



FAMILY-BASED ADJUSTMENT OF STATUS OPTIONS

By ILRC Attorneys

I. Introduction

A noncitizen can pursue lawful permanent residence through a family member in two different ways—one, through consular processing at a U.S. consulate abroad,¹ or two, through adjustment of status at a U.S. Citizenship and Immigration Services (“USCIS”) office or Immigration Court in the United States. For people who are already in the United States, adjustment of status is preferable if they are otherwise eligible. The adjustment process is completed entirely in the United States and thus unlawful presence bars are not triggered by a departure to attend the consular interview. It also avoids the travel costs, family separation resulting from completing the process abroad, and provides an appeal or review process, unlike consular processing.

This advisory will focus on family-based adjustment of status through INA § 245(a) and INA § 245(i). For a more in-depth guide on family-based adjustment, please see the ILRC’s *Family & Immigration: Practical Guide* (ILRC 2017).²

In order to determine if a person is eligible for family-based adjustment of status, advocates can begin the process by asking the following questions:

- Has the individual been “inspected and admitted or paroled” into the United States, or are they 245(i) eligible? Make sure to consider not only entries with visas, but also advance parole, parole in place, TPS, and “wave throughs.”
- Do they have any inadmissibility issues? If so, are they eligible for a waiver or do they qualify for an exception or exemption?
- Do they have a qualifying family member who could file, or who has already filed, a petition on their behalf?
- Are they an immediate relative, or if not, is a visa currently available according to the State Department Visa Bulletin?
- Are they barred by any of the adjustment of status bars under 245(c), such as being a non-immediate relative without lawful status?

¹ INA §221, 222.

² Available at <https://www.ilrc.org/family-manual>.

Note: Any victim of domestic violence can submit a VAWA self-petition, regardless of gender, through a process that mirrors the family-based petition process so long as they meet certain requirements. VAWA-self petitioners are individuals who have been abused by a U.S. citizen (“USC”) or lawful permanent resident (“LPR”) spouse, parent or child. The VAWA self-petition process allows the victim of domestic violence to gain LPR status without relying on a petition by the abusive LPR or USC relative. Please see ILRC’s *The VAWA Manual: Immigration Relief for Abused Immigrants* (ILRC 2017) for a more in-depth discussion, as the VAWA petition and adjustment process is beyond the scope of this advisory.

II. Adjustment of Status under INA § 245(a)

Section 245(a) of the INA requires that an applicant for adjustment of status *(1) have been “inspected and admitted or paroled,” (2) be admissible, (3) have an immigrant visa immediately available to them, and (4) warrant a favorable exercise of discretion.* Also, they must not fall under any of the adjustment of status bars. Each of these requirements and the bars to adjustment will be discussed in turn.

A. “Inspected and admitted or paroled”

1. Inspected and Admitted:

The INA defines “admission” as the “lawful entry of the alien into the United States after inspection and authorization by an immigration officer.”³ There are multiple ways that an individual can meet this requirement:

Entry with a visa: Those admitted into the United States with a valid visa, whether with a tourist visa (B-2), student visa (F-1), or another nonimmigrant visa, meet the requirement of having been “inspected and admitted.” As long as their last entry was with a valid visa, even if they had previous entries without inspection,⁴ and even if they stay beyond the expiration of their visa (“overstay”), they still satisfy the requirement of having been “inspected and admitted or paroled.”⁵

Note that there are different provisions for those that were admitted under the visa waiver program.⁶ Individuals who entered as part of the visa waiver program are ineligible to change their nonimmigrant status and are barred under INA §245(c) from adjustment unless they are immediate relatives of a USC.⁷

TPS holders living in the Sixth and Ninth Circuits: Temporary Protected Status (TPS) is a form of temporary immigration relief available to people from specific countries designated by the Department of Homeland Security (“DHS”). For TPS recipients living in the Sixth and Ninth Circuits,⁸ a grant of TPS is considered an “admission” for adjustment purposes under INA § 245(a).⁹

At this time, only individuals who reside in these circuits can use a grant of TPS to meet the “admission” requirement for 245(a) adjustment. There is a pending case in federal district court in the Eastern District of New York, *Moreno v. Nielson*,

³ INA § 101(a)(13).

⁴ Previous unlawful entries, however, may raise inadmissibility issues such as unlawful presence and misrepresentation.

