
appearing in the lower right corner of this page.  
However, because USCIS fees change periodically, you  
can verify if the fees are correct by following one of the  
steps below:

1. Visit our website at [www.uscis.gov](http://www.uscis.gov), select  
"Immigration Forms" and check the appropriate fee;
2. Review the Fee Schedule included in your form  
package, if you called us to request the form; or
3. Telephone our National Customer Service Center at  
1-800-375-5283 and ask for the fee information.



If you change your address and you have an application or petition pending with USCIS, you may change your address on-line at [www.uscis.gov](http://www.uscis.gov), click on "Change your address with USCIS" and follow the prompts or by completing and mailing Form AR-11, Alien's Change of Address Card, to:

**U.S. Citizenship and Immigration Services**  
**Change of Address**  
**P.O. Box 7134**  
**London, KY 40742-7134**

For commercial overnight or fast freight services only, mail to:

**U.S. Citizenship and Immigration Services**  
**Change of Address**  
**1084-I South Laurel Road**  
**London, KY 40744**



**Any Form I-140 that is not signed or accompanied by the correct fee, will be rejected with a notice that the Form I-140 is deficient. You may correct the deficiency and resubmit the Form I-140. An application or petition is not considered properly filed until accepted by USCIS.**

**Initial processing.** Once a Form I-140 has been accepted, it will be checked for completeness, including submission of the required initial evidence. If you do not completely fill out the form, or file it without required initial evidence, you will not establish a basis for eligibility and we may deny your Form I-140.

**Requests for more information or interview.** We may request more information or evidence, or we may request that you appear at a USCIS office for an interview. We may also request that you submit the originals of any copy. We will return these originals when they are no longer required.

**Decision.** The decision on a Form I-140 involves a determination of whether you have established eligibility for the requested benefit. You will be notified of the decision in writing.

**Meaning of petition approval.** Approval of a petition means you have established that the person you are filling for is eligible for the requested classification.

This is the first step towards permanent residence. However, this does not in itself grant permanent residence or employment authorization. You will be given information about the requirements for the person to receive an immigrant visa or to adjust status after your petition is approved.

**Instructions for Industry and Occupation Codes.**

**NAICS Code.** The North American Industry Classification System (NAICS) code can be obtained from the U.S. Department of Commerce, U.S. Census Bureau at ([www.census.gov/epcd/www/naics.html](http://www.census.gov/epcd/www/naics.html)). Enter the code from left to right, one digit in each of the six boxes. If you use a code which is less than six digits, enter the code left to right and then add zeros in the remaining unoccupied boxes.

The code sequence 33466 would be entered as:

3	3	4	6	6	0
---	---	---	---	---	---

The code sequence 5133 would be entered as:

5	1	3	3	0	0
---	---	---	---	---	---

**SOC Code.** The Standard Occupational Classification (SOC) System codes can be obtained from the Department of Labor, U.S. Bureau of Labor Statistics (<http://stats.bls.gov/soc/sooguide.htm>). Enter the code from left to right, one digit in each of the six boxes. If you use a code which is less than six digits, enter the code left to right and then add zeros in the remaining unoccupied boxes.

The code sequence 19-1021 would be entered as:

1	9	—	1	0	2	1
---	---	---	---	---	---	---

The code sequence 15-100 would be entered as:

1	5	—	1	0	0	0
---	---	---	---	---	---	---



To order USCIS forms, call our toll-free number at **1-800-870-3676**. You can also get USCIS forms and information on immigration laws, regulations and procedures by telephoning our National Customer Service Center at **1-800-375-5283** or visiting our internet website at [www.uscis.gov](http://www.uscis.gov).

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As an alternative to waiting in line for assistance at your local USCIS office, you can now schedule an appointment through our internet-based system, **InfoPass**. To access the system, visit our website. Use the **InfoPass** appointment scheduler and follow the screen prompts to set up your appointment. **InfoPass** generates an electronic appointment notice that appears on the screen.

If you knowingly and willfully falsify or conceal a material fact or submit a false document with this Form I-140, we will deny the Form Form I-140 and may deny any other immigration benefit.

In addition, you will face severe penalties provided by law and may be subject to criminal prosecution.

We ask for the information on this form, and associated evidence, to determine if you have established eligibility for the immigration benefit for which you are filing. Our legal right to ask for this information can be found in the Immigration and Nationality Act, as amended. We may provide this information to other government agencies. Failure to provide this information, and any requested evidence, may delay a final decision or result in denial of your Form I-140.

An agency may not conduct or sponsor an information collection and a person is not required to respond to a collection of information unless it displays a currently valid OMB control number. The public reporting burden for this collection of information is estimated at 60 minutes per response, including the time for reviewing instructions, completing and submitting the form. Send comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden, to: U.S. Citizenship and Immigration Services, Regulatory Management Division, 111 Massachusetts Avenue, N.W., 3rd Floor, Suite 3008, Washington, DC 20529. OMB No. 1615-0015. **Do not mail your application to this address.**

**START HERE - Please type or print in black ink.**

**For USCIS Use Only**

**Part 1. Information about the person or organization filing this petition. If an individual is filing, use the top name line. Organizations should use the second line.**

Family Name (Last Name)	Given Name (First Name)	Full Middle Name
<input type="text"/>	<input type="text"/>	<input type="text"/>
Company or Organization Name		
<input type="text"/>		
Address: (Street Number and Name)		Suite #
<input type="text"/>		<input type="text"/>
Attn:		
<input type="text"/>		
City	State/Province	
<input type="text"/>	<input type="text"/>	
Country	Zip/Postal Code	
<input type="text"/>	<input type="text"/>	
IRS Tax #	U.S. Social Security # (if any)	E-Mail Address (if any)
<input type="text"/>	<input type="text"/>	<input type="text"/>

**Part 2. Petition type.**

This petition is being filed for: (Check one.)

- a.  An alien of extraordinary ability.
- b.  An outstanding professor or researcher.
- c.  A multinational executive or manager.
- d.  A member of the professions holding an advanced degree or an alien of exceptional ability (who is NOT seeking a National Interest Waiver).
- e.  A professional (at a minimum, possessing a bachelor's degree or a foreign degree equivalent to a U.S. bachelor's degree) or a skilled worker (requiring at least two years of specialized training or experience).
- f.  (Reserved.)
- g.  Any other worker (requiring less than two years of training or experience).
- h.  Soviet Scientist.
- i.  An alien applying for a National Interest Waiver (who IS a member of the professions holding an advanced degree or an alien of exceptional ability).

**Part 3. Information about the person you are filing for.**

Family Name (Last Name)	Given Name (First Name)	Full Middle Name
<input type="text"/>	<input type="text"/>	<input type="text"/>
Address: (Street Number and Name)		Apt. #
<input type="text"/>		<input type="text"/>
C/O: (In Care Of)		
<input type="text"/>		
City	State/Province	
<input type="text"/>	<input type="text"/>	
Country	Zip/Postal Code	E-Mail Address (if any)
<input type="text"/>	<input type="text"/>	<input type="text"/>
Daytime Phone # (with area/country codes)		Date of Birth (mm/dd/yyyy)
<input type="text"/>		<input type="text"/>
City/Town/Village of Birth	State/Province of Birth	Country of Birth
<input type="text"/>	<input type="text"/>	<input type="text"/>
Country of Nationality/Citizenship	A # (if any)	U.S. Social Security # (if any)
<input type="text"/>	<input type="text"/>	<input type="text"/>

If in the U.S.	Date of Arrival (mm/dd/yyyy)	I-94 # (Arrival/Departure Document)
	<input type="text"/>	<input type="text"/>
Current Nonimmigrant Status	Date Status Expires (mm/dd/yyyy)	
	<input type="text"/>	<input type="text"/>

Returned	Receipt
Date	
Date	
Resubmitted	
Date	
Date	
Reloc Sent	
Date	
Date	
Reloc Rec'd	
Date	
Date	

**Classification:**

- 203(b)(1)(A) Alien of Extraordinary Ability
- 203(b)(1)(B) Outstanding Professor or Researcher
- 203(b)(1)(C) Multi-National Executive or Manager
- 203(b)(2) Member of Professions w/Adv. Degree or Exceptional Ability
- 203(b)(3)(A)(i) Skilled Worker
- 203(b)(3)(A)(ii) Professional
- 203(b)(3)(A)(iii) Other Worker

**Certification:**

- National Interest Waiver (NIW)
- Schedule A, Group I
- Schedule A, Group II

Priority Date	Consulate
<input type="text"/>	<input type="text"/>

**Concurrent Filing:**

I-485 filed concurrently.

**Remarks**

**Action Block**

**To Be Completed by Attorney or Representative, if any.**

Fill in box if G-28 is attached to represent the applicant.

ATTY State License #

**Part 4. Processing Information.**

1. Please complete the following for the person named in Part 3: (Check one)

Alien will apply for a visa abroad at the American Embassy or Consulate at:

City

Foreign Country

Alien is in the United States and will apply for adjustment of status to that of lawful permanent resident.

Alien's country of current residence or, if now in the U.S., last permanent residence abroad.

2. If you provided a U.S. address in Part 3, print the person's foreign address:

3. If the person's native alphabet is other than Roman letters, write the person's foreign name and address in the native alphabet:

4. Are any other petition(s) or application(s) being filed with this Form I-140?

No

Yes-(check all that apply)

Form I-485

Form I-765

Form I-131

Other - Attach an explanation.

5. Is the person you are filing for in removal proceedings?

No

Yes-Attach an explanation.

6. Has any immigrant visa petition ever been filed by or on behalf of this person?

No

Yes-Attach an explanation.

If you answered yes to any of these questions, please provide the case number, office location, date of decision and disposition of the decision on a separate sheet(s) of paper.

**Part 5. Additional information about the petitioner.**

1. Type of petitioner (Check one.)

Employer

Self

Other (Explain, e.g., Permanent Resident, U.S. citizen or any other person filing on behalf of the alien.)

2. If a company, give the following:

Type of Business

Date Established (mm/dd/yyyy)

Current Number of Employees

Gross Annual Income

Net Annual Income

NAICS Code

DOL/ETA Case Number

3. If an individual, give the following:

Occupation

Annual Income

**Part 6. Basic information about the proposed employment.**

1. Job Title

2. SOC Code

3. Nontechnical Description of Job

4. Address where the person will work if different from address in Part 1.

5. Is this a full-time position?

Yes  No

6. If the answer to Number 5 is "No," how many hours per week for the position?

7. Is this a permanent position?

Yes  No

8. Is this a new position?

Yes  No

9. Wages per week

\$

**Part 7. Information on spouse and all children of the person for whom you are filing.**

List husband/wife and all children related to the individual for whom the petition is being filed. Provide an attachment of additional family members, if needed.

Name (First/Middle/Last)	Relationship	Date of Birth (mm/dd/yyyy)	Country of Birth

**Part 8. Signature.** Read the information on penalties in the instructions before completing this section. If someone helped you prepare this petition, he or she must complete Part 9.

I certify, under penalty of perjury under the laws of the United States of America, that this petition and the evidence submitted with it are all true and correct. I authorize U.S. Citizenship and Immigration Services to release to other government agencies any information from my USCIS (or former INS) records, if USCIS determines that such action is necessary to determine eligibility for the benefit sought.

<b>Petitioner's Signature</b>	<b>Daytime Phone Number (Area/Country Codes)</b>	<b>E-Mail Address</b>
<input type="text"/>	<input type="text"/>	<input type="text"/>
<b>Print Name</b>	<b>Date (mm/dd/yyyy)</b>	
<input type="text"/>	<input type="text"/>	

NOTE: If you do not fully complete this form or fail to submit the required documents listed in the instructions, a final decision on your petition may be delayed or the petition may be denied.

**Part 9. Signature of person preparing form, if other than above. (Sign below.)**

I declare that I prepared this petition at the request of the above person and it is based on all information of which I have knowledge.

Attorney or Representative: In the event of a Request for Evidence (RFE), may the USCIS contact you by Fax or E-mail?  Yes  No

<b>Signature</b>	<b>Print Name</b>	<b>Date (mm/dd/yyyy)</b>
<input type="text"/>	<input type="text"/>	<input type="text"/>
<b>Firm Name and Address</b>		
<input type="text"/>		
<b>Daytime Phone Number (Area/Country Codes)</b>	<b>Fax Number (Area/Country Codes)</b>	<b>E-Mail Address</b>
<input type="text"/>	<input type="text"/>	<input type="text"/>



## Instructions for I-485, Application to Register Permanent Residence or Adjust Status

### Updated filing Address Information

The filing addresses provided on this form reflect the most current information as of the date this form was last printed. If you are filing Form I-485 more than 30 days after the latest edition date shown in the lower right-hand corner, please visit our website at [www.uscis.gov](http://www.uscis.gov) before you file, and check the Forms and Fees page to confirm the correct filing address and version currently in use. Check the edition date located at the lower right-hand corner of the form. If the edition date on your Form I-485 matches the edition date listed for Form I-485 on the online Forms and Fees page, your version is current and will be accepted by USCIS. If the edition date on the online version is later, download a copy and use the online version. If you do not have internet access, call the National Customer Service Center at 1-800-375-5283 to verify the current filing address and edition date. **Improperly filed forms will be rejected, and the fee returned, with instructions to resubmit the entire filing using the current form instructions.**

This form is used by a person who is in the United States to apply to U.S. Citizenship and Immigration Services (USCIS) to adjust to permanent resident status or register for permanent residence.

This form may also be used by certain Cuban nationals to request a change in the date that their permanent residence began.

#### 1. Based on an immigrant petition.

You may apply to adjust your status if:

- A. An immigrant visa number is immediately available to you based on an approved immigrant petition; or
- B. You are filing this application with a completed relative petition, special immigrant juvenile petition or special immigrant military petition which if approved would make an immigrant visa number immediately available to you.

#### 2. Based on being the spouse or child (derivative) - at the time another adjustment applicant (principal) files to adjust status or at the time a person is granted permanent resident status in an immigrant category that allows derivative status for spouses and children.

- A. If the spouse or child is in the United States, the individual derivatives may file their Form I-485 adjustment of status applications concurrently with the Form I-485 for the principal applicant, or file the Form I-485 at anytime after the principal is approved, if a visa number is available.

- B. If the spouse or child is residing abroad, the person adjusting status in the United States should file the Form I-824, Application for Action on an Approved Application or Petition, concurrently with the principal's adjustment of status application to allow the derivatives to immigrate to the United States without delay if the principal's adjustment of status application is approved. The fee submitted with the Form I-824 will not be refunded if the principal's adjustment is not granted.

#### 3. Based on admission as the fiancé(e) of a U.S. citizen and subsequent marriage to that citizen.

- A. You may apply to adjust status if you were admitted to the United States as the K-1 fiancé(e) of a United States citizen and you married that citizen within 90 days of your entry.
- B. If you were admitted as the K-2 child of such a fiancé(e), you may apply to adjust status based on your parent's adjustment application.

#### 4. Based on asylum status.

You may apply to adjust status after you have been granted asylum in the United States if you have been physically present in the United States for one year after the grant of asylum, provided you still qualify as an asylee or as the spouse or child of a refugee.

#### 5. Based on refugee status.

You may apply to adjust status after you have been admitted as a refugee and have been physically present in the United States for one year following your admission, provided that your status has not been terminated.

#### 6. Based on Cuban citizenship or nationality.

You may apply to adjust status if:

- A. You are a native or citizen of Cuba, were admitted or paroled into the United States after January 1, 1959, and thereafter have been physically present in the United States for at least one year; or

B. You are the spouse or unmarried child of a Cuban described above and regardless of your nationality, you were admitted or paroled after January 1, 1959, and thereafter have been physically present in the United States for at least one year.

**7. Applying to change the date on which your permanent residence began.**

If you were granted permanent residence in the United States prior to November 6, 1966, and are a native or citizen of Cuba, or you are the spouse or unmarried child of such an individual, you may ask to change the date your lawful permanent residence began to your date of arrival in the United States or May 2, 1964, whichever is later.

**8. Based on continuous residence since before January 1, 1972.**

You may apply for permanent residence if you have continuously resided in the United States since before January 1, 1972. This is known as "Registry."

**9. Other basis of eligibility.**

If you are not included in the above categories, but believe you may be eligible for adjustment or creation of record of permanent residence, contact our National Customer Service Center at 1-800-375-5283 for information on how to use the internet to make an application at your local USCIS office.

**10. Who Is Not Eligible to Adjust Status.**

Unless you are applying for creation of record based on continuous residence since before January 1, 1972, or adjustment of status under a category in which special rules apply (such as 245(i) adjustment, asylum adjustment, Cuban adjustment, special immigrant juvenile adjustment, or special immigrant military personnel adjustment), you are not eligible for adjustment of status if any of the following apply to you:

- A. You entered the United States in transit without a visa;
- B. You entered the United States as a nonimmigrant crewman;
- C. You were not admitted or paroled following inspection by an immigration officer;
- D. Your authorized stay expired before you filed this application;
- E. You were employed in the United States, without USCIS authorization, prior to filing this application;
- F. You failed to maintain your nonimmigrant status, other than through no fault of your own or for technical reasons; unless you are applying because you are:

- 1. An immediate relative of a United States citizen (parent, spouse, widow, widower or unmarried child under 21 years old);
- 2. A K-1 fiancé(e) or a K-2 fiancé(e) dependent who married the United States petitioner within 90 days of admission; or
- 3. An H or I nonimmigrant or special immigrant (foreign medical graduates, international organization employees or their derivative family members);

- 7. You were admitted as a K-1 fiancé(e), but did not marry the U.S. citizen who filed the petition for you, or you were admitted as the K-2 child of a fiancé(e) and your parent did not marry the United States citizen who filed the petition;
- 8. You are or were a J-1 or J-2 exchange visitor and are subject to the two-year foreign residence requirement and you have not complied with or been granted a waiver of the requirement;
- 9. You have A, E or G nonimmigrant status or have an occupation that would allow you to have this status, unless you complete Form I-508 (I-508F for French nationals) to waive diplomatic rights, privileges and immunities and, if you are an A or G nonimmigrant, unless you submit a completed Form I-566;
- 10. You were admitted to Guam as a visitor under the Guam visa waiver program;
- 11. You were admitted to the United States as a visitor under the Visa Waiver Program, unless you are applying because you are an immediate relative of a U.S. citizen (parent, spouse, widow, widower or unmarried child under 21 years old); or
- 12. You are already a conditional permanent resident.

