

Adjustment of Status and Consular Processing Workshop

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Making a Critical Choice

- Varied pathways to permanent residence eligibility: family-based, employment-based, DV lottery, special immigrant, asylee or refugee
- In each case, throughout your representation, you must consider: When the client is eligible, should he or she “adjust” status to permanent residence at a USCIS office in the U.S., or “consular process”, i.e. apply for an immigrant visa at a U.S. consulate abroad?



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How to Choose – What do you need to know?

- What does your client want to do? Good to know but not the most important factor
- Most important factor: what are the legal requirements and pitfalls for each choice?
- If adjustment is preferred: is your client eligible to adjust under INA §245(c) or another section of the INA? If ineligible can't adjust !
- If client can't or doesn't want to adjust, will your client become inadmissible upon leaving the country? Are waivers available? How long must your client be gone?

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Option One: Adjustment of Status

- For most applicants: “Adjustment of Status” allows individual in the U.S. to change from nonimmigrant to permanent resident status
- Governed in most cases by INA §245 and 8 CFR §§245.1 – 245.22
- Discretionary with the Atty Gen – INA §245(a)
- Must Be Physically Present in U.S. at Time of Filing



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Prerequisites INA §245(a) Adjustment

- Immigrant Visa must be Immediately Available At Time of Filing
- Must be both Eligible for Visa and Admissible
- Alien Must Have Been “Inspected and Admitted” or “Paroled”



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Is an Immigrant Visa Immediately Available?

- Consult the DOS Visa Bulletin at http://travel.state.gov/visa/bulletin/bulletin_1360.html
- Consult the correct FB or EB category
- Know the priority date (usually petition or labor certification filing date), country of chargeability
- Reading the Bulletin: Date Certain, or U = Unavailable, or C = Current



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Special Cases – Visas Available Not on the Visa Bulletin

- “Immediate Relatives”, the parents, spouses and unmarried children under age 21 of US citizens.
- Asylees and refugees adjusting status under INA §209
- Certain Special Immigrant Categories filing I-360 petitions, incl. some VAWA, SIJ, Religious Workers – Must carefully check!
- Special laws: NACARA, HRIFA, Registry



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Is Your Client Eligible for an immigrant visa?

- Must be the beneficiary of an approved immigrant visa petition (I-130, I-140, DV)
- OR must be eligible to “concurrently file” petition with adjustment of status application (more on this later)
- OR must be in a status permitting adjustment without a petition, for example asylee or refugee



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Was Your Client Inspected, and Admitted or Paroled?

- I-94 and/or passport stamp showing last entry needed in most cases. I-94 is being phased out.
- If was lawfully admitted but lost proof, may file I-102 for duplicate I-94.
- Even if your client has married a US citizen, still needs to prove this!
- If your client entered without inspection, and was “paroled” out of ICE detention, doesn’t count.



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Who Can't Adjust under INA §245(c) – the basic rules

- Persons who have ever been unlawfully employed (except immediate relatives, certain special immigrants, or employment-based immigrants eligible under §245(k))
- Persons who have ever violated status (except immediate relatives, certain special immigrants)
- Visa Waiver Entry (except immediate relatives who are not in immigration court)



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More People who Can't Adjust

- Alien Crewmen or Aliens in Transit
- Persons admitted in S visa status
- Terrorists
- Conditional residents under INA §216
- K-1 fiance/fiancées who did not marry petitioner within 90 days of entry
- Employment-Based Immigrants not in "lawful nonimmigrant status"

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Note about Jurisdiction

- If your client has ever been in removal proceedings (and hasn't left the US), jurisdiction normally lies with the Immigration Court, not USCIS, unless he or she is an "arriving alien".
- If your client has a removal order, he or she must either consular process with "permission to reapply" (done with Form I-212) and waivers of unlawful presence and inadmissibility, or must successfully move the Court to reopen. This is complicated and risky.

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The Exceptions to the Exceptions: Persons Protected from INA §245(c)

- **Employment Based Immigrants: §245(k)**
- No more than 180 days out of status or unlawful employment since last lawful entry
- Only protects from INA §245(c)
- **“Grandfathered” Aliens: §245(i)**
- Requires petition or labor certification filed prior to April 30, 2001 “approvable when filed”
- Protects from both §245(c) and the “inspected and admitted” requirement of §245(a)
- Requires \$1,000.00 penalty fee

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Why Adjust, If You Can?