⁵ Note that some applicants of Legalization at INA 245A might be able to use a trip using their temporary status to count as an admission for 245(a) purposes. If a client attempted to obtain lawful permanent residence under “1986 Amnesty” it might be worth checking if they ever traveled abroad lawfully despite having failed to obtain their lawful permanent residency. See INA § 245A(b)(3)(A) & 8 CFR § 245A.

⁶ INA § 217.

⁷ USCIS, *Policy Memorandum: Adjudication of Adjustment of Status Applicants for Individuals Admitted to the United States Under the Visa Waiver Program* (November 18, 2013), https://www.uscis.gov/sites/default/files/files/nativedocuments/2013-1114_AOS_VWP_Entrants_PM_Effective.pdf.

⁸ The Sixth Circuit covers the states of Kentucky, Michigan, Ohio, and Tennessee. The Ninth Circuit covers Alaska, Arizona, California, Hawaii, Idaho, Montana, Nevada, Oregon, Washington, and Guam.

⁹ See *Flores v. USCIS*, 718 F.3d 548 (6th Cir. 2013); *Ramirez v. Brown*, 852 F.3d 954 (9th Cir. 2017).

seeking to bring the remaining circuits in line with the Sixth and Ninth Circuits.¹⁰ This case is still pending as of the date of this publication and practitioners should check the progress of the case if assessing adjustment eligibility for their clients with TPS.

“Wave through” by immigration officials: In some instances, a person presents themselves at a port of entry and is allowed into the United States by an immigration officer, despite not having a valid visa. This is known as a “wave through” by an immigration official. In *Matter of Quilantan*, the Board of Immigration Appeals (BIA) found that a person who is “waved through” by an immigration official meets the “inspected and admitted” requirement under INA § 245(a).¹¹ Noncitizens who present themselves for inspection at a port of entry and are allowed to enter, even if they were not questioned by immigration agents or in possession of valid entry documents, are considered lawfully admitted so long as they did not claim to be U.S. citizen.¹²

Applicants who claim a “wave through” admission bear the burden of proving this entry. Some ideas for how to prove a “wave through”:

- Detailed declaration describing the “wave through” entry, including details like approximately when and where the entry occurred; what, if any, questions were asked of them; who, if anyone, was traveling with them; what form of transportation (car, by foot, etc.) they used to enter the United States; and other details such as the weather, time of day or other details about the context.
- Detailed declaration from others who were witness to the “wave through,” such as the person who was driving the car when “waved through” or other passenger. These should only come from individuals who have status themselves.
- Evidence of physical presence in the United States on and around the day of entry, including declarations by individuals who can attest to the individual’s arrival or presence.
- Other primary corroborating evidence such as bus tickets or receipts of purchases near the border from the time of claimed entry.¹³

U nonimmigrant status grantees: In an unpublished case, *Alejandro Garnica Silva*, the BIA held that a grant of U nonimmigrant status qualifies as an “admission.”¹⁴ In this case, a U nonimmigrant was placed in removal proceedings for having committed a crime involving moral turpitude within five years after the date of “admission.” The immigration judge and BIA agreed that the conviction made the respondent deportable because he was “admitted” when he was granted U nonimmigrant status.

As a result of U nonimmigrant status being held to be an “admission,” individuals who have been granted U status may be eligible to adjust under INA § 245(a) so long as they meet the other requirements. While U visa holders are eligible to adjust status under specific provisions at § 245(m), it would benefit some U visa holders to adjust through a family member under § 245(a) rather than waiting until they have had three years in U nonimmigrant status as required under § 245(m). It is important to note that a U adjustment under § 245(m) has much more generous inadmissibility standards and waivers than a traditional family-based adjustment under § 245(a) and may not be the best option for some clients.

¹⁰ *Challenges to TPS Termination*, CATHOLIC LEGAL IMMIGRATION NETWORK, INC. <https://cliniclegal.org/resources/challenges-tps-terminations> (last visited Dec. 17, 2018).

¹¹ *Matter of Quilantan*, 25 I&N Dec. 285 (BIA 2010); see also *Matter of Areguillin*, 17 I&N Dec. 308 (BIA 1980).

¹² *Reid v. INS*, 420 U.S. 619, 624 (1975) (Someone who is permitted to enter the United States by falsely claiming to be a U.S. citizen is deemed to have made an entry without inspection).