**Fill Out the Form I-485**

- 1. Type or print legibly in black ink.
- 2. If extra space is needed to complete any item, attach a continuation sheet, indicate the item number, and date and sign each sheet.
- 3. Answer all questions fully and accurately. State that an item is not applicable with "N/A." If the answer is none, write "none."
- 4. You must file your application with the required Initial Evidence described below. Your application must be properly signed and filed with the correct fee. If you are under 14 years of age, your parent or guardian may sign your application.

**Translations.** Any document containing foreign language submitted to the Service shall be accompanied by a full English language translation which the translator has certified as complete and accurate, and by the translator's certification that he or she is competent to translate from the foreign language into English.

**Copies.** Unless specifically required that an original document be filed with an application or petition, an ordinary legible photocopy may be submitted. Original documents submitted when not required will remain a part of the record, even if the submission was not required.

**Initial Evidence.**

You must file your application with the following evidence:

**1. Criminal history.**

- A. If you have ever been arrested or detained by any law enforcement officer for any reason, and no charges were filed, submit:

An original official statement by the arresting agency or applicable court order confirming that no charges were filed.

- B. If you have ever been arrested or detained by any law enforcement officer for any reason, and charges were filed, or if charges were filed against you without an arrest, submit:

An original or court-certified copy of the complete arrest record and/or disposition for each incident (e.g., dismissal order, conviction record or acquittal order).

- C. If you have ever been convicted or placed in an alternative sentencing program or rehabilitative program (such as a drug treatment or community service program), submit:

1. An original or court-certified copy of the sentencing record for each incident, and
2. Evidence that you completed your sentence, specifically:
  - a. An original or certified copy of your probation or parole record, or
  - b. Evidence that you completed an alternative sentencing program or rehabilitative program.

- D. If you have ever had any arrest or conviction vacated, set aside, sealed, expunged or otherwise removed from your record, submit:

1. An original or court-certified copy of the court order vacating, setting aside, sealing, expunging or otherwise removing the arrest or conviction, or
2. An original statement from the court that no record exists of your arrest or conviction.

**NOTE that unless a traffic incident was alcohol or drug related, you do not need to submit documentation for traffic fines and incidents that did not involve an actual arrest if the only penalty was a fine of less than \$500 and/or points on your driver's license.**

**2. Birth certificate.**

Submit a copy of your foreign birth certificate or other record of your birth that meets the provisions of secondary evidence found in Title 8, Code of Federal Regulations (CFR), 103.2(b)(2).

**3. Copy of passport page with nonimmigrant visa.**

If you have obtained a nonimmigrant visa(s) from an American embassy or consulate abroad within the last year, submit a photocopy(ies) of the page(s) of your passport containing the visa(s).

**4. Photos.**

You must submit two identical color photographs of yourself taken within 30 days of the filing of this application. The photos must have a white to off-white background, be printed on thin paper with a glossy finish, and be unmounted and unretouched.

Passport-style photos must be 2" x 2." The photos must be in color with full face, frontal view on a white to off-white background. Head height should measure 1" to 1 3/8" from top of hair to bottom of chin, and eye height is between 1 1/8" to 1 3/8" from bottom of photo. Your head must be bare unless you are wearing a headdress as required by a religious order of which you are a member. Using pencil or felt pen, lightly print your name and Alien Receipt Number on the back of the photo.

**5. Biometric services.**

If you are between the ages of 14 and 79, you must be fingerprinted as part of the USCIS biometric services requirement. After you have filed this application, USCIS will notify you in writing of the time and location where you must go to be fingerprinted. If necessary, USCIS may also take your photograph and signature. Failure to appear to be fingerprinted or for other biometric services may result in a denial of your application.

**6. Police clearances.**

If you are filing for adjustment of status as a member of a special class described in an I-485 supplement form, please read the instructions on the supplement form to see if you need to obtain and submit police clearances, in addition to the required fingerprints, with your application.

## 7. Medical examination.

When required, submit a medical examination report on the form you have obtained from USCIS.

### A. Individuals applying for adjustment of status through a USCIS service center.

#### 1. General:

If you are filing your adjustment of status application with a USCIS service center, include your medical examination report with the application, unless you are a refugee.

#### 2. Refugees:

If you are applying for adjustment of status one year after you were admitted as a refugee, you only need to submit a vaccination supplement with your adjustment of status application, not the entire medical report, unless there were medical grounds of inadmissibility that arose during the initial examination that you had overseas.

### B. Individuals applying for adjustment of status through a local USCIS office.

If you are filing your adjustment of status application with a local USCIS office include your medical examination report with the application.

## 8. Fiancé(e)s.

If you are a K-1 fiancé(e) or K-2 dependent who had a medical examination within the past year as required for the nonimmigrant fiancé(e) visa, you only need to submit a vaccination supplement, not the entire medical report. You may include the vaccination supplement with your adjustment of status application.

## 9. Persons not required to have a medical examination.

The medical report is not required if you are applying for creation of a record for admission as a lawful permanent resident under section 249 of the INA as someone who has continuously resided in the United States since January 1, 1972 (registry applicant).

## 13. Form G-325A, Biographic Information Sheet.

You must submit a completed Form G-325A if you are between 14 and 79 years of age.

## 14. Affidavit of Support/Employment Letter.

### A. Affidavit of Support.

Submit an Affidavit of Support (Form I-864) if your adjustment of status application is based on your entry as a fiancé(e), a relative visa petition (Form I-130) filed by your relative, or an employment based visa petition (Form I-140) related to a business that is five percent or more owned by your family.

### B. Employment Letter.

If your adjustment of status application is related to an employment based visa petition (Form I-140), you must submit a letter on the letterhead of the petitioning employer which confirms that the job on which the visa petition is based is still available to you. The letter must also state the salary that will be paid.

**NOTE:** The affidavit of support and/or employment letter are not required if you are applying for creation of a record based on continuous residence since before January 1, 1972, asylum or refugee adjustment, or a Cuban citizen or a spouse or unmarried child of a Cuban citizen who was admitted after January 1, 1959.

## 15. Evidence of eligibility.

### A. Based on an immigrant petition.

Attach a copy of the approval notice for an immigrant petition that makes a visa number immediately available to you, or submit a complete relative, special immigrant juvenile, or special immigrant military petition which, if approved, will make a visa number immediately available to you.

### B. Based on admission as the K-1 fiancé(e) of a U. S. citizen and subsequent marriage to that citizen.

Attach a copy of the fiancé(e) petition approval notice, a copy of your marriage certificate and your Form I-94.

### C. Based on asylum status.

Attach a copy of the letter or Form I-94 that shows the date you were granted asylum.

### D. Based on continuous residence in the United States since before January 1, 1972.

Attach copies of evidence that shows continuous residence since before January 1, 1972.

## 16. Based on Cuban citizenship or nationality.

Attach evidence of your citizenship or nationality, such as a copy of your passport, birth certificate or travel document.

## 17. Based on derivative status as the spouse or child of another adjustment applicant or person granted permanent residence based on issuance of an immigrant visa.

File your application with the application of the other applicant, or with evidence that the application is pending with USCIS or was approved, or with evidence that your spouse or parent was granted permanent residence based on an immigrant visa, and:

If you are applying as the spouse of that person, also attach a copy of your marriage certificate and copies of documents showing the legal termination of all other marriages by you and your spouse;

If you are applying as the child of that person, attach also a copy of your birth certificate and, if the other person is not your parent, submit copies of evidence (such as a marriage certificate and documents showing the legal termination of all other marriages and an adoption decree) to demonstrate that you qualify as his or her child.

### 18. Other basis for eligibility.

Attach copies of documents proving that you are eligible for the classification.

### Form I-485 USCIS Lockbox Filing Address for Local Office Filings:

If you are applying for adjustment of status under one of the eligibility categories listed below, file your Form I-485, Application to Register Permanent Residence or Adjust Status with the USCIS Lockbox Facility.

1. Spouse, parent, unmarried son/daughter under age 21 of a U.S. Citizen with an approved or concurrently filed Form I-130;
2. Beneficiary of an approved Form I-130 filed by a qualifying relative;
3. Qualifying derivative, family-based beneficiary;
4. K-1 Fiancé(e) (and K-2 dependents) whose Form I-485 is based on an approved Form I-129F;
5. Applicants who are beneficiaries of an approved Form I-360, Petition for Amerasian, Widow(er), or Special Immigrant, as a battered spouse or child;
6. Widow/widower of a U.S. Citizen with an approved or concurrently filed Form I-360;
7. Special Immigrant Military filing Form I-485 based on honorable active duty service in the U.S. armed forces with an approved or concurrently filed Form I-360;
8. Special Immigrant juvenile with a pending or concurrently filed Form I-360;
9. Amerasians with an approved or concurrently filed Form I-360;

10. Applicants eligible under the Cuban Adjustment Act of November 2, 1965.
11. Diversity lottery winner eligible to file Form I-485;
12. Public Interest Parolees from certain former Soviet and Southeast Asian countries filing Form I-485 under Public Law 101-167 (the "Lautenberg Amendment");
13. Registry applicant filing Form I-485 based on birth in the U.S. to a foreign diplomatic officer;
14. Former diplomat filing Form I-485 under Section 13 of the Immigration and Nationality Act;
15. Registry applicant filing Form I-485 based on continuous residence in the U.S. since before 01/01/72 or
16. Applicants who are beneficiaries of Private Bills:

### USCIS Lockbox Addresses:

For United Postal Service (USPS) deliveries:

USCIS  
P.O. Box 805887  
Chicago, IL 60680-4120

For private couriers (non-USPS) deliveries:

USCIS  
Attn: FBASI  
427 S. LaSalle - 3rd Floor  
Chicago, IL 60605-1029

### Form I-485 Service Center Filing Addresses:

1. **Form I-485 is Based on an Underlying Form I-140, Immigrant Petition for Alien Worker:**

Adjustment of status applications filed based on a concurrently filed, pending, or approved Form I-140 must be filed with the Nebraska Service Center or the Texas Service Center, depending on where the applicant lives. If you wish to concurrently file your Form I-485 and Form I-140 an immigrant visa number must be immediately available at the time of filing.

**NOTE:** To facilitate acceptance and processing of Form I-485 when Form I-140 has already been approved, submit a copy of the I-140 approval notice. If Form I-140 is pending, submit copies of the Form I-140 receipt notice and the page of the DOL labor certification showing the priority date (if labor certification is required) or just a copy of the Form I-140 receipt notice (but only if a labor certification is not required).

If you live in the following states: Alaska, Arizona, California, Colorado, Guam, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Michigan, Minnesota, Missouri, Montana, Nebraska, Nevada, North Dakota, Ohio, Oregon, South Dakota, Utah, Washington, Wisconsin or Wyoming, the mailing address you should use is:

**USCIS**  
**Nebraska Service Center**  
**P. O. Box 87485**  
**Lincoln, NE 68501-7485**

If you live in the following states: Alabama, Arkansas, Connecticut, Florida, Georgia, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Mississippi, New Hampshire, New Jersey, New Mexico, New York, North Carolina, South Carolina, Oklahoma, Pennsylvania, Puerto Rico, Rhode Island, Tennessee, Texas, Vermont, Virginia, U.S. Virgin Islands, West Virginia or Washington, DC, the mailing address you should use is:

**USCIS**  
**Texas Service Center**  
**P. O. Box 851804**  
**Mesquite, TX 75185-1804**

**2. Form I-485 is Based on an Underlying Form I-360, Petition for Amerasian, Widow(er), or Special Immigrant:**

**A. Filing Address for International Organization Employee or Family Member:**

Adjustment of status applications filed based on a concurrently filed, pending, or approved Form I-360 for International Organization Employee or eligible family member must be filed with the Nebraska Service Center (see address below).

**B. Filing Address for Afghan and Iraqi Translators:**

Adjustment of status applications filed based on an approved Form I-360 for Afghan and Iraqi Translators must be filed with the Nebraska Service Center (see address below). You cannot concurrently file Forms I-360 and I-485 for this classification.

**C. Filing Address for Other I-360 Categories:**

Other adjustment of status applications filed based on an approved Form I-360 for the following classifications must be filed with the Nebraska Service Center or the Texas Service Center, depending on where the applicant lives.

**NOTE: You cannot concurrently file Forms I-360 and I-485 for the following classifications:**

- 1. Religious Worker or Minister;**
- 2. Panama Canal Company Employment;**
- 3. U.S. Government in Canal Zone Employment;**
- 4. Special Immigrant Physician; or**
- 5. International Broadcasters.**

If you live in the following states: Alaska, Arizona, California, Colorado, Guam, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Michigan, Minnesota, Missouri, Montana, Nebraska, Nevada, North Dakota, Ohio, Oregon, South Dakota, Utah, Washington, Wisconsin or Wyoming, send your application to the Nebraska Service Center:

**USCIS**  
**Nebraska Service Center**  
**P.O. Box 87485**  
**Lincoln, NE 68501-7485**

If you live in the following states: Alabama, Arkansas, Connecticut, Florida, Georgia, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Mississippi, New Hampshire, New Jersey, New Mexico, New York, North Carolina, South Carolina, Oklahoma, Pennsylvania, Puerto Rico, Rhode Island, Tennessee, Texas, Vermont, Virginia, U.S. Virgin Islands, West Virginia or Washington, DC, send your application to the Texas Service Center:

**USCIS**  
**Texas Service Center**  
**P.O. Box 851804**  
**Mesquite, TX 75185-1804**

**3. Form I-485 is Based on an Underlying Form I-526, Immigrant Petition by Alien Entrepreneur:**

If you are an immigrant investor with an approved Form I-526, you must file Form I-485 with the Texas Service Center, regardless of where the business enterprise is located.

**NOTE: You cannot concurrently file form I-526 and I-485.**

**USCIS**  
**Texas Service Center**  
**P.O. Box 851804**  
**Mesquite, TX 75185-1804**

**4. Filing Address for Asylee Adjustment of Status applicants:**

All asylee adjustment of status applications must be filed with the Nebraska Service Center or the Texas Service Center, depending on where the applicant lives. If you are

filing Form I-131, Application for Travel Document, to enable you to travel outside the U. S. while your adjustment of status application is pending, you should indicate that you are requesting a refugee travel document. The relating Form I-131 for a Refugee Travel document is filed with the Nebraska Service Center, regardless of the Form I-485 filing location.

If you live in the following states: Alaska, Arizona, California, Colorado, Guam, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Michigan, Minnesota, Missouri, Montana, Nebraska, Nevada, North Dakota, Ohio, Oregon, South Dakota, Utah, Washington, Wisconsin or Wyoming, the mailing address you should use is:

**USCIS**  
**Nebraska Service Center**  
**P.O. Box 87485**  
**Lincoln, NE 68501-7485**

If you live in the following states: Alabama, Arkansas, Connecticut, Delaware, Florida, Georgia, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Mississippi, New Hampshire, New Jersey, New Mexico, New York, North Carolina, South Carolina, Oklahoma, Pennsylvania, Puerto Rico, Rhode Island, Tennessee, Texas, Vermont, Virginia, U.S. Virgin Islands, West Virginia or Washington, DC, send your application to the Texas Service Center:

**USCIS**  
**Texas Service Center**  
**P.O. Box 852211**  
**Mesquite, TX 75185-2211**

**5. Filing Address for Refugee Adjustment of Status applicants:**

All refugee adjustment of status applications must be filed with the Nebraska Service Center:

**USCIS**  
**Nebraska Service Center**  
**P.O. Box 87209**  
**Lincoln, NE 68501-7209**

**6. Filing Address for HRIFA dependents:**

Only the dependents spouse and children of the principal granted legal status under HRIFA are eligible to apply for benefits under HRIFA. The filing period for principal HRIFA applicants has closed. All HRIFA applications for dependents must be filed at the Nebraska Service Center.

**USCIS**  
**Nebraska Service Center**  
**P.O. Box 87245**  
**Lincoln, NE 68501-7245**

**Questions Regarding Form I-485**

For additional information about Form I-485, including how to file your application or filing locations not mentioned, call the USCIS National Customer Service Center at 1-800-375-5283 or visit our website at [www.uscis.gov](http://www.uscis.gov).

The filing fee for a Form I-485 is **\$930.00**.

An additional biometric fee of **\$80.00** is required when filing this Form I-485. After you submit Form I-485, USCIS will notify you about when and where to go for biometric services.

The fee is **\$930.00** only (no biometrics fee required) for applicants under 14 years who submits Form I-485 independent from other family members.

The fee for a child under the age fourteen years will be **\$600.00** when submitted concurrently for adjudication with the application of a parent under sections 201(b)(A)(i), 203(a)(2)(A) and 203(d) of the INA.

You may submit one check or money order for both the application and biometric fees, for a total of **\$1010.00**.

Use the following guidelines when you prepare your check or money order for the Form I-485 and the biometric service fee:

1. The check or money order must be drawn on a bank or other financial institution located in the United States and must be payable in U.S. currency; and

2. Make the check or money order payable to U.S. Department of Homeland Security, unless:

A. If you live in Guam and are filing your petition there, make it payable to **Treasurer of Guam**.

B. If you live in the U.S. Virgin Islands and are filing your petition there, make it payable to **Commissioner of Finance of the Virgin Islands**.

**NOTE:** Effective July 30, 2007, if you file Form I-485 to adjust your status as a permanent resident, no additional fee is required to also file an application for employment authorization on Form I-765 and/or advance parole on Form I-131. You may file these forms concurrently. If you choose to file the I-765 and/or I-131 separately after the effective date, you must also submit a copy of your I-797C, Notice of Action, receipt as evidence of the filing of an I-485.

**NOTE:** Please spell out U.S. Department of Homeland Security; do not use the initials "USDHS" or "DHS."

**Notice to Those Making Payment by Check.** If you send us a check, it will be converted into an electronic funds transfer (EFT). This means we will copy your check and use the account information on it to electronically debit your account for the amount of the check. The debit from your account will usually take 24 hours, and will be shown on your regular account statement.

You will not receive your original check back. We will destroy your original check, but we will keep a copy of it. If the EFT cannot be processed for technical reasons, you authorize us to process the copy in place of your original check. If the EFT cannot be completed because of insufficient funds, we may try to make the transfer up to two times.

