CHAPTER TWO

OVERVIEW OF THE APPLICATION PROCESS FOR PERMANENT RESIDENCE

I. FILING THE ALIEN RELATIVE PETITION (I-130)

A. **I-130 form and fee** - The I-130 and its supporting documentation establish that the petitioner is in fact an LPR or U.S. citizen, and that the claimed relationship to beneficiary is a legally qualifying one. The fee for the I-130 petition is currently $420.

B. Where to file - by mail with the appropriate USCIS lockbox. The USCIS website has instructions on where to mail I-130s.

C. Documents supporting the petition

1. ***evidence of U.S. citizenship*** - *lists of acceptable primary and secondary evidence of citizenship are listed in the regulations at 8 CFR § 204.1(g)(1)*

2. ***evidence of permanent resident status*** - *copy of LPR card, or any other USCIS document showing LPR status (such as stamp in passport)*

3. ***documents to prove the family relationship*** - *requirements are outlined in the regulations at 8 CFR § 204.2*

II. APPLICATION FOR PERMANENT RESIDENCE

A. ADJUSTMENT OF STATUS IN THE UNITED STATES OR VISA PROCESSING ABROAD AT AMERICAN CONSULATE?

There are two ways to become a permanent resident based on a family petition: through consular processing in the person's home country, and through adjustment of status at an USCIS district office in the United States. We will discuss consular processing later. First we'll describe how someone who has an approved petition and a current priority date goes about filing for permanent residence in the United States.

1. WHO IS ELIGIBLE TO ADJUST?

a. Background

Under INA § 245(a), only aliens who entered with inspection and met other requirements may adjust status in the US. Many aliens who were ineligible to adjust had to return to their country with an appointment at the American consulate, where they would apply for their permanent residence in a consular interview. This caused a great hardship to many applicants

who had to spend greater amounts of money because of the travel and time involved. Applicants who can qualify for adjustment under INA § 245(a) do not have to pay any penalty fee, simply the normal permanent residence application fee.

In 1994, the law on adjustment was complicated, but also improved, by the three-year addition of Section 245(i) to the INA, which added many new classes of aliens who were eligible to adjust in the U.S. if they would pay a penalty fee. This section was created with a sunset clause, and it temporarily disappeared from the law in 1998, except for the applicants grandfathered by Congress, i.e., those who filed an I-130, I-360 (special immigrants), or labor certification on or before January 14, 1998. On December 21, 2000 Congress passed the Legal Immigration and Family Equity Act ("LIFE"), which included a temporary reinstatement of 245(i). Under the LIFE Act, Congress restored section 245(i) to cover aliens who filed an I-130, I-360, or labor certification application prior to April 30, 2001 and who were physically present in the U.S. on December 21, 2000. Aliens who adjust under Section 245(i) must pay a penalty fee of $1,000, in addition to the normal fee for adjustment. There are some exceptions to the penalty for people such as minor children.

The grounds of inadmissibility at INA § 212(a) further complicate the question of who is eligible to adjust, because in order to be eligible to adjust, a noncitizen must be *admissible* – which means either not subject to any of the grounds of inadmissibility; or inadmissible but eligible for, and granted, a waiver. Now we will review the Section 245(a), 245 (c), and 245(i) adjustment criteria and describe the key bars to admissibility.

b. Section 245(a): Adjustment Eligibility Without Penalty Fee

Under INA § 245(a), an alien may adjust to permanent residence in the United States rather than apply at a consulate if the alien was inspected and admitted or paroled into the United States, an immigrant visa is available at the time of filing, and the alien is admissible.

Certain aliens who entered with inspection may nevertheless be ineligible for adjustment under INA § 245(a) because of other provisions in the law found at INA § 245(c). This section bars 245(a) adjustment eligibility for the following categories of aliens:

2. alien crewmen
3. aliens admitted in transit without visa
4. aliens who worked without permission of USCIS and/or who otherwise violated their status (there is an exception to this for immediate relatives of U.S. citizens), and
5. aliens deportable under anti-terrorism provisions of the INA.