¹³ 7 USCIS-PM B.2(A)(7).

¹⁴ *Alejandro Garnica Silva*, A098 269 615 (BIA June 29, 2017).

2. Parole:

The Attorney General has discretion to grant “parole” to certain noncitizens, allowing them to enter or remain in the United States without having been legally “admitted.”¹⁵ A person who is “paroled” is eligible to meet the threshold “inspected and admitted **or paroled**” requirement for INA § 245(a).

There are several reasons a person may have been “paroled” into the United States. For someone outside the United States, they might be paroled in for urgent humanitarian reasons like an emergency or public benefit. Individuals who are already present in the United States may be “paroled” either through advance parole or parole in place. Once they enter as a parolee, they can qualify for 245(a) adjustment if they are otherwise eligible, just like someone who entered with a visa.

Advance Parole: Advance parole is way for certain immigrants with temporary status or protection to travel outside the United States, to re-enter (to be “paroled”) upon their return to the United States.¹⁶ Advance parole is only available to noncitizens who have an underlying basis to request parole, such as TPS, DACA, or a pending adjustment application. Undocumented persons cannot apply for advance parole. An individual who travels abroad and re-enters on advance parole has can become eligible for adjustment of status under INA § 245(a). This is particularly significant for DACA recipients and TPS holders, who live outside the Sixth and Ninth Circuits, and who entered the United States without inspection. If they were to re-enter with advance parole, they could become adjustment-eligible in spite of having initially entered without inspection.

Advance parole is also significant because it allows a person who has no other lawful basis for re-entering the country to seek permission to leave and re-enter *without triggering unlawful presence bars* under INA § 212(a)(9)(B).¹⁷ Even though travel on advance parole does not trigger the three- or ten-year unlawful presence bars, it does not cure any of the unlawful presence bars that might have been triggered by a previous departure. In the context of INA § 212(a)(9)(C), a “permanent bar” can be triggered by an unlawful reentry after having spent more than one year out of status in the United States or an unlawful reentry after a deportation.¹⁸ A person can still “self-deport” with advance parole if they have an outstanding removal order. Advocates should be careful to screen for this, especially because the “permanent bar” applies to minors.

Currently, DACA recipients are no longer eligible to apply for advance parole, so this would only benefit individuals who have already traveled on advance parole.¹⁹ TPS holders are still eligible to request advance parole. This can be an important option for TPS holders who do not have a lawful admission and want to secure a parole entry for future adjustment purposes. See ILRC’s, *Practice Alert: Ramirez v. Brown* (Sep. 2017)²⁰ for more information and strategies.

Traveling outside the United States, even with advance parole, always carries a risk. Although the risk tends to be small, individual cases should be evaluated thoroughly. Advance parole permits a person to request permission to reenter the

¹⁵ INA § 212(d)(5).

¹⁶ USCIS Adjudicator’s Field Manual, § 54.1. See also, USCIS’s definition of “Parolee” and “Advance Parole,” stating that advance parole “may be issued to [noncitizens] residing in the United States other than lawful permanent resident status who have an unexpected need to travel and return, and whose conditions of stay do not otherwise allow for their readmission to the United States if they depart,” <http://www.dhs.gov/definition-terms#parolee>.

¹⁷ *Matter of Arrabally Yerrabelly*, 25 I&N Dec. 771 (BIA 2012) (stating that travel on advance parole is not a “departure” for purposes of inadmissibility under 212(a)(9)(B)(i)). *Matter of Arrabally and Yerrabelly* has since been applied to TPS and DACA recipients who traveled on advance parole and then sought adjustment of status. They were able to adjust status because they had not triggered the three- or ten-year unlawful presence bars when they left and returned under advance parole.

¹⁸ INA § 212(a)(9)(C), a person who reenters the United States without authorization after being deported or reenters unlawfully after having spent more than one year of unlawful status is subject to the “permanent bar.” This can only be waived after the individual has been outside the U.S. for 10 years. This provision applies to minors, unlike the unlawful presence bars.

¹⁹ *Deferred Action for Childhood Arrivals: Response to January 2018 Preliminary Injunction*, U.S. Citizenship and Immigration Services (USCIS) (last visited Dec. 17, 2018), <https://www.uscis.gov/humanitarian/deferred-action-childhood-arrivals-response-january-2018-preliminary-injunction>.