#### **How to Check if the Fees Are Correct.**

The form and biometric fees on this form are current as of the edition date appearing in the lower right corner of this page. However, because USCIS fees change periodically, you can verify if the fees are correct by following one of the steps below:

1. Visit our website at [www.uscis.gov](http://www.uscis.gov), select "Immigration Forms" and check the appropriate fee;
2. Review the Fee Schedule included in your form package, if you called us to request the form or
3. Telephone our National Customer Service Center at 1-800-375-5283 and ask for the fee information.

**NOTE:** If your Form I-485 requires payment of a biometric service fee for USCIS to take your fingerprints, photograph or signature, you can use the same procedure to obtain the correct biometric fee.

If you change your address and you have an application or petition pending with USCIS, you may change your address on-line at [www.uscis.gov](http://www.uscis.gov), click on "Change your address with USCIS" and follow the prompts or by completing and mailing Form AR-11, Alien's Change of Address Card, to:

**U.S. Citizenship and Immigration Services  
Change of Address  
P.O. Box 7134  
London, KY 40742-7134**

For commercial overnight or fast freight services only, mail to:

**U.S. Citizenship and Immigration Services  
Change of Address  
1084-I South Laurel Road  
London, KY 40744**

Any application that is not signed or is not accompanied by the correct application fee will be rejected with a notice that the application is deficient. You may correct the deficiency and resubmit the application. An application is not considered properly filed until accepted by USCIS.

#### **Initial processing.**

Once an application has been accepted, it will be checked for completeness, including submission of the required initial evidence. If you do not completely fill out the form or file it without required initial evidence, you will not establish a basis for eligibility and we may deny your application.

#### **Requests for more information or interview.**

We may request more information or evidence, or we may request that you appear at a USCIS office for an interview. We may also request that you submit the originals of any copy. We will return these originals when they are no longer required.

#### **Interview.**

After you file your application, you may be notified to appear at a USCIS office to answer questions about the application. You will be required to answer these questions under oath or affirmation. You must bring your Arrival-Departure Record (Form I-94) and any passport or official travel document you have to the interview.

#### **Decision.**

You will be notified in writing of the decision on your application.

#### **Selective Service Registration.**

If you are a male at least 18 years old, but not yet 26 years old, and required according to the Military Selective Service Act to register with the Selective Service System, USCIS will help you register.

When your signed application is filed and accepted by USCIS, we will transmit to the Selective Service System your name, current address, Social Security number, date of birth and the date you filed the application. This action will enable the Selective Service System to record your registration as of the filing date of your application.

If USCIS does not accept your application and, if still so required, you are responsible to register with the Selective Service System by using other means, provided you are under 26 years of age. If you have already registered, the Selective Service System will check its records to avoid any duplication.



(NOTE: Men 18 through 25 years old who are applying for student financial aid, government employment or job training benefits should register directly with the Selective Service System or such benefits may be denied. Men can register at a local post office or on the Internet at <http://www.ssa.gov>).

*Travel outside the United States for adjustment of status applicants under sections 209 and 245 of the Act, and Registry applicants under section 249 of the Act.*

Your departure from the United States (including brief visits to Canada or Mexico) constitutes an abandonment of your adjustment of status application, unless you are granted permission to depart and you are inspected upon your return to the United States. Such permission to travel is called "advance parole." To request advance parole, you must file Form I-131, Application for Travel Document, with the appropriate fee at the USCIS office where you applied for adjustment of status.

## 1. Exceptions.

### A. H, L, V or K3/K4 nonimmigrants:

If you are an H, L, V, or K3/K4 nonimmigrant who continues to maintain his or her status, you may travel on a valid H, L, V or K3/K4 visa without obtaining advance parole.

### B. Refugees and Asylees:

If you are applying for adjustment of status one year after you were admitted as a refugee or one year after you were granted asylum, you may travel outside the United States on your valid refugee travel document, if you have one, without the need to obtain advance parole.

## 2. Warning:

Travel outside of the United States may trigger the three and ten year bar to admission under section 212(a)(9)(B)(i) of the Act for adjustment applicants, but not registry applicants. This ground of inadmissibility is triggered if you were unlawfully present in the United States (i.e., you remained in the United States beyond the period of authorized stay) for more than 180 days before you applied for adjustment of status and you travel outside of the United States while your adjustment of status application is pending.

**NOTE:** Only unlawful presence that was accrued on or after April 1, 1997, counts towards the three and ten year bar under section 212(a)(9)(B)(i) of the Act.)

If you become inadmissible under section 212(a)(9)(B)(i) of the Act while your adjustment of status application is pending, you will need a waiver of inadmissibility under section 212(a)(9)(B)(v) of the Act before your adjustment of status application can be approved. This waiver, however, is granted on a case-by-case basis and in the exercise of discretion. It requires a showing of extreme hardship to your United States citizen or lawful permanent resident spouse or parent, unless you are a refugee or asylee. For refugees and asylees, the waiver may be granted for humanitarian reasons, to assure family unity or if it is otherwise in the public interest.

If you knowingly and willfully falsify or conceal a material fact or submit a false document with this Form I-485, we will deny the Form I-485 and may deny any other immigration benefit.

In addition, you will face severe penalties provided by law and may be subject to criminal prosecution.

We ask for the information on this form, and associated evidence, to determine if you have established eligibility for the immigration benefit for which you are filing. Our legal right to ask for this information can be found in the Immigration and Nationality Act, as amended. We may provide this information to other government agencies. Failure to provide this information, and any requested evidence, may delay a final decision or result in denial of your Form I-485.

An agency may not conduct or sponsor an information collection and a person is not required to respond to a collection of information unless it displays a currently valid OMB control number. The public reporting burden for this collection of information is estimated at 5 hours and 15 minutes per response, including the time for reviewing instructions, completing and submitting the form. Send comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden, to: U.S. Citizenship and Immigration Services, Regulatory Management Division, 111 Massachusetts Avenue, N.W., 3rd Floor, Suite 3008, Washington, DC 20529. OMB No. 1615-0023. **Do not mail your application to this address.**

**START HERE - Please type or print in black ink.**

**Part 1. Information about you.**

Family Name		Given Name	Middle Name
Address- C/O			
Street Number and Name			Apt. #
City			
State		Zip Code	
Date of Birth (mm/dd/yyyy)	Country of Birth:		
	Country of Citizenship/Nationality:		
U.S. Social Security #		A # (if any)	
Date of Last Arrival (mm/dd/yyyy)		I-94 #	
Current USCIS Status		Expires on (mm/dd/yyyy)	

**For USCIS Use Only**

Returned	Receipt
Resubmitted	
Reloc Sent	
Reloc Rec'd	
Applicant Interviewed	

**Part 2. Application type. (Check one.)**

I am applying for an adjustment to permanent resident status because:

- a.  an immigrant petition giving me an immediately available immigrant visa number has been approved. (Attach a copy of the approval notice, or a relative, special immigrant juvenile or special immigrant military visa petition filed with this application that will give you an immediately available visa number, if approved.)
- b.  my spouse or parent applied for adjustment of status or was granted lawful permanent residence in an immigrant visa category that allows derivative status for spouses and children.
- c.  I entered as a K-1 fiancé(e) of a United States citizen whom I married within 90 days of entry, or I am the K-2 child of such a fiancé(e). (Attach a copy of the fiancé(e) petition approval notice and the marriage certificate).
- d.  I was granted asylum or derivative asylum status as the spouse or child of a person granted asylum and am eligible for adjustment.
- e.  I am a native or citizen of Cuba admitted or paroled into the United States after January 1, 1959, and thereafter have been physically present in the United States for at least one year.
- f.  I am the husband, wife or minor unmarried child of a Cuban described above in (e) and I am residing with that person, and was admitted or paroled into the United States after January 1, 1959, and thereafter have been physically present in the United States for at least one year.
- g.  I have continuously resided in the United States since before January 1, 1972.
- h.  Other basis of eligibility. Explain (for example, I was admitted as a refugee, my status has not been terminated, and I have been physically present in the U.S. for one year after admission). If additional space is needed, use a separate piece of paper.

I am already a permanent resident and am applying to have the date I was granted permanent residence adjusted to the date I originally arrived in the United States as a nonimmigrant or parolee, or as of May 2, 1964, whichever date is later, and: (Check one.)

- i.  I am a native or citizen of Cuba and meet the description in (e) above.
- j.  I am the husband, wife or minor unmarried child of a Cuban, and meet the description in (f) above.

<p><b>Section of Law</b></p> <input type="checkbox"/> Sec. 209(b), INA <input type="checkbox"/> Sec. 13, Act of 9/11/57 <input type="checkbox"/> Sec. 245, INA <input type="checkbox"/> Sec. 249, INA <input type="checkbox"/> Sec. 1 Act of 11/2/66 <input type="checkbox"/> Sec. 2 Act of 11/2/66 <input type="checkbox"/> Other
<p><b>Country Chargeable</b></p>
<p><b>Eligibility Under Sec. 245</b></p> <input type="checkbox"/> Approved Visa Petition <input type="checkbox"/> Dependent of Principal Alien <input type="checkbox"/> Special Immigrant <input type="checkbox"/> Other
<p><b>Preference</b></p>
<p><b>Action Block</b></p>
<p>To be Completed by Attorney or Representative, if any  <input type="checkbox"/> Fill in box if G-28 is attached to represent the applicant.</p>
<p>VOLAG #</p>
<p>ATTY State License #</p>

**Part 3. Processing information.**

A. City/Town/Village of Birth		Current Occupation	
Your Mother's First Name		Your Father's First Name	
Give your name exactly as it appears on your Arrival/Departure Record (Form I-94)			
Place of Last Entry into the United States (City/State)		In what status did you last enter? (Visitor, student, exchange alien, crewman, temporary worker, without inspection, etc.)	
Were you inspected by a U.S. Immigration Officer? <input type="checkbox"/> Yes <input type="checkbox"/> No			
Nonimmigrant Visa Number		Consulate Where Visa Was Issued	
Date Visa Was Issued (mm/dd/yyyy)	Gender: <input type="checkbox"/> Male <input type="checkbox"/> Female	Marital Status: <input type="checkbox"/> Married <input type="checkbox"/> Single <input type="checkbox"/> Divorced <input type="checkbox"/> Widowed	
Have you ever before applied for permanent resident status in the U.S.?		<input type="checkbox"/> No <input type="checkbox"/> Yes. If you checked "Yes," give date and place of filing and final disposition.	

**B. List your present husband/wife, all of your sons and daughters (If you have none, write "none." If additional space is needed, use separate paper).**

Family Name	Given Name	Middle Initial	Date of Birth (mm/dd/yyyy)
Country of Birth	Relationship	A #	Applying with you? <input type="checkbox"/> Yes <input type="checkbox"/> No
Family Name	Given Name	Middle Initial	Date of Birth (mm/dd/yyyy)
Country of Birth	Relationship	A #	Applying with you? <input type="checkbox"/> Yes <input type="checkbox"/> No
Family Name	Given Name	Middle Initial	Date of Birth (mm/dd/yyyy)
Country of Birth	Relationship	A #	Applying with you? <input type="checkbox"/> Yes <input type="checkbox"/> No
Family Name	Given Name	Middle Initial	Date of Birth (mm/dd/yyyy)
Country of Birth	Relationship	A #	Applying with you? <input type="checkbox"/> Yes <input type="checkbox"/> No
Family Name	Given Name	Middle Initial	Date of Birth (mm/dd/yyyy)
Country of Birth	Relationship	A #	Applying with you? <input type="checkbox"/> Yes <input type="checkbox"/> No

**C. List your present and past membership in or affiliation with every organization, association, fund, foundation, party, club, society or similar group in the United States or in other places since your 16th birthday. Include any foreign military service in this part. If none, write "none." Include the name(s) of organization(s), location(s), dates of membership, from and to, and the nature of the organization(s). If additional space is needed, use a separate piece of paper.**

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**Part 3. Processing information. (Continued)**

Please answer the following questions. (If your answer is "Yes" on any one of these questions, explain on a separate piece of paper and refer to "What Are the General Filing Instructions? Initial Evidence" to determine what documentation to include with your application. Answering "Yes" does not necessarily mean that you are not entitled to adjust status or register for permanent residence.)

1. Have you ever, in or outside the United States:
  - a. knowingly committed any crime of moral turpitude or a drug-related offense for which you have not been arrested?  Yes  No
  - b. been arrested, cited, charged, indicted, fined or imprisoned for breaking or violating any law or ordinance, excluding traffic violations?  Yes  No
  - c. been the beneficiary of a pardon, amnesty, rehabilitation decree, other act of clemency or similar action?  Yes  No
  - d. exercised diplomatic immunity to avoid prosecution for a criminal offense in the United States?  Yes  No
2. Have you received public assistance in the United States from any source, including the United States government or any state, county, city or municipality (other than emergency medical treatment), or are you likely to receive public assistance in the future?  Yes  No
3. Have you ever:
  - a. within the past ten years been a prostitute or procured anyone for prostitution, or intend to engage in such activities in the future?  Yes  No
  - b. engaged in any unlawful commercialized vice, including, but not limited to, illegal gambling?  Yes  No
  - c. knowingly encouraged, induced, assisted, abetted or aided any alien to try to enter the United States illegally?  Yes  No
  - d. illicitly trafficked in any controlled substance, or knowingly assisted, abetted or colluded in the illicit trafficking of any controlled substance?  Yes  No
4. Have you ever engaged in, conspired to engage in, or do you intend to engage in, or have you ever solicited membership or funds for, or have you through any means ever assisted or provided any type of material support to any person or organization that has ever engaged or conspired to engage in sabotage, kidnapping, political assassination, hijacking or any other form of terrorist activity?  Yes  No
5. Do you intend to engage in the United States in:
  - a. espionage?  Yes  No
  - b. any activity a purpose of which is opposition to, or the control or overthrow of, the government of the United States, by force, violence or other unlawful means?  Yes  No
  - c. any activity to violate or evade any law prohibiting the export from the United States of goods, technology or sensitive information?  Yes  No
6. Have you ever been a member of, or in any way affiliated with, the Communist Party or any other totalitarian party?  Yes  No
7. Did you, during the period from March 23, 1933 to May 8, 1945, in association with either the Nazi Government of Germany or any organization or government associated or allied with the Nazi Government of Germany, ever order, incite, assist or otherwise participate in the persecution of any person because of race, religion, national origin or political opinion?  Yes  No
8. Have you ever engaged in genocide, or otherwise ordered, incited, assisted or otherwise participated in the killing of any person because of race, religion, nationality, ethnic origin or political opinion?  Yes  No
9. Have you ever been deported from the United States, or removed from the United States at government expense, excluded within the past year, or are you now in exclusion, deportation, removal or rescission proceedings?  Yes  No
10. Are you under a final order of civil penalty for violating section 274C of the Immigration and Nationality Act for use of fraudulent documents or have you, by fraud or willful misrepresentation of a material fact, ever sought to procure, or procured, a visa, other documentation, entry into the United States or any immigration benefit?  Yes  No
11. Have you ever left the United States to avoid being drafted into the U.S. Armed Forces?  Yes  No
12. Have you ever been a J nonimmigrant exchange visitor who was subject to the two-year foreign residence requirement and have not yet complied with that requirement or obtained a waiver?  Yes  No
13. Are you now withholding custody of a U.S. citizen child outside the United States from a person granted custody of the child?  Yes  No
14. Do you plan to practice polygamy in the United States?  Yes  No

**Part 4. Signature.** *(Read the information on penalties in the instructions before completing this section. You must file this application while in the United States.)*

**Your registration with U.S. Citizenship and Immigration Services.**

"I understand and acknowledge that, under section 262 of the Immigration and Nationality Act (Act), as an alien who has been or will be in the United States for more than 30 days, I am required to register with U.S. Citizenship and Immigration Services. I understand and acknowledge that, under section 265 of the Act, I am required to provide USCIS with my current address and written notice of any change of address within ten days of the change. I understand and acknowledge that USCIS will use the most recent address that I provide to USCIS, on any form containing these acknowledgements, for all purposes, including the service of a Notice to Appear should it be necessary for USCIS to initiate removal proceedings against me. I understand and acknowledge that if I change my address without providing written notice to USCIS, I will be held responsible for any communications sent to me at the most recent address that I provided to USCIS. I further understand and acknowledge that, if removal proceedings are initiated against me and I fail to attend any hearing, including an initial hearing based on service of the Notice to Appear at the most recent address that I provided to USCIS or as otherwise provided by law, I may be ordered removed in my absence, arrested and removed from the United States."

**Selective Service Registration.**

The following applies to you if you are a male at least 18 years old, but not yet 26 years old, who is required to register with the Selective Service System: "I understand that my filing this adjustment of status application with U.S. Citizenship and Immigration Services authorizes USCIS to provide certain registration information to the Selective Service System in accordance with the Military Selective Service Act. Upon USCIS acceptance of my application, I authorize USCIS to transmit to the Selective Service System my name, current address, Social Security Number, date of birth and the date I filed the application for the purpose of recording my Selective Service registration as of the filing date. If, however, USCIS does not accept my application, I further understand that, if so required, I am responsible for registering with the Selective Service by other means, provided I have not yet reached age 26."

**Applicant's Certification**

I certify, under penalty of perjury under the laws of the United States of America, that this application and the evidence submitted with it is all true and correct. I authorize the release of any information from my records that U.S. Citizenship and Immigration Services (USCIS) needs to determine eligibility for the benefit I am seeking.

*Signature* *Print Your Name* *Date* *Daytime Phone Number*

( )

*NOTE: If you do not completely fill out this form or fail to submit required documents listed in the instructions, you may not be found eligible for the requested document and this application may be denied.*

**Part 5. Signature of person preparing form, if other than above. (sign below)**

I declare that I prepared this application at the request of the above person and it is based on all information of which I have knowledge.