> ***Example****: Corina, from Croatia, came to the United States on an F-1 visa in 2005. She dropped out of school after two years and began working. She married Lucas, an LPR, in May 2009. Under current law, Corina is not eligible for adjustment of status under INA § 245(a). Even though Corina entered with inspection, she violated her nonimmigrant status, which made her ineligible to adjust under INA § 245(c).*

Note that Section 245(a) was amended in October 2000 to allow approved self-petitioners

under the Violence Against Women Act ("VAWA") to adjust status under Section 245(a) even if they entered without inspection or fell out of status. VAWA eligibility is discussed in more detail in Chapter 5 of this manual.

c. Adjustment under Section 245(i)

Applying for permanent residence in the United States was extended to a broader group of applicants by the changes to the law in 1994 but only on a temporary basis until on or before January 14, 1998. At that point, Congress let 245(i) adjustment expire, while grandfathering in all applicants who had already filed an I-130 relative petition, I-360 special immigrant petition, or a labor certification by that date. Prior to INA § 245(i) adjustment, only aliens who had entered the United States with inspection and fulfilled other requirements could apply for adjustment. All others had to apply abroad at American consulates. The 1994 law at INA § 245(i) permits many aliens who entered without inspection to adjust here. With passage of the LIFE Act, Congress extended 245(i) eligibility for persons who filed an I-130, I-360, or labor certification on or before April 30, 2001. If they filed after January 14, 1998, they must also submit proof of physical presence on December 21, 2000.

i. Eligibility - The amendments of 1994 and 2000 made those previously unable to adjust under INA § 245(a) eligible if they paid a penalty fee. The standard filing fee is $315; the penalty fee is an additional $1,000.

ii. Exceptions from the penalty - These are provided for children under age 17 and for Family Unity applicants (Family Unity is a special status for spouses and unmarried children of LPRs who gained their status through the legalization programs. The relative must have been in the United States before May 5, 1988, or December 1, 1988, depending on the legalization program, and must have applied to INS for the status.)

iii. Sunset - Congress first allowed this section to expire on January 14, 1998, but later extended it to include applications filed by April 30, 2001.

iv. Grandfathered aliens – Aliens eligible to file for adjustment under INA § 245(i) include not only the principal beneficiary of the petition but also any derivative beneficiaries. To qualify for "grandfathering," the petition must have been approvable when filed. A grandfathered alien may apply later for 245(i) adjustment of status on a different basis than that of the original petition, e.g., a grandfathered beneficiary of a sibling petition (4^{th} preference) may use his grandfathered status to apply for adjustment as a diversity visa lottery winner.

***Example**: Lily's LPR father filed a 2A petition for Lily's mother on January 10,1998, when Lily was 19. Lily is now over 21 and she has*

married Hector, an LPR from Cuba. If Hector files a visa petition for Lily, she will be eligible to adjust status under INA Section 245(i) when her priority date is current, because she is "grandfathered" for 245(i) purposes; the petition for her mother was filed by the 245(i) deadlines, and she qualified as a derivative beneficiary at that time.

v. Process for adjustment application - The application for adjustment is made on Form I-485. It is possible to file an I-130 visa petition along with the I-485 application in a "one-stop" process for a person who will be eligible to adjust as soon as the visa petition is approved, such as an immediate relative. Other persons will have to file their I-485 with an approval notice of their previously filed petition (I-130, I-360, or I-140) when the priority date is current. If applying under section 245(i) and the I-130, I-360, or labor certification was filed after January 14, 1998, the applicant must also submit proof of physical presence on December 21, 2000. All 245(i) applicants must also submit an I-485A supplement form.

d. Forms and Documents Included in Adjustment Application Packet

The following forms and documents comprise a complete adjustment application:

i. Form I-485, the adjustment application, completed and signed.
ii. Form I-485A if applying for adjustment under 245(i)
iii. Proof of physical presence in the United States on December 21, 2000 (if applicable)
iv. Form G-325A, the biographic data form (not required for persons under 14)
v. Photos
vi. An I-130 petition with supporting documents, or an approval notice of a previously approved visa petition (if filing an I-130, the applicant must also file a separate fee)
vii. Filing fee - the adjustment filing fee effective November 23, 2010 is $985 ($635 for applicants under 14 who are filing along with at least one parent) and is best paid with a money order to "Department of Homeland Security." The penalty fee is $1,000 in addition to the $985, for people adjusting under INA § 245(i). An additional $85 biometrics fee must be included for applicants ages 14 and older. USCIS will send a fingerprint appointment notice to the applicant before the adjustment interview takes place.
viii. Sealed medical exam by USCIS approved civil surgeon, on Form I-693 (including vaccination report on USCIS vaccination report form)
ix. Copy of passport and I-94, or other proof of lawful entry (if applicable)
x. Evidence of financial support, which must include an I-864 Affidavit of Support signed by the petitioner for all family-based

adjustment applicants, and for employment-based applicants whose relative has a significant (at least 5%) ownership interest in the for-profit entity that filed the employment petition. The I-864 must be accompanied by one year of federal income tax returns from the sponsor/petitioner.

xi. Form I-765, application for employment authorization (optional) (no fee for those paying the adjustment of status filing fee)

xii. Copy of applicant's birth certificate, with translation

xiii. Copy of marriage certificate, and translation (if applicable)

xiv. Form I-131, application for advance parole, if travel is contemplated before the adjustment is granted. No fee is required for those who pay the adjustment of status filing fee.