²⁰ Available at <https://www.ilrc.org/practice-alert-ramirez-v-brown-november-2017-update-adjustment-opportunities-people-tps-and-people>

country physically. Individuals who travel on advance parole remain “applicants for admission”²¹ and Customs and Border Protection will still screen travelers for admissibility. Therefore, it is essential to determine if there are any risk factors present in an individual’s case prior to their departure from the United States.

Parole in Place: Individuals with a parent, spouse, or child in the U.S. military may be eligible for parole in place (“PIP” or “military PIP”) at the discretion of USCIS.²² PIP is available to certain family members of USCs and LPRs who are active duty members of the U.S. Armed Services, like the Selective Reserve of the Ready Reserve, and veterans whether living or deceased, who were not dishonorably discharged.²³ Family members include spouses, minor and adult children, whether married or not, and parents.²⁴

Individuals are eligible for PIP if they are:

- A family member of an active duty or ready reserve member of the U.S. military (this includes veterans whether living or deceased);
- Physically present in the United States;
- Have not previously been “admitted” into the country; and
- Do not have serious adverse factors present such as a criminal record or prior immigration fraud.²⁵

A grant of PIP cures a person’s entry without inspection²⁶ thereby allowing eligible individuals to adjust status without needing to leave the country to consular process.

An individual does not have to immigrate through the same family member who makes them parole-eligible; in other words, a different USC or LPR family member can petition for them than the service member who is the basis of the PIP request.

B. Be admissible

In addition to having been inspected and admitted or paroled, an applicant for adjustment of status must also be admissible under all applicable grounds of inadmissibility at INA § 212(a). There are various grounds of inadmissibility, from crime-related to health-related grounds, which are triggered by specific circumstances. For example, for the crimes-related grounds, some require convictions and others only require conduct. Some grounds of inadmissibility have waivers, which if granted as a matter of discretion, can allow an applicant to overcome the ground of inadmissibility. Advocates should ensure that their clients do not come within any of the inadmissibility grounds, or if they do, that there is a waiver available under INA § 212 and that the client is eligible for the waiver. Please see the ILRC’s *Inadmissibility and Deportability* (ILRC 2016)²⁷ manual for a complete discussion of the grounds of inadmissibility that can affect applicants. Some of the most common non-criminal grounds of inadmissibility are:

Prior deportation or removal: Individuals who re-entered or attempted to re-enter the United States unlawfully after a removal or deportation might be barred from adjusting status under INA § 212(a)(9)(C). That provision, also known as the “permanent bar,” makes an individual inadmissible if they have been unlawfully present in the United States for an

²¹ INA § 212(d)(5)(A).

²² USCIS Memo on November 15, 2013, *Parole-in-Place for Spouses, Children, and Parents of Members of the Military*, at https://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/2013/2013-1115_Parole_in_Place_Memo_.pdf.

²³ USCIS, *Policy Memorandum: Discretionary Options for Designated Spouses, Parents, and Sons and Daughters of Certain Military Personnel, Veterans, and Enlistees* (November 23, 2016), https://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/2016/PIP-DA_Military_Final_112316.pdf.

²⁴ *Id.*

²⁵ USCIS, *Policy Memorandum: Parole-in-Place for Spouses, Children, and Parents of Members of the Military* (November 15, 2013), https://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/2013/2013-1115_Parole_in_Place_Memo_.pdf and USCIS November 23, 2016.

²⁶ INA § 212(a)(6)(A)(i).

²⁷ Available at <https://www.ilrc.org/publications/inadmissibility-deportability>.

aggregate period of more than one year or have been ordered removed **AND** they attempt to enter or re-enter without being admitted. This is especially common with people who have received an expedited removal at the border and enter the United States soon after without inspection. No waiver of 212(a)(9)(C) is available until they remain outside the United States for ten years and then seek consent to reapply for admission.²⁸

Example: Raul was caught trying to come to the U.S. with a fake visa on May 14, 2008. He was given an expedited removal and sent back to Mexico. Raul reentered two days later without inspection. Even though Raul is 245(i) eligible, has a U.S. citizen wife, and no criminal record or other issues, he will be unable to adjust because he is inadmissible under 212(a)(9)(C) for returning to the U.S. unlawfully after a removal. Raul must remain outside the country for 10 years before he can apply for a waiver.