*Signature* *Print Your Full Name* *Date* *Phone Number (Include Area Code)*

( )

*Firm Name and Address*

*E-Mail Address (if any)*

## CHILD STATUS PROTECTION ACT

Created by David Nazer, El Paso JLC, under the supervision of Judge Penny M. Smith; 4/2/04

**STEP 1: DOES CHILD STATUS PROTECTION ACT (CSPA) APPLY?** *Note: K-4 and V visa applicants can never benefit from CSPA.*

<u>Date Petition was filed.</u>	<u>Does CSPA Apply?</u>	<u>What to do next</u>
Petition Approved AFTER 8/6/02	CSPA must be considered.	Go to Step 2.
Petition Approved BEFORE 8/6/02 but final determination has not been made on the application.	Maybe	Look down this table.
Petition Approved before 8/6/02; <u>And</u> Alien aged out on or after 8/6/02.	YES	Go to Step 2.
Petition Approved before 8/6/02; <u>And</u> Alien aged out before 8/6/02; <u>And</u> alien had applied for a visa before aging out; <u>And</u> alien was refused visa under §221(g);	YES	Go to Step 2.
Petition Approved before 8/6/02; <u>And</u> alien aged out before 8/6/02; <u>And</u> alien failed to apply for visa before aging out.	NO	Analysis completed, CSPA does not apply.
Petition Approved before 8/6/02 & alien aged out before 8/6/02 <u>And</u> alien applied after aging out; <u>And</u> alien was denied visa on the basis of aging out.	NO	Analysis completed, CSPA does not apply.

### STEP 2: AGING OUT FORMULAS

**AGING OUT = CHILD'S CALCULATED AGE IS OVER 21**

**45 DAY RULE under PATRIOT ACT =** For any petition filed before 9/11/01, an alien attached to that petition remains eligible for child status (does not age out) for 45 days after turning 21.

<u>Covered class of people.</u>	<u>Calculating "Age" of alien.</u>	<u>What to do next.</u>
<b>Immediate Relatives</b> under § 201(b)(2)(A)(i) Children of United States Citizen (visa symbol IR-2), Orphan adopted abroad by United States Citizen (visa symbol IR-3), and Orphan to be adopted in United States (visa symbol IR-4).	Age of alien beneficiary on the date the petition was filed (visas are always available) under § 204 to classify alien as immediate relative.	Analysis completed.

<b>Sons &amp; daughters of Naturalized Citizens</b> (LPR previously filed I-130 for alien child & naturalized). Petition filed under § 203(a)(2)(A).	Age of alien beneficiary on the date that the petitioner parent naturalized. § 201(f)(2).	Analysis Completed.
<b>Termination of Marriage (Divorce/Annulment) of son or daughter of United States Citizen</b> where petition under § 204 initially filed for UNMARRIED alien under § 203(a)(3) CONVERTS TO AN IMMEDIATE RELATIVE or F-1.	Age of alien beneficiary on the date that alien beneficiary's marriage was lawfully terminated. § 201(f)(3).	Analysis completed.
<b>All Preference Cases</b> (sons and daughters of LPRs). § 203(h)(1) & § 203(a)(2)(A) (children of LPR) or § 203(d) (child defined in 101(b)(1)(A), (B), (C), (D), & (E)).	Age of alien when visa preference number first becomes available MINUS the number of days to adjudicate the petition (time between filing petition and approval of the petition). 203(h)(1)(A) & (B).	<b>1 year filing deadline.</b> 203(h)(1)(A) - CSPA ONLY APPLIES IF alien sought to acquire LPR status within 1 year of preference visa becoming available.

How to get Visa Bulletin on-line: <http://CADATA.CA.STATE.GOV>

**1 YEAR REQUIREMENT § 203(h)(1)(A)** (Petition is filed under § 204 for classification as alien child under § 203(a)(2)(A)). Applicant would be considered to have sought to acquire LPR status on the date of the application as an LPR, which must be done within one year of the visa preference becoming available (priority date becoming current). Derivatives must also take the required steps within one year (or principal can act as derivative's agent and take the required steps on derivative's behalf).

**DOCUMENTS REQUIRED FOR COMPUTATION OF AGE** *\*\*Note: The alien retains the same CSPA age throughout the pendency of the case and must continue to satisfy the criteria for "child," i.e., unmarried.*

- the alien's date of birth;
- the immigrant visa category;
- whether the alien is a principal or derivative;
- whether the petitioner naturalized and if so, the date of naturalization;
- the alien's marital status and, if ever married, the dates of marriage and dates of divorces;
- the date the petition was filed;
- the date the petition was approved;
- the date the priority date became current;
- the alien's age on the date that a visa became available (i.e., age on date of petition approval or on date priority date became current, whichever is later);
- the date the alien submitted the DS-230 Part I (or, in following to join adjustment cases, the date the adjusting principal filed the I-824);
- the date(s) the principal and relevant derivative alien applied for the IV;
- the outcome of any IV applications made prior to the CSPA's effective date (if any).

## Application of Section 212(a)(9) of the Act <sup>1</sup>

Set forth below is a 4-step procedure for determining whether section 212(a)(9) of the Act applies. It is important to remember that, where 212(a)(9) applies, all three subsections - (A), (B) and (C) - might provide separate bars to reentry in any given case.

**Step 1:** Determine whether section 212(a)(9) applies.

Has the alien previously departed the US?

If not, 212(a)(9) does not apply.

If so, go to **step 2**. [Section 212(a)(9) applies to aliens who have previously physically departed the US and are now either seeking admission, or have reentered (or attempted to reenter) without inspection.]

**Step 2:** Determine whether section 212(a)(9)(A) applies.

Did the alien's previous departure occur after the issuance of a removal or deportation order?

If not, (A) does not apply. Go to **step 4**. [Section 212(a)(9)(A) only applies to aliens who were ordered removed or who departed the US while an order of removal was outstanding.]

If so, go to **step 3**.

**Step 3:** Determine whether section 212(a)(9)(A)(i) OR (ii) applies. (Only one will apply)

Was the prior order issued to the alien when he was an arriving alien?

If so, 212(a)(9)(A)(i) applies. The alien is inadmissible for 5 years.

If not, 212(a)(9)(A)(ii) applies. The alien is inadmissible for 10 years.

**Except:** Under section 212(a)(9)(A)(iii), the AG may consent in advance to the alien applying for readmission.

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<sup>1</sup> From Office of Immigration Litigation Training Materials.



**Step 4:** Determine whether section 212(a)(9)(B)(i) OR (ii) OR 212(a)(9)(C)(i) applies.

Was alien unlawfully present [prior to a departure from the US] for more than 180 days, but less than 1 year?

If so, (B)(i) applies - the alien is inadmissible for 3 years.

Was alien unlawfully present for more than 1 year?

If so, (B)(ii) applies - the alien is inadmissible for 10 years.

**Except:** The AG may waive inadmissibility under 212(a)(9)(B) in the case of an immigrant who can show extreme hardship to USC/LPR spouse or parent.

Has the alien attempted to reenter or entered the US unlawfully AFTER having been (1) unlawfully present in the US for more than 1 year OR (2) ordered removed.

If so, section 212(a)(9)(C)(i) applies - the alien is inadmissible.

**Except:** An alien who is inadmissible under 212(a)(9)(C) may apply for a waiver IF he is seeking admission more than 10 years after last departure from the US and AG consents to re-application.

**Waiver:** under certain circumstances, section 212(a)(9)(C)(i) can be waived in the case of an alien who is a VAWA self-petitioner.

## Visa Bulletin

Number 117  
Volume VIII  
Washington, D.C.

### VISA BULLETIN APRIL 2008

#### A. STATUTORY NUMBERS

1. This bulletin summarizes the availability of immigrant numbers during April. Consular officers are required to report to the Department of State documentarily qualified applicants for numerically limited visas; the Bureau of Citizenship and Immigration Services in the Department of Homeland Security reports applicants for adjustment of status. Allocations were made, to the extent possible under the numerical limitations, for the demand received by March 11th in the chronological order of the reported priority dates. If the demand could not be satisfied within the statutory or regulatory limits, the category or foreign state in which demand was excessive was deemed oversubscribed. The cut-off date for an oversubscribed category is the priority date of the first applicant who could not be reached within the numerical limits. Only applicants who have a priority date earlier than the cut-off date may be allotted a number. Immediately that it becomes necessary during the monthly allocation process to retrogress a cut-off date, supplemental requests for numbers will be honored only if the priority date falls within the new cut-off date.

2. Section 201 of the Immigration and Nationality Act (INA) sets an annual minimum family-sponsored preference limit of 226,000. The worldwide level for annual employment-based preference immigrants is at least 140,000. Section 202 prescribes that the per-country limit for preference immigrants is set at 7% of the total annual family-sponsored and employment-based preference limits, i.e., 25,620. The dependent area limit is set at 2%, or 7,320.

3. Section 203 of the INA prescribes preference classes for allotment of immigrant visas as follows:

#### FAMILY-SPONSORED PREFERENCES

**First:** Unmarried Sons and Daughters of Citizens: 23,400 plus any numbers not required for fourth preference.

**Second:** Spouses and Children, and Unmarried Sons and Daughters of Permanent Residents: 114,200, plus the number (if any) by which the worldwide family preference level exceeds 226,000, and any unused first preference numbers:

A. Spouses and Children: 77% of the overall second preference limitation, of which 75% are exempt from the per-country limit;

B. Unmarried Sons and Daughters (21 years of age or older): 23% of the overall second preference limitation.

**Third:** Married Sons and Daughters of Citizens: 23,400, plus any numbers not required by first and second preferences.

**Fourth:** Brothers and Sisters of Adult Citizens: 65,000, plus any numbers not required by first three preferences.

#### EMPLOYMENT-BASED PREFERENCES

**First:** Priority Workers: 28.6% of the worldwide employment-based preference level, plus any numbers not required for fourth and fifth preferences.

**Second:** Members of the Professions Holding Advanced Degrees or Persons of Exceptional Ability: 28.6% of the worldwide employment-based preference

level, plus any numbers not required by first preference.

**Third: Skilled Workers, Professionals, and Other Workers:** 28.6% of the worldwide level, plus any numbers not required by first and second preferences, not more than 10,000 of which to "Other Workers".

**Fourth: Certain Special Immigrants:** 7.1% of the worldwide level.

**Fifth: Employment Creation:** 7.1% of the worldwide level, not less than 3,000 of which reserved for investors in a targeted rural or high-unemployment area, and 3,000 set aside for investors in regional centers by Sec. 610 of P.L. 102-395.

4. INA Section 203(e) provides that family-sponsored and employment-based preference visas be issued to eligible immigrants in the order in which a petition in behalf of each has been filed. Section 203(d) provides that spouses and children of preference immigrants are entitled to the same status, and the same order of consideration, if accompanying or following to join the principal. The visa prorating provisions of Section 202(e) apply to allocations for a foreign state or dependent area when visa demand exceeds the per-country limit. These provisions apply at present to the following oversubscribed chargeability areas: CHINA-mainland born, INDIA, MEXICO, and PHILIPPINES.

5. On the chart below, the listing of a date for any class indicates that the class is oversubscribed (see paragraph 1); "C" means current, i.e., numbers are available for all qualified applicants; and "U" means unavailable, i.e., no numbers are available. (NOTE: Numbers are available only for applicants whose priority date is earlier than the cut-off date listed below.)

Family	All Chargeability Areas Except Those Listed	CHINA-mainland born	INDIA	MEXICO	PHILIPPINES
1st	22FEB02	22FEB02	22FEB02	08JUL92	01MAR93
2A	08MAY03	08MAY03	08MAY03	01MAY02	08MAY03
2B	22MAR99	22MAR99	22MAR99	01APR92	01FEB97
3rd	22MAY00	22MAY00	22MAY00	22JUL92	01APR91
4th	22JUL97	15DEC96	22NOV96	01DEC94	22FEB86

\*NOTE: For April, 2A numbers EXEMPT from per-country limit are available to applicants from all countries with priority dates earlier than 01MAY02. 2A numbers SUBJECT to per-country limit are available to applicants chargeable to all countries EXCEPT MEXICO with priority dates beginning 01MAY02 and earlier than 08MAY03. (All 2A numbers provided for MEXICO are exempt from the per-country limit; there are no 2A numbers for MEXICO subject to per-country limit.)

	All Chargeability Areas Except Those Listed	CHINA-mainland born	INDIA	MEXICO	PHILIPPINES
<b>Employment-Based</b>					
1st	C	C	C	C	C
2nd	C	01DEC03	01DEC03	C	C
3rd	01JUL05	08FEB03	01OCT01	01OCT01	01JUL05

Other Workers	01MAR02	01MAR02	01MAR02	01MAR02	01MAR02
4th	C	C	C	C	C
Certain Religious Workers	C	C	C	C	C
5th	C	C	C	C	C
Targeted Employment Areas/ Regional Centers	C	C	C	C	C

The Department of State has available a recorded message with visa availability information which can be heard at: (area code 202) 663-1541. This recording will be updated in the middle of each month with information on cut-off dates for the following month.

Employment Third Preference Other Workers Category: Section 203(e) of the NACARA, as amended by Section 1(e) of Pub. L. 105-139, provides that once the Employment Third Preference Other Worker (EW) cut-off date has reached the priority date of the latest EW petition approved prior to November 19, 1997, the 10,000 EW numbers available for a fiscal year are to be reduced by up to 5,000 annually beginning in the following fiscal year. This reduction is to be made for as long as necessary to offset adjustments under the NACARA program. Since the EW cut-off date reached November 19, 1997 during Fiscal Year 2001, the reduction in the EW annual limit to 5,000 began in Fiscal Year 2002.

**B. DIVERSITY IMMIGRANT (DV) CATEGORY**

Section 203(c) of the Immigration and Nationality Act provides a maximum of up to 55,000 immigrant visas each fiscal year to permit immigration opportunities for persons from countries other than the principal sources of current immigration to the United States. The Nicaraguan and Central American Relief Act (NACARA) passed by Congress in November 1997 stipulates that beginning with DV-99, and for as long as necessary, up to 5,000 of the 55,000 annually-allocated diversity visas will be made available for use under the NACARA program. This reduction has resulted in the DV-2008 annual limit being reduced to 50,000. DV visas are divided among six geographic regions. No one country can receive more than seven percent of the available diversity visas in any one year.

For April, immigrant numbers in the DV category are available to qualified DV-2008 applicants chargeable to all regions/eligible countries as follows. When an allocation cut-off number is shown, visas are available only for applicants with DV regional lottery rank numbers **BELOW** the specified allocation cut-off number:

Region	All DV Chargeability Areas Except Those Listed Separately	
AFRICA	21,500	Except: Egypt: 17,900 Ethiopia: 14,150 Nigeria: 9,900
ASIA	9,100	
EUROPE	20,625	
NORTH AMERICA	11	

(BAHAMAS)		
OCEANIA	1,200	
SOUTH AMERICA, and the CARIBBEAN	1,425	

Entitlement to immigrant status in the DV category lasts only through the end of the fiscal (visa) year for which the applicant is selected in the lottery. The year of entitlement for all applicants registered for the DV-2008 program ends as of September 30, 2008. DV visas may not be issued to DV-2008 applicants after that date. Similarly, spouses and children accompanying or following to join DV-2008 principals are only entitled to derivative DV status until September 30, 2008. DV visa availability through the very end of FY-2008

cannot be taken for granted. Numbers could be exhausted prior to September 30.

**C. ADVANCE NOTIFICATION OF THE DIVERSITY (DV) IMMIGRANT CATEGORY RANK CUT-OFFS WHICH WILL APPLY IN MAY**

For May, immigrant numbers in the DV category are available to qualified DV-2008 applicants chargeable to all regions/eligible countries as follows. When an allocation cut-off number is shown, visas are available only for applicants with DV regional lottery rank numbers BELOW the specified allocation cut-off number:

Region	All DV Chargeability Areas Except Those Listed Separately	
AFRICA	26,700	Except: Egypt: 20,500 Ethiopia: 16,000 Nigeria: 11,600
ASIA	10,500	
EUROPE	23,500	
NORTH AMERICA (BAHAMAS)	12	
OCEANIA	1,400	
SOUTH AMERICA, and the CARIBBEAN	1,550	

**D. INDIA EMPLOYMENT SECOND PREFERENCE VISA AVAILABILITY**

Section 202(a)(5) of the Immigration and Nationality Act provides that if total demand will be insufficient to use all available numbers in a particular Employment preference category in a calendar quarter, then the unused numbers may be made available without regard to the annual "per-country" limit. It has been determined that based on the current level of demand being received, primarily by Citizenship and Immigration Services Offices, there would be otherwise unused numbers in the Employment Second preference category. As a result, numbers have once again become available to the India Employment Second preference category. The rate of number use in the Employment Second preference category will continue to be monitored, and it may be necessary to make adjustments should the level of demand increase substantially.

**E. SI CATEGORY VISA AVAILABILITY FOR IRAQI AND AFGHANI TRANSLATORS**

The National Visa Center has already scheduled 485 Special Immigrant Translator cases for interview in

FY-2008. Of these, 332 SIVs have been issued to principal applicants and there are another 170 cases scheduled for March. Given the number of cases scheduled, along with the 221(g) cases still pending, it is likely that the FY-2008 numerical limitation of 500 visas in this category will soon be reached.

**E. OBTAINING THE MONTHLY VISA BULLETIN**

The Department of State's Bureau of Consular Affairs offers the monthly "Visa Bulletin" on the INTERNET'S WORLDWIDE WEB. The INTERNET Web address to access the Bulletin is:

**<http://travel.state.gov>**

From the home page, select the VISA section which contains the Visa Bulletin.

To be placed on the Department of State's E-mail subscription list for the "Visa Bulletin", please send an E-mail to the following E-mail address:

**[listserv@callist.state.gov](mailto:listserv@callist.state.gov)**

and in the message body type:

**Subscribe Visa-Bulletin *First name/Last name***  
**(example: *Subscribe Visa-Bulletin Sally Doe*)**

To be removed from the Department of State's E-mail subscription list for the "Visa Bulletin", send an e-mail message to the following E-mail address:

**[listserv@callist.state.gov](mailto:listserv@callist.state.gov)**

and in the message body type: **Signoff Visa-Bulletin**

The Department of State also has available a recorded message with visa cut-off dates which can be heard at: (area code 202) 663-1541. The recording is normally updated by the middle of each month with information on cut-off dates for the following month.

Readers may submit questions regarding Visa Bulletin related items by E-mail at the following address:

**[VISABULLETIN@STATE.GOV](mailto:VISABULLETIN@STATE.GOV)**

(This address cannot be used to subscribe to the Visa Bulletin.)

Department of State Publication 9514  
CAVO:March 11, 2008

Immigration Briefings  
October 2007

Immigration Law in Motion--The Changing Landscape of Motions for Continuance, Change of Venue, Reopening, Remand, and Reconsideration Before the Immigration Judges, the Board of Immigration Appeals, and the Federal Circuit Courts

by

Anne J. Greer and Teresa L. Donovan [FN1].