Applicants applying through marriage will also have to provide evidence that a marriage is bona fide, such as joint bank accounts, credit accounts, insurance policies with both names, rental agreements with both names, birth certificates of children, etc. (See list of documents to prove bona fide marriage at Appendix 1 to Chapter 1.)

e. Where to File

All family based adjustment of status applications are required to be filed at the Chicago Lockbox facility. Check the USCIS website for the most up-to-date address for the Lockbox.

f. Interviews

Depending on how soon an interview for adjustment is scheduled, some documents may have to be updated at the interview, especially financial documentation and offers of employment, and perhaps medical exams. At the interview, the USCIS officer will go over the information in the application to confirm that it is accurate. The applicant should bring the originals/certified copies of any document they submitted as a copy. Applicants immigrating through marriage should be prepared to answer questions about the validity` of their marriage.

g. Unlawful Presence Bars to Adjustment

The inadmissibility grounds found at INA § 212(a)(9)(B) are known as the three- and ten-year bars; they complicate an alien's ability to return to the United States after she or he has been living here unlawfully. The three-year bar applies to aliens who have been unlawfully present in the United States for more than 180 days but less than one year, who then depart the United States and seek readmission. Such an alien is ineligible to re-enter the United States for three years unless a waiver is granted. The ten-year bar applies to aliens who have been unlawfully present in the United States for one year or more, who then depart the United States and seek readmission. In this case, the alien is ineligible to return to the United States for ten years unless a waiver is granted. The only waiver for the three- and ten-year bars is for aliens who are the spouse, child, son or daughter of a USC or LPR, where the alien applicant can show that the USC or LPR relative would suffer extreme hardship if the bar is enforced.

The existence of these bars underscores the importance of qualifying for adjustment of status; many potential applicants for residency who are now living in the United States

unlawfully will be subject to the bars if they do not qualify for adjustment of status under 245(a) or (i) and have to leave the United States to consular process.

> ***Example****: Natalia entered the U.S. without inspection in December 2000 and married her citizen husband in July 2005. She is ineligible for adjustment under INA §245(a) or 245(i). Natalia has now been in the U.S. unlawfully for over one year; if she leaves the U.S. to consular process, she will be subject to the 10-year bar unless a waiver is granted.*

The three- and ten-year bars and other grounds of inadmissibility are discussed in more detail in Chapter 3 of this manual.

B. CONSULAR PROCESSING FOR PERMANENT RESIDENT VISA ABROAD

Applicants for a family-based immigrant visa will be applying for lawful permanent residence at an American consulate abroad if they are ineligible or elect not to adjust status in this country.

1. Overview of the Procedure

This process is handled by the National Visa Center (NVC) and immigrant visa sections at United States consulates abroad. During the period of time when applicants were able to take advantage of section 245(i), many people elected to pay the penalty fee and adjust status rather than suffer the inconveniences and uncertainties of consular processing. Since many intending immigrants are now ineligible for section 245(i), more applicants for permanent residence need to consular process. In addition to the added time and monetary expense, leaving the United States may trigger certain bars to reentry.

If the petitioning U.S. citizen or LPR relative is residing in the United States, he or she will first petition for the alien relative by filing an I-130 petition with the USCIS. If the petitioner is residing abroad, he or she will likely be filing the I-130 petition at the nearest U.S. consulate or USCIS overseas office. After the I-130 is approved, notice is sent to the petitioner and the approved petition is forwarded to the NVC. The NVC sends out an initial set of instructions informing the beneficiary listed on the I-130 — now the applicant for permanent residency — that he or she may begin the consular processing stage. These initial instructions include fee bills that inform the applicant that certain fees must be paid in order to continue the processing of the case. Once the necessary fees are paid, the NVC instructs the applicant to go to the Department of State website to download and complete the appropriate forms and gather the necessary documents. Once the required forms are completed and sent with the requested documentation to the NVC, the file is forwarded to the post, and, in most cases, the NVC will schedule the interview. The process is explained in greater detail below.

2. National Visa Center

After the USCIS approves the I-130 petition and sends an approval notice to the petitioner, it forwards the approved petition to the NVC in cases where the parties will be consular processing. The NVC is responsible for centralizing the next processing stage. It advises the intending immigrant on when the priority date is "current," the documents that will

be needed, and the process of obtaining the immigrant visa through the consulate. For almost all consular posts, the NVC reviews the original documents and schedules the immigrant visa appointment. After this initial processing is complete, the NVC forwards the approved I-130, the completed forms, and documentation to the appropriate consular post abroad.