- Convenient for client who already lives in US
- You, the attorney, will be present at any interview regarding eligibility and admissibility
- Client and immediate family members, if eligible and if advisable, may apply for work and travel authorization during pendency of the case
- If current “priority date” goes backwards, i.e. “retrogresses”, after adjustment filing case will be held in abeyance with continued eligibility for work and travel authorization

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More Reasons to Adjust

- If something goes wrong, your client is not stuck many miles from the USA, possibly separated from work, loved ones, and lawyer
- If there is a problem, especially at a local office, communication with govt. may be easier
- Many adjustment applications, if denied by USCIS, may be renewed before an IJ in removal proceedings. Inadmissibility waivers may be considered by USCIS or IJ while client is in US.

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CONCURRENT PROCESSING

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Consular Processing

- Processed through the Department of State (DOS), National Visa Center (NVC) and Consular Post. INA §§221–22, 8 CFR §204, 9 FAM §42
- Individual lives outside U.S., cannot adjust status or prefers consular processing for strategy or convenience
- Can designate country of processing on I-130 or I-140, but visa interview normally is in current or last country of residence, 9 FAM §42.61(a), but 9 FAM §42.61(a) does allow processing at country of citizenship, or in other countries based on hardship, upon request, with DOS approval. Must have ability to remain in country of processing for at least several months.

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Consular Processing Considerations

- Must be admissible under INA §212 or eligible for a waiver. Waivers often add time to case.
- Must enter the U.S. within 6 months of issuance of immigrant visa. 22 CFR §§42.72–42.64(b).
- Consulates sometimes will “review” approved immigrant visa petitions for possible fraud.
- NVC will handle processing of original documentation and forms until interview.
- Spouse and minor children living abroad, if derivatives of petition, may apply with applicant or “follow to join”

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Consular Officer

- Broad unreviewable discretionary authority. No formal appeal process nor U.S. Federal Court review.
- Attorneys generally not allowed at interviews.
- Not supposed to re-adjudicate the underlying petition, but instead reviews and returns petition to USCIS for possible revocation only if clearly approved in error. In practice, in high-fraud posts, petition review is frequent.
- Denials must be written specifying basis of decision. Normally will be given opportunity to overcome ineligibility ground.
- If problem, attorney should communicate with consulate.
- Decisions involving issues of law, not fact, are subject to DOS Advisory Opinion. Attorneys may use legalnet.state.gov

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Proceed with Caution!

- Some people should not consular process, the risk is too high.
- If you will take the risk, ensure you have a strong legal opinion regarding eligibility if needed, or a waiver application if eligible, and that your client, the petitioner and other relevant parties have full knowledge of risks and time factors.
- Make sure you have determined whether your client has accrued unlawful presence and has not become subject to “permanent bar”. Be careful – for example asylum applicants who worked unlawfully one day between work permits may have accrued years of unlawful presence.
- People who have removal or deportation orders, unless granted “permission to reapply” based on Form I-212, will be barred. Always check if your client may have been in immigration court!

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“HYPOTHETICAL” SITUATIONS – YOU CHOOSE!

- Yosef is a biochemist of extraordinary ability. He was admitted in O-1 status to pursue his cutting-edge research. He and his employer are anxious for him to become a permanent resident as it will qualify him for grant funding, and his EB-1 I-140 is ready to file. You’ve done your homework, and he has no known inadmissibility or eligibility issues. How would you decide whether he should adjust or consular process?

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Yosef – Hypothetical 1

- Adjustment may be a good idea for Yosef. Why?
- Concurrent filing is permitted, probably saving considerable time.
- Yosef may wish a spouse or child to obtain work and travel authorization.
- He can keep on doing his important work without the interruption a trip to Ethiopia would cause.
- His kids might have to miss school if they consular process.

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Lydia – Hypothetical TWO

- Lydia entered the U.S. as a B-2 visitor from Colombia in 2004 but never left. She recently married Mike, a U.S. citizen. They want to get her green card as soon as feasible.
- Is adjustment eligible as an immediate relative?
- They can't find the passport or I-94?
- She desperately wants to go back home to see her dying mother? (*Arrabally and Yerrabelly*, 25 I & N Dec. 771 (BIA, 2012))

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Hypotheticals 2 – Lydia cont.