Motions serve as pivotal tools of the immigration practitioner's trade. This is proving increasingly true in today's immigration practice. In the past, when immigration law presented a quieter front, the variety and volume of motions were more circumscribed. Today, skillful motions practice assumes an expanded and increasingly important role in response to frequent statutory, regulatory, and process change, as well as the growing body of administrative and judicial precedent addressing motions.

When properly deployed, motions contribute to achieving the adjudicatory objectives of fairness to the parties and efficiency of process. The practitioner should aim to meet these goals by addressing the requisite legal standards as set forth by the Immigration and Nationality Act (the Act) and regulations, [FN1] administrative guidance, [FN2] and case law. Vital procedural guidance regarding filing requirements for various motions can also be found in the practice manual for the Board of Immigration Appeals (the Board, or BIA) and individual immigration court operating procedures, which are available online at [www.usdoj.gov/eoir](http://www.usdoj.gov/eoir), [FN3] The Office of the Chief Immigration Judge (OCIJ) is developing a nationwide practice manual pursuant to an August 2006 directive from the former Attorney General. [FN4] It is critical that the movant carefully tailor the request to these requirements. In ad-

dition to following the "recipe" for a particular motion, the movant must file it in the proper forum, i.e., the immigration court or the Board. [FN5] Further, given that judicial review of a Board's administrative appellate decision occurs in the federal circuit in which the immigration judge concluded the removal proceeding, relevant federal circuit law should be consulted. [FN6] This is particularly significant because the circuit courts employ different analyses in ascertaining the circumstances under which they retain subject matter jurisdiction to review the denial of these motions by immigration judges and the Board in light of statutory changes to judicial review of immigration matters enacted in 1996 and 2005. Understanding these nuances is important in preparing the motion initially to preserve judicial review by framing arguments appropriately as warranted by the facts.

This *Briefing* will examine the evolution of specific, discretionary motions before the immigration court, the Board, and the Federal Circuit Courts of Appeal; i.e., motions for continuance, change of venue, reopening, remand, and reconsideration. Each motion will be addressed in terms of history, applicable procedural and substantive requirements, administrative appellate review before the Board, and judicial review in the circuit courts.

#### SPECIFIC MOTIONS BEFORE THE IMMIGRATION JUDGE AND THE BOARD

##### *Motions for Continuance*

**Authority.** The Act does not contain specific statutory authority for the adjudication of motions for continuances. Some courts have recognized an implicit authority in the section of the Act authorizing immigration judges to "conduct proceedings for deciding the inadmissibility or deportability of an alien." [FN7] In this view, the implicit statutory authority is implemented by the regulation governing continuances. [FN8]

cause she did not receive certain "written material" relating to the case, which she intended to use as evidence, until one day before the hearing. [FN21] She next asserted that she had scheduled a meeting with an employee of a translating service about "some pertinent information regarding the hearing as to witnesses and allegations of fact, etc.," including obtaining translation of a letter written by the alien. [FN22] The translating service employee failed to attend the meeting and counsel did not receive the translated letter. The Board upheld the immigration judge's denial of the continuance request, finding first that the receipt of the "written material" a day in advance of the hearing did not prevent counsel from including it as evidence. Further, the alien could have testified as to the contents of the untranslated letter and other "pertinent information" at the hearing.

While the decision to grant or deny a motion for continuance is within the "sound discretion" of the immigration judge, the exercise of discretion is limited. For example, the alien is entitled to certain procedural protections, including the guarantee of a reasonable opportunity to present evidence on his or her own behalf. [FN23] Further, mere efficiency in terms of completing the case is not a sufficient reason to deny a continuance based on a justifiable request for more time. [FN24] Yet, the avoidance of unreasonably protracted delay can support the denial of a continuance. [FN25]

The good cause standard also applies to the immigration judge when exercising his or her authority to grant a continuance. The immigration judge has a duty not to continue the matter for a period of time longer than reasonably needed to serve the purpose. For example, an immigration judge did not act with good cause by granting a one-year continuance to give the respondent more time to establish rehabilitation in furtherance of an application for discretionary relief. [FN26] Case law from the reviewing circuit court should be consulted for examples of how the immigration judge's evaluation of the good cause standard is reviewed for abuse of

discretion. [FN27]

**Continuances Pending Adjudication of Ancillary Petitions.** In addition to time for preparation, including procuring and assessing evidence, respondents frequently seek continuances for the Department of Homeland Security (DHS) to adjudicate a benefits petition that would enable them to apply for relief from removal before the immigration judge; e.g., adjustment of status. [FN28]

Eligibility for adjustment of status requires an alien who has been admitted or paroled into the United States to file an application for adjustment of status establishing that he has an immigrant visa immediately available and is admissible to the United States. The availability of the immigrant visa in many cases depends upon the favorable adjudication by DHS of a visa petition filed by an immediate family member or an employer. This process may take a lengthy period of time and requires different steps, depending on whether the alien is seeking a family-based or employment-based adjustment. Under the Board's decision in *Matter of Garcia*, the immigration judge may grant a continuance pending the adjudication of the underlying visa petition by DHS. [FN29]

Significant litigation arises over whether an immigration judge or the Board abused discretion in denying a continuance to await the adjudication of an immigrant visa petition. [FN30] Case law from the Eleventh Circuit Court of Appeals provides useful insight into the circumstances warranting delay of the proceedings to await the outcome of the ancillary adjudication. In *Bull v. INS*, the respondent's United States citizen wife filed a visa petition on his behalf, which remained pending adjudication at the time of the deportation hearing. [FN31] The immigration judge denied the respondent's request for a continuance to await the outcome of the visa petition adjudication by DHS. Without the approved visa petition, the respondent did not have a visa immediately available, and he had not filed the adjustment application. In addition, the immigration judge concluded the respondent could not present



vests with the immigration court system, which consists of over 50 immigration courts nationwide. [FN44] The DHS determines venue in a case when it files the NTA with an immigration court. [FN45] Jurisdiction and venue are distinct. Jurisdiction remains within the immigration court system until the matter is decided by an immigration judge and an appeal is filed. [FN46] Venue may be altered by filing the proper motion.

The immigration judge's authority to rule on a motion to change venue, subsequent to the filing of the NTA by DHS, has long been recognized by case law. In *Matter of K-*, the Board stated that "the power to rule...for change of venue...lies solely with the hearing officer [now immigration judge]." [FN47] The Board did not elaborate on the source of this power, treating it as an inherent authority belonging to the adjudicator. In *Matter of Seren*, the Board clarified for purposes of deportation proceedings that, "[m]atters involving procedural due process in a hearing before an immigration judge are under his jurisdiction. Venue is, of course, such a matter." [FN48] In *Seren*, the Board premised the power to decide venue on the regulation at former 8 C.F.R. § 242.8(a), which granted the immigration judge the authority to take such action as "may be appropriate to the disposition of the case."

In *Matter of Wadas*, the Board based the immigration judge's authority to adjudicate motions to change venue in exclusion proceedings on former 8 C.F.R. § 236.1, which provided: "... immigration judges shall also exercise the discretion and authority conferred upon the Attorney General by the Act as is appropriate and necessary for the disposition of such cases." [FN49] The judge's authority over venue "was committed to the sound exercise of his discretion." [FN50] The Board determined in *Matter of Alphonse* [FN51] that the immigration judge's authority over venue did not extend to an alien in Immigration and Naturalization Service (INS) detention, reasoning that consideration of parole and detention matters are exclusively within the INS District Director's jurisdiction. [FN52]

In 1987, the regulations were amended to specifically address motions to change venue and confirm the immigration judges' authority to adjudicate them, irrespective of whether the alien was detained, or was in exclusion or deportation proceedings. [FN53] The new venue regulation read: "The Immigration Judge, for good cause, may change venue on motion by one of the parties, or upon his or her own authority after the charging document has been filed with the Office of the Chief Immigration Judge." [FN54] According to the rule's supplementary information, the rule was designed to provide consistency, clarity, and fairness, "[making] uniform the Immigration Judge's authority to change venue in all proceedings." [FN55]

In 1992, the regulations were amended to eliminate the immigration judges' *sua sponte* authority to grant a change of venue. [FN56] The amended regulation at former 8 C.F.R. § 3.20(b) provided: "The Immigration Judge, for good cause, may change venue only upon motion by one of the parties, after the charging document has been filed with the Office of the Chief Immigration Judge." The current regulation at 8 C.F.R. § 1003.20(b) remains largely unchanged. Thus, the immigration judge has jurisdiction to rule on a motion to change venue filed by either party, but has no authority to order a change of venue on his or her own motion. [FN57]

**Good Cause standard.** *Matter of Rahman* remains the most widely cited case addressing what constitutes "good cause" for purposes of requesting a change of venue. [FN58] *Rahman* cautions careful consideration of the relevant factors and requires thoughtful and thorough presentation of valid reasons supporting a request for a change of venue. Good cause is determined by balancing factors relevant to the venue issue, including the respondent's residence, location of respondent's counsel, location and availability of witnesses and evidence, administrative convenience, and expeditious treatment of the case. In *Rahman*, the respondent requested a change of venue from the immigration judge based

The advent of televideo conferencing, telephonic hearings, and administrative control courts results in cross-jurisdictional hearing scenarios. An immigration judge may be sitting in Falls Church, Virginia, and appearing by televideo at the Los Angeles Immigration Court, where the parties and the interpreter are present. Because the Act vests venue for circuit court judicial review in the circuit where the immigration judge completed proceedings, the question arises whether the immigration judge in Virginia hearing a case in California should apply the law of the Fourth or Ninth Circuit Court.

Several courts have commented on the lack of clarity generated by the differing locations of the parties and the immigration judges. [FN70] In response, the Executive Office for Immigration Review (EOIR) issued a proposed rule to amend 8 C.F.R. §§ 1003.14(a) and 1003.20(a) clarifying that "venue shall lie at the place of the hearing as identified on the charging document or initial hearing notice, unless an immigration judge has granted a change of venue to a different location." [FN71] The proposed regulation accords with Interim Operating Policies and Procedures Memorandum No. 04-06, *Hearings Conducted through Telephone and Video Conference* (OPPM 04-06). [FN72] Under the proposed rule, the designated hearing location controls for law of the circuit purposes even if an immigration judge is conducting the hearing by video conference in an alternative location or if the case records are filed with an administrative control court in a different city.

***Motions to Reopen Before the Immigration Courts and the Board [FN73]***

**Authority.** A motion to reopen immigration proceedings can be filed by either party and is based on new facts or circumstances arising after the issuance of a final administrative order. [FN74] Since the 1940s, federal regulations have provided that a motion to reopen "shall state the new facts to be proven at a hearing to be held if the motion is granted, and shall be supported by affidavits or oth-

er evidentiary material." [FN75]

Motions to reopen immigration proceedings have long been disfavored because, like petitions for rehearing and motions for a new trial based on newly discovered evidence in the federal courts, there is a public interest in bringing finality to proceedings. [FN76] The United States Supreme Court has found that this "is especially true in a deportation proceeding, where, as a general matter, every delay works to the advantage of the deportable alien who wishes merely to remain in the United States." [FN77]

In 1990, because of perceived abuses in the filing of motions to reopen or reconsider immigration proceedings, Congress directed the Attorney General to issue regulations setting time and number limitations on motions. [FN78] Congress stated that "[U]nless the Attorney General finds reasonable evidence to the contrary, the regulations should state that such motions be made within 20 days of the date of the final determination in the proceeding and that such motions be limited to one motion to reopen and one motion to reconsider." [FN79] As directed, the Justice Department's initial proposed regulations set a 20-day time limit on motions to reopen and reconsider and a numerical limit of one. [FN80] After public comment, the Attorney General promulgated revised final regulations effective July 1, 1996, extending the 20-day time limit to a 30-day limit for motions to reconsider and a 90-day limit for motions to reopen. [FN81] The regulations incorporated the number limit so that an alien could file only one motion to reopen and one motion to reconsider. [FN82] Five months later, Congress codified these time and number restrictions on motions to reopen and motions to reconsider; this is the current law. [FN83]

**Procedural Requirements.** The regulatory provisions governing motions to reopen are framed in the negative, i.e., "a motion shall not be granted" unless a certain condition is met. The regulations do not require reopening in any particular case. [FN84] Thus, the regulations governing motions to

tion. [FN101] Lin unlawfully reentered the United States in 1999, and, in 2004, filed a motion to reopen his original removal hearing before the immigration judge. The immigration judge denied the motion based on a lack of jurisdiction. The Board affirmed the immigration judge's decision. The Board found that Lin's prior removal order was subject to reinstatement pursuant to § 241(a)(5) of the Act and that Lin was barred from seeking any benefit under the Act pursuant to § 208(d)(6) of the Act, because he had filed a frivolous asylum application. It appears that the motion was not denied based on Lin's departure from the United States nor on the untimeliness of the motion.

The government invoked the regulatory bar on post-departure motions to reopen in response to Lin's petition for review filed with the Ninth Circuit. The Ninth Circuit found, *inter alia*, that regulations at 8 C.F.R. § 1003.23(b)(1) do not always preclude an alien who has been removed from filing a motion to reopen. Looking at the regulation's first sentence, the court observed that it is phrased in the present tense. [FN102] Therefore, when Lin departed the country in 1997, he was *not* the subject of proceedings because his proceedings were complete and, consequently, he could file a motion to reopen despite his departure from this country.

In *William v. Gonzales*, the Fourth Circuit Court of Appeals invalidated this regulatory bar on post-departure motions to reopen. [FN103] In that case, William, a lawful permanent resident, was removed from the United States in July 2005 due to his 1997 conviction for a crime involving moral turpitude. Within five months of his departure, William's 1997 conviction was vacated and he sought reopening before the Board. The Board denied the motion pursuant to 8 C.F.R. § 1003.2(d) because William had departed the United States. The Fourth Circuit agreed with William that federal regulations at 8 C.F.R. § 1003.2(d) (barring post-departure motions to reopen) conflict with § 240(c)(7)(A) of the Act (authorizing an alien to file one motion to reopen proceedings) because the Act has no require-

ment that only aliens who are present in the United States may file a motion to reopen. The court invalidated the regulation and remanded the case to the Board. In his strong dissent, Chief Justice Williams asserted that he was unable "to conclude that Congress has clearly signaled its intention to repeal the departure bar at 8 C.F.R. § 1003.2(d)." [FN104]

**Time and Number Limitations.** An alien may file only one motion to reopen, whether before the immigration judge or the Board, and the motion must be filed within 90 days of the date of the entry of the final administrative order in the case. [FN105] These time and number limitations do not apply to a DHS motion to reopen removal proceedings filed before the immigration judge or the Board. [FN106] For purposes of calculating the motions deadline, the "entry" of a final administrative order refers "to the date that a designated adjudicator renders a binding decision." [FN107] The 90-day time limit cannot be extended. The filing of a petition for review in federal circuit court does not extend the time limit for filing a motion to reopen. [FN108] A motion is deemed filed when received at the immigration court or the Board. [FN109]

The time and number limitations on motions to reopen are not absolute. There are four narrow exceptions to these time and number restrictions on motions to reopen. [FN110] However, even if a motion falls within one of these exceptions, the motion must still meet the other general motions requirements.

The first exception to the time and number limitations on motions to reopen arises in the context of *in absentia* removal, deportation, and exclusion hearings where an alien is ordered removed, deported, or excluded in his absence due to his failure to appear at a scheduled hearing. The regulations and the Act provide different time limits on motions to reopen and rescind orders entered *in absentia*. An alien who fails to attend a scheduled hearing due to exceptional circumstances must file a motion to reopen and rescind the *in absentia* order within 180 days after the date of the order of removal. An alien

Motions to Reopen and Voluntary Departure.

Another important consideration in motions practice is the interplay between the statutory and regulatory provisions governing voluntary departure and those governing motions to reopen. [FN126] As stated, with few exceptions, an alien must file a motion to reopen within 90 days of the issuance of a final administrative order. The statutory deadlines for voluntarily departing the United States are different from the deadlines for filing motions to reopen.