The intending immigrant will apply for an immigrant visa at one of the following U.S. consulates to complete the process for obtaining immigrant status: (1) the consulate in the country where the person last resided; (2) the consulate in the country where the person is currently residing and intends to remain throughout the processing stage; (3) any other consulate that will accept jurisdiction of the case if the person is currently residing in the United States and establishes hardship if forced to return to the country of last residence. In the last situation, hardship can be civil unrest or war, but cannot simply be economic factors. Applicants from a country with which the United States does not maintain diplomatic relations will process their applications at a consulate designated by the State Department.

If the applicant is in a preference category that is not current, the NVC stores the approved I-130 petition and sends the intending immigrant a letter informing him or her that further documents will be sent once the priority date becomes current and there is a visa immediately available.

The NVC sends instructions on paying the required immigrant visa and affidavit of support fees. The NVC payment letter explains the payment options and includes the Affidavit of Support (I-864) Fee Bill and Immigrant Visa Application Processing Fee Bill. The letter and fee bills will be sent to the attorney or accredited representative who assisted in filing the I-130 and submitted a Form G-28 Notice of Appearance as Attorney or Representative. If no G-28 was filed, or if the petitioner filed the I-130 pro se, the NVC informs the beneficiary to complete a Form DS-261, Online Choice of Agent and Address, and sends the petitioner the Affidavit of Support Fee Bill. The DS-261 requires the intending immigrant to either appoint an agent or attorney who will receive further communication from the NVC or consulate or indicate that correspondence be sent to the intending immigrant. Once the DS-261 is completed, the Immigrant Visa Fee Bill is sent to the agent, attorney or visa applicant. The fees can be paid electronically from a checking or savings account held at a U.S. financial institution. The fees can also be paid by cashier's check or money order to the NVC post office box in St. Louis, Missouri. All of the fee bills contain a unique bar code and fees paid by cashier's check or money order must be accompanied by the original fee bill invoice. Currently, the fee for the affidavit of support is $88 and the immigrant visa fee is $230.

3. Pre-screening

The next step in consular processing is a "pre-screening" to determine that the applicant is ready to present all the required documents and forms for the consular interview. After the necessary fees have been paid, all applicants must complete and submit the DS-260, Online Immigrant Visa and Alien Registration Application. The form is completed and submitted through the Consular Electronic Application Center (CEAC) website**.** All of the information entered online is accessible by the NVC and consular posts and the applicant is not required to submit a paper version to the NVC or bring a copy to the visa interview.

The petitioner must complete and submit the I-864 and supporting documentation to the

NVC. Additionally, the applicant must submit the original or certified copies of civil documents and police certificates (unless the applicant is from a country where one is not available) to the NVC. It is important to return these documents with the original NVC instruction letter that contains the case number and bar code. The NVC will review the documents and forms for completeness and may send a notice to the representative or agent if there are any deficiencies on the forms or missing documents. This notice will include a list of the missing documents and/or instructions on correcting incomplete forms. Again, it is important to return the missing documents and/or corrected forms with the checklist letter response sheet that contains your client's case number and barcode.

The State Department has implemented the Electronic Processing Program for processing at select posts. Under this program the I-864 is downloaded, completed, signed, scanned, and saved as a PDF file and e-mailed to the NVC. Also, the required civil documents and supporting documents must be converted to PDF files and then e-mailed to NVC. For the select consular posts participating in this program, it is not required to mail the original forms, civil documents and supporting documents to the NVC, but the applicant must be prepared to present the original physical documents at the time of the visa interview. At the present time, the agency is phasing this program in, making electronic processing mandatory for some consulates and optional for others. More consular posts will be added to this program in the future.

For information on the status of a case still pending at the NVC, one may call the automated voice center at (603) 334-0700. Telephone operators are available to answer questions Monday through Friday from 7:30 a.m. to midnight (Eastern). The mailing address is 31 Rochester Avenue, Portsmouth, NH 03801-2909. Representatives with a G-28 on file also can inquire about a client's case via email at nvcattorney@state.gov. The inquiry should be limited to one case per email and should contain the NVC case number as the subject heading of the email. The inquiry also should contain the petitioner's and beneficiary's name, date of birth, and country of chargeability, the representative's full name, and agency or firm name and address.