- What if she had previously been engaged to Victor, another U.S. citizen, and entered as a K-1 fiancée, but she and Victor didn't ever marry?
- What if Lydia and Mike met and married each other in Colombia, and she had never come to the US? Can't she just get a tourist visa and come in now, and then adjust status?
- What if Lydia lied to get her B-2 visa, saying she had a husband and kids in Colombia?

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INA § 212(a)(9)

- Who is inadmissible under 212(a)(9)?
- Aliens with prior expulsion orders seeking readmission (212(a)(9)(A))
- Aliens with accrued unlawful presence seeking readmission (212(a)(9)(B))
- Aliens with more than one year of unlawful presence who departed and reentered or attempted to reenter illegally (212(a)(9)(C))
- Aliens with a prior removal order who reentered or attempted to reenter illegally (212(a)(9)(C))

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THREE-YEAR BAR INA § 212(a)(9)(B)(i)(I)

- Unlawfully present
- More than 180 days
- On or after April 1, 1997
- Voluntarily departs
- Before proceedings (no three-year bar if after proceedings)
- Departure stops time

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TEN-YEAR BAR INA § 212(a)(9)(B)(i)(II)

- Unlawfully present
- More than one year
- On or after April 1, 1997
- Voluntarily departs or is removed
- Departure stops time

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UNLAWFUL PRESENCE

- Entered illegally
- Time after I-94 expires
- IJ or INS/USCIS determines status violation
- Mexicans 30 days after entrance with B-1/B-2 NIV/BCC
- Not Canadians who enter as tourists
- Not Mexicans who enter with BCC (Forms I-186 or I-580) unless they get an I-94

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LAWFUL PRESENCE FOR THREE- AND TEN-YEAR BAR

- Under 18
- Voluntary departure
- Pending adjustment
- Pending or granted asylum or withholding, provided worked with EAD
- Family Unity
- Deferred action
- Parole under 212(d)(5)

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LAWFUL PRESENCE FOR THREE- AND TEN-YEAR BAR

- Battered spouse, child
- Cuban/Haitian entrant
- NACARA adjustment
- Pending or granted TPS, DED
- Granted withholding, CAT
- File to remove condition for LPR, through appeal
- Tolling if file change or extension of status (for three-year bar) if filed while in status
- Stay of removal order

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WHO HAS UNLAWFUL PRESENCE? HOW MUCH?

- Peggy, now age 17, entered the United States without papers four years ago
- Martin entered the United States on August 23, 2011 on a ten-year tourist visa and was authorized to stay for six months. He has been working illegally for the past 10 weeks.
- Norberto, from Colombia, entered the United States without inspection on July 4, 2005 and then applied for asylum on December 4, 2005.

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PERMANENT BAR INA § 212(a)(9)(C)(i)

- Unlawfully present
- More than one year in the aggregate
- Leave the United States
- Attempted EWI or EWI

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UNLAWFUL PRESENCE FOR PERMANENT BAR

- No statutory exceptions for minors, asylum applicants, Family Unity, battered women/children, tolling for extension or change of status
- USCIS and DOS interpreting statute narrowly
- CDJ stopped applying exceptions in 2008

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PERMANENT BAR INA § 212(a)(9)(C)(ii)

- Prior order of removal, exclusion, or deportation (at any time)
- Departure effecting the order
- Attempted EWI or EWI
- On or after April 1, 1997

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Portability

- American Competitiveness in the 21st Century (AC21) permits AOS applicants to move to new employment and maintain their case if the following conditions exist:
 1. The I-140 Petition has been approved;
 2. The I-485 has been pending for more than 180 days;
 3. The new job is in the same or similar occupational classification.



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Maintaining NIV Status During AOS

Pros:

- “Insurance” against denial of AOS application
- Travel with NIV visa instead of Advance Parole
- Nonimmigrant status versus “pending” AOS
- Maintenance of NIV work authorization

Cons:

- Cost of employer
- Need to obtain NIV visa



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Concurrent Filing

- AC21 allows for "concurrent filing" of the I-140 Petition for Alien Worker and the I-485 Adjustment of Status Application
- Priority date must be current in the employment-based preference category
- Allows the foreign national to become "portable" at a quicker pace
- When is it ever a good decision not to concurrently file?