Rather than entering a removal order, an immigration judge may grant an alien a period of time in which to voluntarily depart the country. [FN127] An alien who is granted voluntary departure prior to the completion of removal proceedings may be granted a voluntary departure period up to 120 days. [FN128] An alien who is granted voluntary departure at the conclusion of proceedings may be granted up to 60 days in which to voluntarily depart. [FN129] An alien who does not depart the United States within the authorized period of voluntary departure is ineligible for cancellation of removal, adjustment of status, and registry for a 10-year period unless the alien can establish exceptional circumstances for his failure to depart. [FN130]

Thus, the issue is whether the timely filing of a motion to reopen tolls the voluntary departure period. Stated differently, the question is whether the filing of a motion to reopen stays the voluntary departure period while the Board adjudicates the motion to reopen. To date, the Board has not issued a precedent decision on this precise issue under the current statutory provisions. [FN131]

In practice, it is nearly impossible for an immigration judge or the Board to adjudicate a motion to reopen within the 60- or 120-day period of voluntary departure. Thus, an alien who files a timely motion to reopen to apply for cancellation, adjustment of status, or registry will most likely become ineligible for such relief under § 240B(d) of the Act if he waits in this country while the motion is adju-

icated. [FN132] Moreover, if the alien departs the country while the motion is pending, the motion is automatically withdrawn. [FN133] Although aliens who accept voluntary departure must be given notice of the consequences of their failure to timely depart the United States, [FN134] the "joint effect of these provisions is practically to foreclose the availability of motions to reopen in most cases where the alien has received voluntary departure." [FN135]

There is a circuit court split on whether a motion to reopen filed within the voluntary departure period tolls the voluntary departure period. Four circuits have held that the timely filing of a motion to reopen tolls the voluntary departure period until the Board rules on the motion. [FN136] In order to give effect to these competing statutory provisions, these courts have held that a timely filed motion to reopen will toll the voluntary departure period. On the other hand, the First, Fourth, and Fifth Circuits have held that the timely filing of a motion to reopen does not toll the voluntary departure period. [FN137]

The United States Supreme Court recently granted a petition for a writ of certiorari to address this very issue; that is, "whether the filing of a motion to reopen removal proceedings automatically tolls the period within which an alien must depart the United States under an order granting voluntary departure." [FN138]

**Substantive Requirements.** Nearly 20 years ago, the United States Supreme Court articulated the "three independent grounds" for the immigration judge or the Board to deny a motion to reopen. [FN139] A motion to reopen can be properly denied if: (1) the alien fails to establish prima facie eligibility for the relief sought; (2) the alien fails to support the motion with previously unavailable evidence, or fails to explain his failure to assert his claim at the hearing; or (3) the alien, despite being eligible, is not entitled to the discretionary grant of relief. [FN140] These grounds were recently reiterated by the Board. [FN141] These often cited reas-

arises, careful attention must be paid to the circuit law to determine the nature and extent of the evidence required to support a motion to reopen premised on an ineffective assistance of counsel claim. [FN153]

The Act provides that aliens may be represented in removal hearings by counsel of their choosing at no expense to the government. [FN154] An alien's right to competent counsel derives not from a specific right to counsel, but from the Fifth Amendment right to due process and a fundamentally fair immigration hearing. [FN155] The Board has found that "ineffective assistance of counsel is a denial of due process only if the proceedings were so fundamentally unfair that the alien was prevented from reasonably presenting his or her case." [FN156]

The Board has held that to successfully raise an ineffective assistance of counsel claim, an alien must, first, comply with the three procedural requirements set forth in *Matter of Lozada*, and, second, demonstrate that his or her case was prejudiced as a result of counsel's conduct. [FN157] The Board held in *Matter of Lozada* that an alien making an ineffective assistance claim must: (1) present an affidavit setting forth in detail the agreement with former counsel and representations by counsel in this regard; (2) inform counsel of allegations of ineffective conduct and give counsel the opportunity to respond; and (3) file a bar complaint or explain the reasons for failing to do so. [FN158]

While the circuit courts have uniformly adopted the Board's three-prong *Lozada* test, the courts do not always require strict compliance with the requirements. A review of case law in the various circuits reveals that each has its own standard for *Lozada* compliance. For example, the Ninth Circuit has held that where counsel's ineffectiveness is obvious and undisputed on the face of the record, the alien need not comply with the *Lozada* requirements. [FN159]

Similarly, while the circuit courts have uniformly adopted the Board's requirement that the ali-

en establish that counsel's conduct prejudiced the case, the courts measure or describe prejudice differently. For example, the Sixth Circuit sets a high prejudice standard while the Ninth Circuit sets a lower standard, with the Third Circuit's *prima facie* standard falling in the middle. To establish an ineffective assistance of counsel claim in the Sixth Circuit, an alien must establish that "counsel prejudiced him or denied him fundamental fairness in order to prove that he has suffered a denial of due process." [FN160] To establish prejudice the alien must show that the outcome of the case would have been different but for counsel's error. Furthermore, an alien has no right to effective assistance of counsel in requesting a discretionary waiver of removal from the Attorney General because the inability to receive such relief does not amount to "deprivation of a liberty interest." [FN161]

The legal standard for establishing prejudice in the Third Circuit requires an alien to show a "reasonable likelihood" or "reasonable probability" that the result would have been different absent counsel's errors. Stated differently, the alien must show a reasonable likelihood that the outcome would have been different had the error not occurred. [FN162] Thus, the Third Circuit appears to require that an alien make a *prima facie* showing of prejudice to obtain reopening. In *Fadiga v. Attorney General*, the Third Circuit determined that the Board employed an overly rigorous prejudice standard by requiring the alien to establish by a preponderance of the evidence eligibility for the relief sought. [FN163]

The Ninth Circuit employs a lower prejudice standard than that set by the Sixth and Third Circuits. The Ninth Circuit has held that to establish prejudice an alien must show that counsel's inadequate performance *may* have affected the outcome of the proceedings. The court explained that this is a lower standard than a *prima facie* standard. [FN164] The Ninth Circuit has also determined that prejudice is presumed where counsel's error deprives the alien of an opportunity to appeal.

*Matter of X-G-W-*, [FN185] the Board found that a 1996 amendment to the "refugee" definition constituted a significant change to the asylum law that justified the Board's consideration of otherwise untimely motions to reopen by aliens who sought to apply or reapply for asylum based on the change in the law. [FN186]

On the other hand, in *Matter of G-D-*, [FN187] an alien asked the Board to reopen and reconsider proceedings on its own motion based on the Board's intervening decision in *Matter of O-Z- & I-Z-*, [FN188] The Board found that its decision in *O-Z- & I-Z-* did not constitute a fundamental change in the law, but rather applied existing law to the facts of the case. At most, it could be considered an "incremental development in the law, not a departure from established principles." [FN189]

#### *Motions to Remand Filed with the Board*

A motion to reopen or reconsider which is filed before the Board during the pendency of an appeal constitutes a motion to remand. Such a motion may be adjudicated by the Board with the appeal. [FN190] Whether the motion to remand is filed for the purpose of reopening or reconsideration, it must meet the standard motions requirements, except the time and numerical restrictions. For example, an alien who files a motion to remand while his appeal is pending to afford him the opportunity to apply for adjustment of status under § 245(a) of the Act [8 U.S.C.A. § 1255(a)] would need to establish prima facie eligibility for relief and that the motion should be granted in the exercise of discretion. As with motions to reopen, a party filing a motion to remand "to pursue relief bears a 'heavy burden' of proving that if proceedings before the immigration judge were reopened, with all the attendant delays, the new evidence would likely change the result of the case." [FN191]

In certain circumstances, a motion to remand will be subject to the time and number limits on a motion to reopen. For example, a motion to remand filed during the pendency of an appeal of an immig-

ration judge's denial of an untimely motion to reopen filed after the issuance of a final administrative order is subject to the time and number limits on motions to reopen. [FN192]

In adjudicating an appeal, the Board may remand on its own motion without a formal request by the parties. For example, when the Board sustains an alien's appeal and finds the alien eligible for some form of relief from removal (such as adjustment or withholding of removal), it will remand the case to the immigration judge for background checks and entry of an order pursuant to 8 C.F.R. § 1003.47(h); or, the Board may determine that further fact-finding is necessary to adjudicate the appeal in which case it must remand the case to the immigration judge. [FN193]

An issue that often arises in the context of remanded proceedings, is the nature and extent of the immigration judge's jurisdiction over the case. In general, when the Board remands the record of proceeding to the immigration judge, it divests itself of jurisdiction, giving the immigration judge jurisdiction to consider all issues unless the Board specifically limited the scope of the remanded proceedings. [FN194] The Board has held that when the record is remanded to the immigration judge for background checks and entry of an order pursuant to 8 C.F.R. § 1003.47(h), the immigration judge may not reconsider the Board's prior decision, but the immigration judge "reacquires jurisdiction over the proceedings" and may consider whether newly proffered evidence supports reopening of the proceedings. [FN195]

#### *Motions to Reconsider Before the Immigration Courts and the Board*

**Authority.** A motion to reconsider "shall specify the errors of fact and law" in the prior immigration judge or Board decision and "shall be supported by pertinent authority." [FN196] Historically, the Justice Department and Congress have paired motions to reopen and motions to reconsider so that they have undergone regulatory reform and

party may file only one motion to reconsider" with the immigration judge. [FN207] The regulations governing motions filed with the Board provide that "[A] party may file only one motion to reconsider any given decision .... [I]n removal proceedings, an alien may file only one motion to reconsider a decision that the alien is removable from the United States." [FN208]

**Substantive Requirements.** As stated, a motion to reconsider is based on the assertion that the previous decision is premised on a factual or legal error or that the decision should be reevaluated due to a change in law. A motion to reconsider based on arguments that should have been raised on appeal or simply repeat arguments rejected on appeal will be denied. [FN209] Likewise, motions to reconsider that are insufficiently detailed and based on conclusory statements will be denied. [FN210]

The regulations specifically bar two types of motions to reconsider. First, a party may not file a motion to reconsider before the Board or the immigration judge seeking reconsideration of a decision denying a prior motion to reconsider. [FN211] Second, a "motion to reconsider based solely on an argument that the case should not have been affirmed without opinion by a single Board Member, or by a three-Member panel, is barred." [FN212]

Last year, in *Matter of O-S-G-*, the Board denied the respondent's motion to reconsider because he simply reasserted his asylum eligibility claim and introduced a new legal argument (asserting his eligibility for asylum based on his membership in a particular social group) which he could have presented to the immigration judge and on appeal, but failed to do so. [FN213] In that case, the Board summarized the general filing requirements for motions to reconsider and set forth the proper standard for challenging a decision in which the Board affirmed the immigration judge's decision without opinion. The Board made a distinction between those motions which are barred by regulation because they are based "solely on the

management decision to issue an AWO," (affirmance without opinion) and those motions which are permitted because they challenge "the underlying reasons for affirmance of the immigration judge's decision." [FN214]

Like a motion to reopen, the contents of a motion to reconsider will depend on the reason or purpose for filing the motion. For example, the Board retains jurisdiction over a motion to reconsider its previous decision dismissing an appeal as untimely filed. [FN215] A party asserting that the Board erroneously found an appeal untimely must specify the Board's error in the prior order and explain why the appeal should be considered timely filed. A party challenging an immigration judge's determination that the right to appeal was waived may file a motion to reconsider with either the immigration judge or the Board. [FN216] The party making such a motion must demonstrate that the waiver, if made, is invalid because it was not knowing and voluntary.

Motions to reconsider filed before the Board and the immigration judge must disclose whether the final removal order is the subject of judicial proceedings, and, if so, it must detail the judicial posture and status of the case including whether the court has decided the case. [FN217] The motion must also disclose whether the alien is the subject of any criminal proceeding under the Act, and, if so, the status of the proceeding. [FN218]

In an interesting decision analyzing the nature of a motion to reconsider filed in removal proceedings, the Fifth Circuit found that the Board's decision granting the DHS' untimely motion to reconsider was in error because the DHS motion to reconsider constituted a collateral attack on the Board's prior decision which was barred by *res judicata*. [FN219]

**Sua Sponte Reconsideration.** As with reopening, the immigration judge and the Board may reconsider removal proceedings on their own motion in exceptional circumstances. [FN220]

**Remand, and Reconsideration.** Judicial review over discretionary adjudications by immigration judges and the Board is circumscribed by § 242(a)(2)(B) of the Act, which prohibits judicial review of denials of discretionary relief including:

(i) any judgment regarding the granting of relief under § 212(h), 212(i), 240A, 240B or 245, or

(ii) any other decision or action of the Attorney General or the Secretary of Homeland Security the authority for which is specified under this subchapter to be in the discretion of the Attorney General or the Secretary of Homeland Security, other than the granting of relief under § 208(a) [asylum]. [FN235]

The United States Circuit Courts of Appeal have issued numerous decisions analyzing their jurisdiction over discretionary motions, with some differences of opinion among them over the nature and extent of judicial review preserved. Further, the circuits differ over the analytical framework underlying these determinations. The following discussion addresses these variations.

**Motions for Continuance—Subject Matter Jurisdiction.** The Circuit Courts analyze their jurisdiction over the denials of continuances under § 242(a)(2)(B)(ii) of the Act, which prohibits judicial review over discretionary determinations, outside of the applications for relief from removal, “specified under this subchapter.” [FN236] The circuits are split, with the Eighth, Tenth, and Seventh circuits concluding that review is not available. The majority disagrees, including the First, Second, Third, Fifth, Sixth, Ninth, and Eleventh. The Supreme Court recently declined to resolve this question. [FN237]

The Eighth Circuit in *Onyinkwa v. Ashcroft* first addressed the issue, finding no jurisdiction to review the petitioner’s claim that the immigration judge abused his discretion in denying a request for a continuance of the removal proceedings. [FN238] According to *Onyinkwa*, “whenever a regulation

implementing a subchapter II statute confers discretion upon an immigration judge, IIRIRA generally divests courts of jurisdiction to review the exercise of that discretion.” [FN239] In this view, immigration judges derive their discretionary authority over continuance motions from the section of the Act authorizing them to conduct removal proceedings, which is contained in subchapter II of the Act. [FN240] The implementing regulation at 8 C.F.R. § 1003.29 governing continuances is within the discretion of the immigration judges and therefore beyond judicial review.

In *Onyinkwa*, the Eighth Circuit relied on the Sixth Circuit’s opinion in *CDI Information Services, Inc. v. Reno*, to find that it lacked jurisdiction to review the immigration judge’s denial of a continuance. [FN241] The Sixth Circuit later opined that the Eighth Circuit “misapplied our precedent” in this regard. [FN242] The Sixth Circuit observed that *CDI Information Services* involved an application for a visa extension, which the court noted is left to the Attorney General’s discretion, not to that of the immigration judges. The Sixth Circuit distinguished this scenario from portions of subchapter II “that leave discretion with [immigration judges] in matters where [immigration judges] are merit decision-makers that are subject to our review.” [FN243]

Subsequently, in *Grass v. Gonzales*, the Eighth Circuit followed *Onyinkwa*, holding that “we have no jurisdiction to review the [immigration judge’s] wholly discretionary denial of *Grass*’s request for a continuance of his removal hearing.” [FN244] Recently, in dicta, the Eighth Circuit suggested that “it may be appropriate for our court to revisit this issue en banc. Since *Grass*, a majority of the circuits have determined that the courts of appeals do have jurisdiction to review an [immigration judge’s] discretionary denial of a motion to continue.” [FN245]

The Tenth Circuit Court of Appeals agreed with the Eighth Circuit in *Yerkovich v. Ashcroft*. [FN246] In *Yerkovich*, the Tenth Circuit observed that it was bound by its decision in *Van Dinh v.*



migration proceeding is *not* a decision 'specified under [the relevant] subchapter to be in the discretion of the Attorney General.' [FN260] These courts, including the First, Second, Third, Fifth, Ninth, and Eleventh employ similar reasoning to conclude, as stated by the Second Circuit, that "continuances are not even mentioned in the subchapter." [FN261] In this view, since the immigration judges' authority over continuances derives from the regulations, rather than the statute, the adjudication is not encompassed within the ambit of the jurisdiction-stripping provision over discretionary determinations under 242(a)(2)(B)(ii). [FN262] As stated by the Eleventh Circuit in *Zafar v. U.S. Atty. Gen.*, "[b]ecause denials of motions to continue are not statutorily-proscribed discretionary acts 'specified under this subsection' to the Attorney General, as enumerated in section 1252(a)(2)(B)(ii), we have jurisdiction to review them." [FN263]

Interestingly, the First Circuit initially determined that it lacked jurisdiction to review the denial of a continuance stating that, "[w]e acknowledge the correctness of the government's argument that we have no jurisdiction over whether the denial of a continuance was an abuse of discretion." [FN264] Subsequently, the First Circuit reversed itself on this point, as did the government, to join the majority of circuits, explaining that, "[w]e agree with the government's new position that we have jurisdiction to review a denial of a continuance." [FN265]

The Sixth Circuit Court of Appeals reached the same outcome through different reasoning. In *Abukhallel v. Gonzales*, the Sixth Circuit found that the regulation governing continuances implements an implicit power granted to immigration judges by statute. [FN266] However, the Sixth Circuit differentiated between the authority conferred on the Attorney General and that delegated to the immigration judges by the Attorney General. In this view, judicial review is only prohibited of decisions within subchapter II left to the Attorney General.

#### Motions for Change of Venue-Subject Matter

Jurisdiction. Unlike the numerous cases addressing jurisdiction over continuances, little circuit court precedent addresses jurisdiction under § 242 of the Act for motions to change venue. The Tenth Circuit Court of Appeals, consistent with its approach regarding lack of jurisdiction over motions for continuances, held that it cannot entertain review of the denial of a motion to change venue.

In *Ballesteros v. Ashcroft*, the Tenth Circuit categorized the alien's challenge to the immigration judge's denial of his motion to change venue as completely discretionary and therefore precluded from review by § 242(a)(2)(B)(ii) of the Act. [FN267] The court examined the alien's arguments to determine whether he raised a legal or constitutional issue that would permit review. However, Mr. Ballesteros' argument that venue would have been more convenient elsewhere did not present a question of law or a constitutional question.

Presumably, the Seventh and the Eighth Circuits, which also find no jurisdiction over continuance motions, will similarly conclude that motions to change venue are encompassed in the statutory authority to conduct removal proceedings. On the other hand, those circuits finding jurisdiction over continuance motions will likely assume subject matter jurisdiction over motions to change of venue under the rationale that the statute does not provide specific, discretionary authority for their adjudication.

Motions to Reopen-Subject Matter Jurisdiction. The circuits do not consider motions to reopen or remand to constitute nonreviewable discretionary determinations under § 242(a)(2)(B)(ii) of the Act, unless the motion seeks reopening of one of the merits based discretionary proceedings specified in § 242(a)(2)(B)(i) of the Act. [FN268] The two circuits that decline subject matter jurisdiction over continuance denials-the Tenth and the Eighth-do find jurisdiction to entertain motions to reopen.

Shortly after issuing the decision in *Yerkovich*

available pursuant to § 242(a)(2)(C) of the Act, jurisdiction to review a motion to reopen of the underlying order is similarly withdrawn. [FN278] Section 242(a)(2)(C) precludes review of aliens ordered removed by reason of having committed any of the offenses covered under the § 212(a)(2) criminal grounds of inadmissibility or the § 237(a)(2) criminal grounds of deportability for aggravated felony, controlled substances, firearms, miscellaneous crimes specified under § 237(a)(2)(D), and two or more crimes involving moral turpitude. There is wide consensus that an alien cannot obtain judicial review of a motion to reopen where the circuit court lacks jurisdiction to review the underlying order of removal. Courts do retain jurisdiction to ascertain whether the criminal conviction fits the Act's definition of these criminal grounds for immigration purposes. [FN279]

Sua Sponte Motions to Reopen—Subject Matter Jurisdiction. The regulations provide the Board with *sua sponte* reopening authority, stating that “[t]he Board may at any time reopen or reconsider on its own motion any case in which it has rendered a decision.” [FN280] Most courts have ruled that the Board's decision whether to exercise this authority is not subject to judicial review, including the First, Second, Third, Fourth Fifth, Sixth, Seventh, Ninth, Tenth, and Eleventh. [FN281] These courts agree that decisions over *sua sponte* reopening of a removal proceeding are committed solely to the Board's discretion without recourse to judicial review. They observe that the regulatory language does not provide any standards for the Board to exercise its discretion that would serve as a basis for review. However, the Eighth Circuit disagrees with the others to find that the Board's decision can be reviewed for abuse of discretion. [FN282] The Eighth Circuit assumed jurisdiction over the Board's *sua sponte* denial of a motion to reopen on the basis of precedent that addressed a different section of the regulations, but that the majority believed bound the court. [FN283]

Motions to Remand—Subject Matter Jurisdiction.