4. Consular Appointment

Approximately four to six weeks before the scheduled immigrant visa interview, the applicant will receive an appointment letter that contains the date and time of the visa interview. This letter will be issued by the NVC, with the exception of some cases processing through Guangzhou, China. The appointment letter again instructs applicants to visit the DOS website for interview preparation instructions and to review consulate specific instructions.

The website provides information to the visa applicant on preparing for the medical examination and reminds the applicant of all the necessary original documents that must be available at the time of the interview. Additionally, applicants are provided with a number of important notices about the visa interview process. These notices advise the applicant that:

- Failure to bring a copy of the appointment letter to the interview may delay the interview.
- He or she should not make any travel arrangements or give up employment or property prior to the issuance of the visa.
- It is possible that the applicant will have to spend several hours at the consulate

before a decision is made on the application. Should complications arise, the applicant may not receive a visa on the day of the appointment and may have to return to the consulate at a later date.

- No assurances can be given in advance that a visa will be issued.

In addition to the general notices provided on the website, applicants are advised to look at the specific instructions provided by the individual consulate to determine if there are other requirements or documents needed.

5. Consular Interview

During the interview the consular official will confirm the information contained in the application, screen for any applicable ground of inadmissibility, and review the supporting documents that are required to be submitted. During the visa interview, the consular officer may inquire into the validity of the marriage or the relationship that forms the basis of the immigrant petition. If the applicant is found inadmissible for a ground that is able to be waived, the applicant will be given an opportunity to submit a waiver form and supporting documentation to a USCIS lockbox in the United States. The USCIS Nebraska Service Center will adjudicate the waiver and once a decision is made, will notify the appropriate consulate. The consulate will then notify the visa applicant of the decision on the waiver and immigrant visa application.

When an immigrant visa is issued, it is usually valid for six months. In order to obtain permanent resident status, the immigrant visa holder must travel to the United States and be admitted within the visa validity period. Additionally, in order to obtain a visa, the applicant must present a passport that is valid for at least 60 days beyond the validity of the immigrant visa. Immigrant visa holders in the first and second preference categories should be warned by consular officials that they are admissible in those categories only if they remain unmarried at the time of application for admission at the port of entry.

If an immigrant visa is refused, the consular officer will inform the applicant of the reasons for the denial, including the provision of law or regulation on which the refusal was based. If the reason for the refusal may be overcome with the submission of additional documents and the applicant indicates an intention to submit the additional evidence, the file will remain open for up to one year. Once the applicant has obtained the necessary documentation, the interview should be rescheduled. However, if no action is taken on the case for one year after the interview, registration, or eligibility to apply for an immigrant visa, will be terminated. The consular officer at the post should notify the applicant of the termination and the right to have the registration reinstated within one year by demonstrating that the failure to act was due to circumstances beyond his or her control.

If the consular officer is requesting information or documentation that you believe is inappropriate or unnecessary, communicate directly with the consular post, preferably by e-mail, fax or telephone. The same is true in situations where the consulate has indicated an intention to deny the application. Put your concerns in writing and cite the regulations, Foreign Affairs Manual, or State Department cables that support your position. If you are unsuccessful in persuading the consular official that is handling the case, you may seek a review from the principal consular officer at that post. You are also encouraged to seek intervention from officials at the State Department Visa Office in Washington, DC at legalnet@state.gov.

6. Immigrant Visa Fee

Immigrant visa holders are required to pay a USCIS Immigrant Fee of $165.00 after they receive the visa packet from the consulate or embassy. This fee is separate from the immigrant visa fee paid to the DOS. The fee covers the cost of producing and delivering the permanent resident card once the visa holder is admitted to the United States. The fee must be paid online through the USCIS website with a debit or credit card or a checking account from a U.S. financial institution. If the fee is not paid, the visa holder will still be admitted to the U.S. and receive a passport stamp valid for one year evidencing lawful permanent residence status. However, the new resident will not receive an I-551 Permanent Resident Card until the required fee is paid.

7. Termination of Registration

Under INA §203(g), DOS is authorized to terminate the registration of anyone who fails to apply for an immigrant visa within one year of notification of the availability of the visa. This provision applies if the applicant fails to contact the NVC after being notified of visa availability or if the applicant fails to appear for a scheduled interview and does not contact the consulate within a year of the missed appointment. Registration is also terminated if an alien fails to submit evidence to overcome the basis for a visa denial within one year after visa refusal.

The regulations require that the consulate notify the registrant of the termination of registration and the right to seek reinstatement within one year of notification by establishing that the failure to apply for an immigrant visa within one year was due to circumstances beyond the applicant's control. Such circumstances include illness preventing the alien from traveling and inability to get travel documents.