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Consular Processing Steps

- Designate U.S. Consulate to be notified on Immigrant Visa Petition
- Approved Petition forwarded to National Visa Center (NVC)
- NVC notifies beneficiary prior to priority date becoming current
- Importance of maintaining contact with NVC



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Consular Processing Steps (cont.)

- NVC sends fee statement
- NVC requests DS-230 Part I and I-864 Affidavit of Support (for family-based petitions)
- NVC collects documents or provides list of documents to bring to interview
- When visa current and all requested documents received, NVC or Consulate schedules medical exam and visa interview



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Variations on Consular Processing

- Electronic Filing Posts (DS-260)
- Consular Specific Instructions
http://travel.state.gov/visa/immigrants/info/info_3830.html
- No estimates are given for specific posts to schedule IV interview after submission of documents
- NVC processes and schedules all IV interviews except for Guangzhou, China



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Documents Required

- Country Reciprocity Schedule -
http://travel.state.gov/visa/fees/fees_5455.html?cid=8939
- Valid Passport (with at least one blank page)
- Prior immigration history – evidence of legal status in United States since April 1, 1997; copies of all approval notices; copies of any papers relating to prior deportation
- Certified copies of court dispositions for any arrest
- Medical exam and immunizations (Panel)
- Birth certificate, marriage and divorce certificates, birth certificates of children with certified English translation



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Required Documents (cont.)

- Pay stubs for prior six months.
- Notarized letter of employment or job offer letter for employment-based cases
- Two passport-style photos (additional photo may be needed for medical)
- Last three year's income tax returns
- Military card/discharge papers
- Evidence of continued shared residence for marriage-based case
- Copy of underlying petition



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Required Documents (cont.)

- Police Certificates
- You must obtain police certificate if you meet any of these criteria after age 16:
 1. have been living in your country of nationality for more than six months
 2. have lived in any different country for more than 12 months
- You must obtain police certificate from a country in which you were arrested no matter your age or length of residence.

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Form I-485 Package

- Forms I-485, I-765, I-131, I-864 and G-325.
- Submit legible copies (and translations where necessary) of birth, marriage, divorce and death certificates, a recent federal tax return, copies of court certified final dispositions of arrests &/or convictions, photographs and properly written checks payable to "US Department of Homeland Security"

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Practice Pointer

- Create and use a checklist!!!!
- Review form instructions on www.uscis.gov.
- Make certain all forms are signed.
- Make certain the fee is correct.
- Check the filing instructions and double check that you are filing the application at the correct office.



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Form I-485, Part 1

- **EXPIRES ON** – What does that mean?
- Look at the I-94 or visa waiver entry stamp
- D/S vs an actual date
- The visa will NOT provide the answer



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Form I-485, Part 2, Application Type

- How does one determine whether to check box “a” or “b”?
- Box “a” refers to immediate relatives or the principal beneficiary of a visa petition
- Box “b” refers to a derivative spouse or child
- Remember to check the visa bulletin to determine if the priority date is current !!!

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Form I-485, Part 3

- The visa has several numbers; which is the NIV number?
- The red number on the bottom right corner.
- Have you ever filed for LPR status?
- What about where there is an approved visa petition and the case has already moved to the NVC?



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Form I-485, Part 3

- Membership in organizations, what qualifies?
- Recent VA decisions finding mosque affiliation does not constitute “membership in or affiliation with”

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Affidavit of Support

- Create and use a checklist!!!
- Review the instructions for the form on www.uscis.gov
- Practice Pointer: you are only required to submit the most recent federal tax return; you are not required to submit 3 years of returns.
- Submit evidence of US citizenship/LPR status, recent paystubs if employed & drivers license.



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I-864, Part 3

- How does one decide who to include as “family members”?
- What do they mean by separate petitions when the entire family is adjusting?

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Form I-864, Part 6, Item 24 b.

- The intending immigrant spouse has filed & paid income taxes. Can his income be included?



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DS 230 Parts 1 & 2

- Create and use a checklist
- If mailing in the civil documents, you will be required to submit ORIGINAL, birth, marriage, divorce and death records plus 1 copy
- Review the document requirements and country specific requirements at www.ImmigrantVisas.state.gov

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Form DS 230

- Remember to up-date the applicants age!
- Item 25: all visits into the USA must be reported.
- Practice Pointer: be certain to check whether your client will face any bars to inadmissibility under 212(a)(9)(B) or(C)!



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Questions & Answers



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