As noted by the Second Circuit, motions to remand are not specifically referenced in the Act or the regulations otherwise discussing motions. [FN284] Thus, arguably, motions to remand are not included as nonreviewable discretionary determinations under § 242(a)(2)(B). In ascertaining subject matter jurisdiction, the circuit courts of appeal apply similar analysis to that of motions to reopen. For example, the Sixth Circuit Court of Appeals determined that it had jurisdiction over the denial of an alien's motion in which he sought a remand for the opportunity to apply for adjustment of status. Here, the denial of the adjustment application itself was not at issue, which would have been precluded by § 242(a)(2)(B)(i). [FN285]

Motions to Reconsider—Subject Matter Jurisdiction. As with motions to reopen, circuit courts of appeal take jurisdiction over motions to reconsider unless reconsideration is sought of a merits decision on a discretionary application for relief encompassed under § 242(a)(2)(B)(i). For example, review of the discretionary denial to reconsider the adverse decision in an asylum case remains available and is not restricted by the general prohibition on discretionary determinations under § 242(a)(2)(B)(ii). [FN286] Motions to reconsider, like motions to reopen, are found to be implicitly included in the authority to review final orders of removal under § 242(a)(1) of the Act. [FN287] The Act explicitly provides for judicial review of motions to reconsider and motions to reopen under § 242(b)(6), which states: “When a petitioner seeks review of an order under this section, any review sought of a motion to reopen or reconsider the order shall be consolidated with the review of the order.” [FN288] Motions to reconsider, while referenced in the statute, are discussed in discretionary terms by regulation at 8 C.F.R. §§ 1003.23(b)(iv) and 1003.2(a). However, as with motions to reopen, if reconsideration is sought of a removal order based on a criminal conviction for which judicial review is unavailable under § 242(a)(2)(C), the court cannot entertain the appeal of the motion. [FN289]

not make issue exhaustion a statutory jurisdictional requirement. [FN304] In the Second Circuit's view, the exhaustion requirement is mandatory rather than jurisdictional in nature, and therefore subject to waiver by the government's failure to object. Thus, in the Second Circuit, the failure of the alien to exhaust an issue before the Board may be waived if the government does not challenge it before the circuit court.

**Abuse of Discretion Standard of Review Applied When Circuit Courts Find Jurisdiction.** Those courts finding jurisdiction to review denials of discretionary motions following the enactment of IIRIRA continue to apply the abuse of discretion standard which had been used before the statute's enactment. As frequently stated, "[w]hether to grant a motion to continue deportation proceedings is within the sound discretion of the [immigration judge] and is reviewed for abuse of discretion only." [FN305] Courts have articulated this standard as requiring reversal unless the decision "was made without a rational explanation, it inexplicably departed from established policies, or it rested on an impermissible basis, e.g., invidious discrimination against a particular race or group." [FN306] An alternative articulation explains that an immigration judge would abuse his or her discretion if the decision was based on an error of law or fact, or the decision "cannot be located within the range of permissible decisions." [FN307]

**Judicial Review Under the REAL ID Act of 2005.** Under amendments enacted by the REAL ID Act of 2005, circuit courts retain jurisdiction to review "constitutional claims or questions of law raised upon a petition for review..." irrespective of whether jurisdiction exists to determine whether an immigration judge abused his discretion in denying a motion or whether the removal order is based on a criminal conviction under §§ 242(a)(2)(B) and (C) of the Act. [FN308] For example, whether the immigration judge's denial of a continuance violated statutory rights under the Act or the constitutional right to due process "are questions of law that we

review de novo, but with deference to the agency's reasonable interpretations of the [Act]." [FN309]

Courts resist attempts to characterize factual challenges as legal or due process issues merely to obtain jurisdiction where it might otherwise be precluded. As stated by the Third Circuit Court of Appeals, "[r]ecasting challenges to factual or discretionary determinations as due process or other constitutional claims is clearly insufficient to give this Court jurisdiction ..." [FN310] On the other hand, Courts will find constitutional violations where they deem warranted. For example, recent cases from the Ninth and Seventh Circuits provide examples of where the denial of continuance requests were found to prejudicially violate the aliens' right to counsel.

In *Hernandez-Gil v. Gonzales*, the Ninth Circuit Court of Appeals found that the immigration judge violated the respondent's right to counsel in denying the respondent's request for more time to obtain representation. [FN311] In *Hernandez-Gil*, respondent's counsel failed to appear at the merits hearing on the application for cancellation of removal. Although the respondent had 16 months between his initial removal hearing to meet with counsel and did not do so, the respondent asked for additional time to meet with an attorney and stated that he was not prepared to go forward on his own. The court, in reversing the Board, emphasized that the respondent had not waived his statutory right to counsel. Information in the record indicated that counsel was in another courtroom attending to a different matter, and thus, presumed by the court to be accessible.

The Seventh Circuit Court of Appeals in *Gjerci v. Gonzales*, held that an immigration judge's denial of an alien's request for continuance to obtain new counsel after prior counsel withdrew denied the alien a fundamentally fair hearing in violation of due process. The court was concerned that the alien "had not understood what happened with respect to the withdrawal" and did not realize what would be required of him at the merits hearing, including re-

591, 1974 WL 30145 (B.I.A. 1974) (holding that immigration judge retains jurisdiction over motion to reconsider when Board dismisses appeal of deportation order for lack of jurisdiction); *see also*, *Matter of Lopez*, 22 I. & N. Dec. 16, 1998 WL 151436 (B.I.A. 1998) (modifying *Mladineo* to clarify that Board retains jurisdiction over motion to reconsider issue of timeliness where Board dismissed appeal as untimely).

[FN6]. Section 242(b)(2) of the Act [8 U.S.C.A. § 1252(b)(2)], (stating that “[t]he petition for review shall be filed with the court of appeals for the judicial circuit in which the immigration judge completed the proceedings”).

[FN7]. Section 240(a)(1) of the Act [8 U.S.C.A. § 1229a(a)(1)]. *See, e.g.*, *Abu-Khalil v. Gonzales*, 436 F.3d 627, 634, 2006 FED App. 0044P (6th Cir. 2006) (stating that the regulation governing continuances “makes explicit an implicit power granted to immigration judges...”).

[FN8]. 8 C.F.R. § 1003.29 (2007).

[FN9]. 28 Fed. Reg. 9504 (Aug. 30, 1963) as codified under former 8 C.F.R. § 242.13.

[FN10]. 52 Fed. Reg. 2931 (Jan. 29, 1987).

[FN11]. While the regulation no longer references limits on continuances for respondents to obtain counsel, Operating Policies and Procedures Memorandum 94-6, *Continuances* (OPPM 94-6), issued by OCIJ on July 18, 1994, directs that: “absent good cause shown, no more than two continuances should be granted by an immigration judge to an alien for the purpose of obtaining legal representation.” This does not prevent the judge from granting additional time, but contemplates that he or she be able to account for extra time provided.

[FN12]. Former 8 C.F.R. § 3.27 (1988).

[FN13]. Redesignated by 57 Fed. Reg. 11571 (April 6, 1992) at former 8 C.F.R. § 3.29.

[FN14]. Redesignated by 68 Fed. Reg. 9824 (February 28, 2003) at 8 C.F.R. § 1003.29.

[FN15]. *Matter of Namio*, 14 I. & N. Dec. 412, 413, 1973 WL 29467 (B.I.A. 1973).

[FN16]. *Id.* at 415.

[FN17]. *Matter of Leyva*, 16 I. & N. Dec. 118, 1977 WL 39229 (B.I.A. 1977).

[FN18]. *Matter of Sibrun*, 18 I. & N. Dec. 354, 1983 WL 183240 (B.I.A. 1983).

[FN19]. *Id.* at 356.

[FN20]. *Id.*

[FN21]. *Id.* at 357.

[FN22]. *Id.*

[FN23]. *Baires v. I.N.S.*, 856 F.2d 89, 91 (9th Cir. 1988).

[FN24]. *See, e.g.*, *Badwan v. Gonzales*, 494 F.3d 566 (6th Cir. 2007) and *Baires v. INS*, *supra*.

[FN25]. *See, e.g.*, *Alsamhour v. Gonzales*, 484 F.3d 117 (1st Cir. 2007) (upholding immigration judge's denial of a continuance to file asylum application when alien missed a nine month filing deadline).

[FN26]. *Matter of Silva-Rodriguez*, 20 I. & N. Dec. 448, 1992 WL 195802 (B.I.A. 1992).

[FN27]. *See, e.g.*, *Witter v. I.N.S.*, 113 F.3d 549 (5th Cir. 1997) and *Baires v. INS*, *supra*.

[FN28]. Section 245(a) of the Act [8 U.S.C.A. § 1255].

[FN29]. *Matter of Garcia*, 16 I. & N. Dec. 653, 1978 WL 36464 (B.I.A. 1978), modified by *Matter of Arthur*, 20 I. & N. Dec. 475, 1992 WL 195807 (B.I.A. 1992) (holding that motions to reopen for consideration of applications for adjustment of status based upon unadjudicated visa petitions with-

"Jurisdiction vests, and proceedings before an Immigration Judge commence, when a charging document is filed with the Immigration Court by the Service."

[FN45]. 8 C.F.R. §§ 1003.14(a) and 1003.20 (2007).

[FN46]. "[T]he place of the deportation proceeding is a matter of venue rather than jurisdiction." *Matter of Smith*, 16 I. & N. Dec. 146, 149 (B.I.A. 1977).

[FN47]. *Matter of K-*, 5 I. & N. Dec. 347, 350 (B.I.A. 1953).

[FN48]. *Matter of Seren*, 15 I. & N. Dec. 590, 591, 1976 WL 32312 (B.I.A. 1976).

[FN49]. *Matter of Wadas*, 17 I. & N. Dec. 346, 1980 WL 121886 (B.I.A. 1980).

[FN50]. *Seren* at 592.

[FN51]. *Matter of Alphonse, Et Al.*, 18 I. & N. Dec. 178, 1981 WL 158843 (B.I.A. 1981).

[FN52]. The former INS was transferred from the Department of Justice to the Department of Homeland Security in 2002 through the enactment of the Homeland Security Act of 2002, Pub. L. 107-206, 116 Stat. 2135.

[FN53]. Formerly, aliens within the United States were proceeded against in deportation proceedings, whereas aliens seeking admission were placed in exclusion proceedings. Today, aliens are charged with inadmissibility or deportability in a single proceeding, the removal proceeding, although the charges differ depending on whether the alien is within the United States pursuant to a lawful admission.

[FN54]. Former 8 C.F.R. § 3.19(b)(1989); see also *Matter of Dobere*, 20 I. & N. Dec. 188 (B.I.A. 1990), superseding *Matter of Alphonse, supra*.

[FN55]. 52 Fed. Reg. 2931 (January 29, 1987).

[FN56]. 57 Fed. Reg. 11568 (April 6, 1992).

[FN57]. The only exception occurs when two courts have administrative control over the same area and clerically transfer a case. This occurs most frequently when a court in a detention setting and a non-detained court are located in close proximity. For example, if a detained alien at the DHS detention facility in Lancaster, California is released, his removal hearing may be transferred to the non-detained setting at the Los Angeles Immigration Court without recourse to a change of venue motion.

[FN58]. *Matter of Rahman*, 20 I. & N. Dec. 480, 1992 WL 195808 (B.I.A. 1992).

[FN59]. Issued by OCUJ on October 9, 2001.

[FN60]. 8 C.F.R. § 1003.20(b) (2007).

[FN61]. *Matter of Patel*, 19 I. & N. Dec. 260, 1985 WL 56046 (B.I.A. 1985).

[FN62]. 8 C.F.R. § 1003.20(c) (2007).

[FN63]. *Matter of Velasquez*, 19 I. & N. Dec. 377, 1986 WL 67716 (B.I.A. 1986).

[FN64]. OPPM 01-02, citing *Hayman Cash Register Co. v. Sarokin*, 669 F.2d 162, 169, 1982-1 Trade Cas. (CCH) P 64508 (3d Cir. 1982).

[FN65]. Section 240(b)(2)(A)(iii) of the Act [8 U.S.C.A. § 1229a(b)(2)(A)(iii)].

[FN66]. Section 240(b)(2)(A)(iv) of the Act [8 U.S.C.A. § 1229a(b)(2)(A)(iv)].

[FN67]. 8 Fed. Reg. 14494 (March 28, 2007) (proposed rule amending regulations addressing jurisdiction and venue in removal proceedings).

[FN68]. 8 C.F.R. §§ 1003.11 and 1003.13 (2007).

[FN69]. The list of administrative control courts with their assignments is posted on the EOIR Web site at [www.usdoj.gov/eoir](http://www.usdoj.gov/eoir).

246 (5th Cir. 2006) (unpublished case finding that the Board properly denied the respondent's motion to reopen for failure to file the required fee because the motion was premised on an ineffective assistance of counsel claim and motion did not relate to the merits of her asylum claim, nor was it supported by an asylum application).

[FN91]. 8 C.F.R. § 1003.8(a)(2)(iv) (2007) (B.I.A.).

[FN92]. 8 C.F.R. § 1003.24(b)(2)(iii) (2007) (IJ).

[FN93]. 8 C.F.R. §§ 1003.8(a)(2)(vi), (vii) (2007) (B.I.A.) and 1003.24(b)(2)(vi), (vii) (2007) (IJ).

[FN94]. 8 C.F.R. § 1003.8(a)(3) (2007) (B.I.A.); see also *Matter of Chicas*, 19 I. & N. Dec. 114, 1984 WL 48593 (B.I.A. 1984) (holding that a fee waiver request will be considered properly filed if accompanied by a sworn declaration made in accord with 28 U.S.C.A. § 1746).

[FN95]. 8 C.F.R. § 1003.24(d) (2007) (IJ).

[FN96]. Section 240(c)(7) of the Act.

[FN97]. 8 C.F.R. §§ 1003.2(d) (2007) (B.I.A.) and 1003.23(b)(1) (2007) (IJ) (these provisions are identical).

[FN98]. *Id.*; see e.g. *Aguilar v. Gonzales*, 475 F.3d 415 (1st Cir. 2007); *Matter of Crammond*, 23 I. & N. Dec. 179, 2001 WL 1515818 (B.I.A. 2001); *Matter of G-N-C*, 22 I. & N. Dec. 281, 288 (B.I.A.).

[FN99]. See, e.g., *Wiedersperg v. INS*, 896 F.2d 1179 (9th Cir. 1990) (deported alien may file motion to reopen where his removal was illegally executed).

[FN100]. See, e.g., *Lin v. Gonzales*, 473 F.3d 979 (9th Cir. 2007).

[FN101]. *Id.*

[FN102]. The first sentence of 8 C.F.R. § 1003.2(d) (2007) provides that a motion to reopen "shall not

be made on behalf of a person who is the subject of removal...proceedings subsequent to his or her departure from the United States." (emphasis added).

[FN103]. *William v. Gonzales*, 2007 WL 2494763 (4th Cir. Sept. 6, 2007).

[FN104]. *Id.*

[FN105]. See §§ 240(c)(7)(A) and (C)(i) of the Act; 8 C.F.R. §§ 1003.2(c)(2) (2007) (B.I.A.) and 1003.23(b)(1) (2007) (IJ).

[FN106]. See 8 C.F.R. §§ 1003.2(c)(2) (2007) (B.I.A.) and 1003.23(b)(1) (2007) (IJ).

[FN107]. *Matter of Goolcharan*, 23 I. & N. Dec. 5, 2001 WL 307091 (B.I.A. 2001).

[FN108]. See *Matter of Susma*, 22 I. & N. Dec. 947, 1999 WL 417970 (B.I.A. 1999).

[FN109]. *Matter of J-J*, 21 I. & N. Dec. 976, 982-984, 1997 WL 434418 (B.I.A. 1997) (observing the absence of a definition of timely filing for motions, the Board looks to timely filing in the context of appellate procedure and concludes that "receipt by the court clerk constitutes filing.").

[FN110]. 8 C.F.R. §§ 1003.2(c)(3)(i) - (iv) (2007) (B.I.A.) and 1003.23(b)(4)(i) - (iv) (2007) (IJ).

[FN111]. Section 240(b)(5)(A) and (C) of the Act [8 U.S.C.A. §§ 1229a(b)(5)(A), (C)]; 8 C.F.R. §§ 1003.2(c)(3)(i) (2007) (B.I.A.) and 1003.23(b)(4)(ii), (iii) (2007) (IJ).

[FN112]. Compare 8 C.F.R. §§ 1003.23(b)(4)(ii) (2007) (IJ) and 1003.2(c)(3) (2007) (B.I.A.) (removal proceedings) with 8 C.F.R. §§ 1003.23(b)(4)(ii)(2007) (IJ) and 1003.2(c)(3)(i) (2007) (B.I.A.) (deportation hearings). See also 8 C.F.R. § 1003.23(b)(4)(iii)(B) (2007) (a motion to reopen in *absentia* exclusion hearings is not subject to time and number limitations).

[FN113]. Compare 8 C.F.R. §§ 1003.23(b)(4)(ii) (2007) (removal proceedings) with (iii)(C)

to reopen.

[FN134]. See section 240B(d)(3) of the Act.

[FN135]. *Chedad v. Gonzales*, 497 F.3d 57 (1st Cir. 2007) (1st Cir. 2007).

[FN136]. *Kantvets v. Gonzales*, 424 F.3d 330, 335 (3rd Cir. 2005); *Sidikhousya v. Gonzales*, 407 F.3d 950, 952 (8th Cir. 2005) (motion filed prior to expiration of the voluntary departure period tolls the time period until the Board rules on the motion); *Azarte v. Ashcroft*, 394 F.3d 1278, 1289 (9th Cir. 2005) (motion filed within the voluntary departure period with a request for a stay of removal or voluntary departure tolls the voluntary departure period while the Board considers the motion); *Ugokwe v. U.S. Attorney General*, 453 F.3d 1325, 1331 (11th Cir. 2006) (same).

[FN137]. *Chedad v. Gonzales, supra*; *Dekoladenu v. Gonzales*, 459 F.3d 500, 507 (4th Cir. 2006); *Banda-Ortiz v. Gonzales*, 445 F.3d 387, 391 (5th Cir. 2006).

[FN138]. *Dada, Sanson T.V. Keisler, Acting Att'y Gen.*, -- S.Ct. --, 2007 WL 2768022 (U.S.) cert. granted *Dada v. Gonzales*, 207 Fed.Appx. 425, 2006 WL 3420124 (C.A. 5) (finding that the Board properly denied alien's motion to reopen for adjustment of status because he was ineligible for such relief under § 240B(d) of the Act for having failed to depart the United States within the voluntary departure period).

[FN139]. *I.N.S. v. Abudu*, 485 U.S. 94, 104, 108 S. Ct. 904, 99 L. Ed. 2d 90 (1988).

[FN140]. *Id.*

[FN141]. *Matter of S-Y-G*, 24 I. & N. Dec. 247, 252, 2007 WL 2220355 (B.I.A. 2007) (discretionary denials of motions to reopen are allowed where the movant fails (1) to sustain the heavy burden of showing eligibility for relief or (2) to proffer material, previously unavailable evidence, or (3) to demonstrate that a favorable exercise

of discretion is unwarranted).

[FN142]. *Black's Law Dictionary* (7th ed. 1999).

[FN143]. *Id.*

[FN144]. *Matter of L-O-G-*, 21 I. & N. Dec. 413, 1996 WL 403255 (B.I.A. 1996).

[FN145]. Section 244(a)(1) of the Act [8 U.S.C.A. § 1254(a)(1)].

[FN146]. *Matter of L-O-G-*, at 419; see also *Matter of S-V-*, 22 I. & N. Dec. 1306, 1308 (B.I.A. 2000).

[FN147]. *Matter of Sipus*, 14 I. & N. Dec. 229, 234 (B.I.A. 1972).

[FN148]. As discussed *infra*, Motions for a Continuance.

[FN149]. *Matter of Velarde-Pacheco*, 23 I. & N. Dec. 253, 256 (B.I.A. 2002) (allowing reopening of proceedings where the motion is: not time and number barred; not barred by *Matter of Shaar*, 21 I. & N. Dec. 541 (B.I.A. 1996) or other procedural grounds; supported by clear and convincing evidence of the bona fides of the marriage; and, the DHS does not oppose the motion or its opposition is based solely on the fact that the alien's visa petition is not yet approved).

[FN150]. See *I.N.S. v. Cardoza-Fonseca*, 480 U.S. 421, 431 107 S. Ct. 1207, 94 L. Ed. 2d 434 (1987); *Poradsova v. Gonzales*, 420 F.3d 70, 82 (2d Cir.2005).

[FN151]. See *Sevoian v. Ashcroft*, 290 F.3d 166, 175 (3d Cir.2002).

[FN152]. See *Bhasin v. Gonzales*, 423 F.3d 977, 986-87 (9th Cir. 2005) (stated differently "credibility determinations on motions to reopen are inappropriate").

[FN153]. See *Matter of Anselmo*, 20 I. & N. Dec. 25, 31, 1989 WL 331861 (B.I.A. 1989) (the Board follows the circuit court's precedent in cases arising

1003.23(b)(1)(i) (2007) (IJ).

[FN173]. *Id.*

[FN174]. Section 240(c)(7)(A) of the Act. *See also Medina-Morales v. Ashcroft*, 371 F.3d 520, 538 (9th Cir. 2004) (comparing the statute with the regulations regarding the specific grant of discretion).

[FN175]. 8 C.F.R. §§ 1003.2(a) (2007) (B.I.A.) and 1003.23 (b)(1)(iv) (2007) (IJ).

[FN176]. 8 C.F.R. §§ 1003.2(a) (2007) (B.I.A.) and 1003.23 (b)(3) (2007) (IJ).

[FN177]. *INS v. Abudu*, 485 U.S. 94, 105 (1988).

[FN178]. *INS v. Doherty*, 502 U.S. 314 (1992) (concurring opinion at 333).

[FN179]. *See e.g. Matter of Barocio*, 19 I. & N. Dec. 255 (B.I.A. 1985) (reopening for reinstatement of voluntary departure not warranted in the exercise of discretion where aliens "deliberately flouted" the immigration laws); *Matter of Reyes*, 18 I. & N. Dec. 249 (B.I.A. 1982) (even assuming prima facie eligibility for suspension of deportation had been established, the Board declined to reopen in the exercise of discretion); *Matter of Lam*, 14 I. & N. Dec. 98 (B.I.A. 1972) (same).

[FN180]. 8 C.F.R. §§ 1003.2(a) (2007) (B.I.A.) and 1003.23(b)(1) (2007) (IJ).

[FN181]. *Matter of J-J-*, 21 I. & N. Dec. 976, 1997 WL 434418 (B.I.A. 1997).

[FN182]. 61 Fed. Reg. 18900, 18902 (1996).

[FN183]. *Matter of X-G-W-*, 22 I. & N. Dec. 71, 1998 WL 378104 (B.I.A. 1998) (under 8 C.F.R. § 1003.2(a) (2007), the Board retains the discretionary power "to reopen and reconsider cases sua sponte in unique situations where it would serve the interests of justice") superseded on other grounds by *Matter of G-C-L*, 23 I. & N. Dec. 359, 2002 WL 1001051 (B.I.A. 2002).

[FN184]. *Matter of G-D-*, 22 I. & N. Dec. 1132, 1999 WL 1072237 (B.I.A. 1999).

[FN185]. *Matter of X-G-W-*, 22 I. & N. Dec. 71, 1998 WL 378104 (B.I.A. 1998).

[FN186]. The Board referred to section 601 of the IRIRA, 110 Stat. 3009-546, 3009-689, amending the definition of "refugee" at section 101(a)(42) of the Act to include: a person who has been forced to abort a pregnancy or to undergo involuntary sterilization, or who has been persecuted for failure or refusal to undergo such a procedure or for other resistance to a coercive population control program, shall be deemed to have been persecuted on account of political opinion, and a person who has a well founded fear that he or she will be forced to undergo such a procedure or subject to persecution for such failure, refusal, or resistance shall be deemed to have a well founded fear of persecution on account of political opinion. The Board recognized that the change in the refugee definition effectively overruled its precedent decision in *Matter of Chang*, 20 I. & N. Dec. 38, 1989 WL 247513 (B.I.A. 1989) (holding that the harm suffered under China's coercive population control policies does not constitute persecution within the meaning of the refugee definition).

[FN187]. *Matter of G-D-*, 22 I. & N. Dec. 1132, 1999 WL 1072237 (B.I.A. 1999).

[FN188]. *Matter of O-Z-*, 22 I. & N. Dec. 23, 1998 WL 177674 (B.I.A. 1998).

[FN189]. *Matter of G-D-*, 22 I. & N. Dec. 1132, 1135, 1999 WL 1072237 (B.I.A. 1999).

[FN190]. 8 C.F.R. § 1003.2(c)(4) (2007) (B.I.A.). Compare 8 C.F.R. § 1003.23(a) (2007) (IJ) (authorizing the parties to file pre-decision motions before the immigration judge).

[FN191]. *Matter of Coelho*, 20 I. & N. Dec. 464, 1992 WL 195806 (B.I.A. 1992).

[FN192]. *Matter of Oparah*, 23 I. & N. Dec. 1,



- [FN210]. See e.g. *Nascimento v. INS*, 274 F.3d 26 (1st Cir. 2001).
- [FN211]. 8 C.F.R. §§ 1003.2(b)(2) (2007) (B.I.A.) and 1003.23(b)(2) (2007) (IJ).
- [FN212]. 8 C.F.R. § 1003.2(b)(3) (2007).
- [FN213]. *Matter of O-S-G*, 24 I. & N. Dec. 56, 2006 WL 3540044 (B.I.A. 2006).
- [FN214]. *Id.* at 59.
- [FN215]. See *Matter of Lopez*, 22 I. & N. Dec. 16, 1998 WL 151436 (B.I.A. 1998).
- [FN216]. See *Matter of Patino*, 23 I. & N. Dec. 74, 2001 WL 534296 (B.I.A. 2001).
- [FN217]. 8 C.F.R. §§ 1003.2(e) (2007) (B.I.A.); and 1003.23(b)(1)(i) (2007) (IJ).
- [FN218]. *Id.*
- [FN219]. See *Guevara v. Gonzales*, 450 F.3d 173 (5th Cir. 2006).
- [FN220]. 8 C.F.R. §§ 1003.23(b)(1) (2007) (IJ) and 1003.2(a) (2007) (B.I.A.). As discussed, *infra*, *Motions to Reopen*.
- [FN221]. *Matter of Morales*, 21 I. & N. Dec. 130, 146, 1995 WL 788982 (B.I.A. 1995).
- [FN222]. See e.g., *Matter of Villareal-Zuniga*, 23 I. & N. Dec. 886, 891-892, 2006 WL 575269 (B.I.A. 2006) (holding in relevant part that immigration judge's denial of respondent's request for a continuance did not violate his due process rights where respondent was statutorily ineligible for the relief sought).
- [FN223]. See e.g., *Matter of Villareal-Zuniga*, 23 I. & N. Dec. 886, 2006 WL 575269 (B.I.A. 2006); *Matter of Luviano*, 21 I. & N. Dec. 235, 1996 WL 136874 (B.I.A. 1996), *rev'd on other grounds*, 23 I. & N. Dec. 718 (A.G. 2005) *Matter of Perez-Andrade*, 19 I. & N. Dec. 433 (B.I.A. 1987).
- [FN224]. 8 C.F.R. § 1003.1(b)(3) (2007).
- [FN225]. See *Matter of S-H-*, 23 I. & N. Dec. 462, 2002 WL 31173153 (B.I.A. 2002) (holding that immigration judges must include clear and complete factual findings in their decisions in light of the Board's more limited fact-finding ability).
- [FN226]. 8 C.F.R. §§ 1003.1(d)(3)(i) ("clearly erroneous" standard of review), 1003.3(f) (2007) (standard of review applies to appeals filed on or after September 25, 2000).
- [FN227]. 67 Fed. Reg. 54878, 54889 (citing *Anderson v. City of Bessemer*, 470 U.S. 564, 573 (1985)).
- [FN228]. 8 C.F.R. § 1003.1(d)(3) (2007).
- [FN229]. 67 Fed. Reg. 54878, 54899.
- [FN230]. 8 C.F.R. § 1003.1(d)(3)(i) (2007).
- [FN231]. 8 C.F.R. § 1003.6(b) (2007). The Board in its discretion may stay removal while an appeal is pending from an order denying a motion to reopen or reconsider.
- [FN232]. 8 U.S.C.A. §§ 1252(a)(2)(B) and (a)(2)(C) (2007).
- [FN233]. Pub. L. 104-208, 110 Stat. 3009 (1996).
- [FN234]. Pub. L. 109-13, 199 Stat. 231 (2005).
- [FN235]. 8 U.S.C.A. §§ 1252(a)(2)(B)(i) and (ii).
- [FN236]. The phrase, "this subchapter" refers to subchapter II (Immigration) of Chapter 12 (Immigration and Nationality) of Title 8 (Aliens and Nationality), including 8 U.S.C.A. §§ 1151-1381, as codified at §§ 201-295 of the Act.
- [FN237]. *Herrera-Ceja v. Gonzales*, 127 S.Ct. 1120, 166 L. Ed. 2d 888 (U.S. 2007).
- [FN238]. *Onyinkwa v. Ashcroft*, 376 F.3d 797 (8th Cir. 2004).
- [FN239]. *Id.* at 799.

(9th Cir. 2006) (finding no jurisdiction to review Board denial of motion to reopen cancellation of removal proceeding to consider additional evidence as to hardship).

[FN269]. *Infanzon v. Ashcroft*, 386 F.3d 1359, 1361 (10th Cir. 2004).

[FN270]. *Id.*

[FN271]. *Guerra-Soto v. Ashcroft*, 397 F.3d 637 (8th Cir. 2005).

[FN272]. *Id.* at 640.

[FN273]. *Id.*

[FN274]. *Sarmadi v. INS*, 121 F.3d 1319, 1321 (9th Cir. 1997), citing *Chow v. INS*, 113 F.3d 659, 664 (7th Cir. 1997); See also, *Patel v. U.S. Atty. Gen.*, 334 F.3d 1259, 1261 (11th Cir. 2003).

[FN275]. Section 240(c)(7)(A) of the Act [8 U.S.C.A. § 1229a(c)(7)(A)].

[FN276]. *Zhao v. Gonzales*, 404 F.3d 295, 303 (5th Cir. 2005).

[FN277]. 8 U.S.C.A. § 1252(b)(6); *Singh v. Gonzales*, 404 F.3d 1024, 1027 (7th Cir. 2005) (discussing import of section 242(b)(6) of the Act [8 U.S.C.A. section 1252(b)(6)]).

[FN278]. See, e.g., *Khan v. Gonzales*, 495 F.3d 31 (2d Cir. 2007); *Martinez-Maldonado v. Gonzales*, 437 F.3d 679, 683 (7th Cir. 2006); *Patel v. U.S. Atty. Gen.*, 334 F.3d 1259, 1262 (11th Cir. 2003); *Sarmadi v. INS*, 121 F.3d 1319, 1322 (9th Cir. 1997).

[FN279]. See, e.g., *Okoro v. INS*, 125 F.3d 920, 925 (5th Cir. 1997) (stating that court has jurisdiction to determine jurisdiction).

[FN280]. 8 C.F.R. § 1003.2(a) (2007).

[FN281]. *Zhang v. Gonzales*, 469 F.3d 51, 53 (1st Cir. 2006); *All v. Gonzales*, 448 F.3d 515, 517-18

(2nd Cir. 2006); *Doh v. Gonzales*, 193 Fed.Appx. 245, 245 (4th Cir.2006) (percuriam) (unpublished); *Enriquez-Alvarado v. Ashcroft*, 371 F.3d 246, 249-250 (5th Cir. 2004); *Harchenko v. INS*, 379 F.3d 405, 410-11 (6th Cir. 2004); *Plich v. Ashcroft*, 353 F.3d 585, 586 (7th Cir. 2003); *Calle-Vujiles v. Ashcroft*, 320 F.3d 472, 474-75 (3d Cir. 2003); *Belay-Gebru v. INS*, 327 F.3d 998, 1000-01 (10th Cir. 2003); *Ekimian v. INS*, 303 F.3d 1153, 1157-58 (9th Cir. 2002); *Anin v. Reno*, 188 F.3d 1273, 1279 (11th Cir. 1999).

[FN282]. *Tamenut v. Gonzales*, 477 F.3d 580 (8th Cir. 2007).

[FN283]. *Id.* at 581 n.1 (citing to *Recio-Prado v. Gonzales*, 456 F.3d 819, 821-22 (8th Cir. 2006)).

[FN284]. *Sanusi v. Gonzales*, 445 F.3d 193, 200-201 (2d Cir. 2006).

[FN285]. *Pilica v. Ashcroft*, 388 F.3d 941, 945-948 (6th Cir. 2004).

[FN286]. See, e.g., *Liu v. Gonzales*, 439 F.3d 109 (2d Cir. 2006) (finding no abuse of discretion by Board in denying motion for reconsideration of asylum claim).

[FN287]. See, e.g., *Patel v. U.S. Atty. Gen.*, 334 F.3d 1259 (11th Cir. 2003).

[FN288]. *Singh v. Gonzales*, 404 F.3d 1024, 1027 (7th Cir. 2005) (discussing import of § 242(b)(6) of the Act [8 U.S.C.A. § 1252(b)(6)]).

[FN289]. See, e.g., *Khan v. Gonzales*, 495 F.3d 31 (2d Cir. 2007).

[FN290]. There are no reported cases of applying equitable tolling to motions to reconsider.

[FN291]. 272 F.3d 1176 (9th Cir. 2001).

[FN292]. See *Iavorski v. United States INS*, 232 F.3d 124, 129-133 (2d Cir. 2000) (finding that aliens relying on equitable tolling must establish that their constitutional right to due process was viol-

[FN304]. *Zhong v. U.S. Dept. of Justice*, 480 F.3d 104 (2d Cir. 2007).

[FN305]. *Onyeme v. INS*, 146 F.3d 227, 231 (4th Cir. 1998) (citing *Hassan v. INS*, 110 F.3d 490, 492 (7th Cir. 1997) and *Bull v. INS*, 790 F.2d 869, 871 (11th Cir. 1986)).

[FN306]. *Hassan v. INS*, 110 F.3d 490, 492 (7th Cir. 1997) (quoting *Castaneda-Suarez v. INS*, 993 F.2d 142, 146 (7th Cir. 1993).

[FN307]. *Morgan v. Gonzales*, 445 F.3d 549, 552 (2d Cir. 2006) (quoting *Zervos v. Verizon New York, Inc.*, 252 F.3d 163, 169 (2d Cir. 2001).

[FN308]. Section 242(a)(2)(D) of the Act [8 U.S.C.A. § 1252(a)(2)(D)], enacted by § 106(a)(1)(A)(iii) of the REAL ID Act of 2005, Pub. L. 109-13, 119 Stat. 231.

[FN309]. *Skorusa v. Gonzales*, 482 F.3d 939, 941 (7th Cir. 2007).

[FN310]. *Jarbough v. Attorney General of the U.S.*, 483 F.3d 184, 190 (3rd Cir. 2007); See also, *Morgan v. Gonzales*, 445 F.3d 549 (2d Cir. 2006); *Khan v. Atty. Gen. of the United States*, 448 F.3d 226, 236 (3rd Cir. 2006) (observing that "Khan's due process argument merely recasts his abuse-of-discretion argument in constitutional terms and can be denied for the reasons already stated").

[FN311]. *Hernandez-Gil v. Gonzales*, 476 F.3d 803 (9th Cir. 2007).

[FN312]. *Gject v. Gonzales*, 451 F.3d 416, 423 (7th Cir. 2006).

[FN313]. *Khan v. Gonzales*, 495 F.3d 31, 35 (2nd Cir. 2007).

[FN314]. See, e.g., *Xio Ji Chen v. U.S. Dept. of Justice*, 471 F.3d 315 (2d Cir. 2006).

[FN315]. *Jean-Pierre v. U.S. Atty. Gen.*, 2007 WL 2712108 (11th Cir. September 19, 2007); *Ramadan v. Gonzales*, 479 F.3d 646, 654 (9th Cir. 2007);

*Xiao Ji Chen v. U.S. Dept. of Justice*, 471 F.3d 315, 326-27 (2d Cir. 2006); *Kamara v. Atty. Gen. of the U.S.*, 420 F.3d 202, 211 (3d Cir. 2005).

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