Unlawful presence: A history of multiple entries and exits to the United States after April 1, 1997, especially after extended periods of time in the United States without status, may have triggered unlawful presence bars, at INA §§ 212(a)(9)(B) & (C). However, because unlawful presence is triggered by a *departure*, as long as someone who has been living in the United States without any status has never left since their initial entry and is eligible to adjust through one of the options discussed in this advisory, they will not have to worry about unlawful presence.

Example: Angela first came to the United States without inspection in 1998, and she has never left. Although she has been living in the United States without status for the last 20 years, as long as she does not leave, she has not triggered unlawful presence. If Angela had a way to adjust, she would not have to seek a waiver of inadmissibility for unlawful presence because the unlawful presence bars are only triggered by a departure.

There is a waiver available for 212(a)(9)(B) unlawful presence inadmissibility, which can be submitted at the same time as an adjustment application.²⁹ As previously discussed, an individual cannot request a waiver of 212(a)(9)(C) until they have remained outside the United States for 10 years and even then, the waiver would need to be requested *before* returning to the United States in order to avoid triggering the permanent bar again. Any client with 212(a)(9)(C) inadmissibility will be ineligible for adjustment of status.

Fraud and Misrepresentation: Using any fraudulent documents or misrepresenting any material fact to a government official will make someone inadmissible. INA § 212(a)(6)(C)(i) states that an individual who, “by *fraud or willfully misrepresenting a material fact*, seeks to procure (or has sought to procure or has procured) a visa, other documentation, or admission...or other benefit...” is inadmissible. This includes using a forged U.S. passport or green card to enter the USA, providing false information on prior immigration applications, or lying on a nonimmigrant visa application or at the time of entry. It does not matter that the misrepresentation did not influence the government’s decision, it only matters that it could have.³⁰ Additionally, the information must be material to the eligibility of the applicant and done willfully, in order to trigger this ground of inadmissibility.³¹

Example: Jonathan immigrated through his USC husband. At the interview, Jonathan told the officer that he and his husband were still married, when in fact they were divorced. This lie is material because if the officer had known they were divorced, he would not have granted the status because it was based on his marriage. Jonathan has misrepresented a material fact and therefore is inadmissible under 212(a)(6)(C)(i).

²⁸ If you identify someone currently in the United States who has a prior removal, you should also warn them about the risk of reinstatement of removal under INA 241(a)(5).

²⁹ INA § 212(a)(9)(B)(v).

³⁰ *Matter of D-R*, 25 I&N Dec. 445, 450-51 (BIA 2011) (It is “not necessary for the Government to show that the statement actually influenced the agency, only that the misrepresentation was capable of affecting or influencing the government’s decision”).

³¹ 8 USCIS-PM J.3(E) (willfulness means that it was deliberate and voluntary).

A waiver of inadmissibility for fraud or misrepresentation is available for people who can show that their USC or LPR spouse or parent would suffer extreme hardship if the waiver is denied.³²

Alien smuggling: Assisting anyone to enter the United States unlawfully, including a relative, can make an applicant ineligible for permanent residence even if the person was not stopped by immigration authorities or arrested for doing so. INA § 212(a)(6)(E) states that any person who “at any time knowingly has *encouraged, induced, assisted, abetted, or aided* any other alien to enter...in violation of law is inadmissible.” Determining whether someone is inadmissible for “alien smuggling” is very fact-specific. For more information, see ILRC, *Practice Advisory: Alien Smuggling: What it is and how it can affect immigrants* (July 18, 2017).³³

Example: Sandra arranged for her elderly mother to enter the United States unlawfully in 2007. Sandra contacted a coyote to bring her and helped pay for the expenses, although Sandra was not there herself. Sandra is inadmissible as an alien smuggler.

A waiver is available in certain circumstances for individuals who meet the requirements listed at INA § 212(d)(11). The two basic requirements are that the person (1) smuggled only their parent, spouse, sons or daughter and (2) is adjusting based on family petition, except in the fourth preference category (brother and sisters of U.S. Citizens).³⁴ There is also a limited automatic exemption for people who qualify for a benefit called “family unity.”³⁵

Public Charge³⁶: An individual can be found to be inadmissible if they are found “likely to become at any time a public charge.” INA § 212(a)(4) states that a person who, “in the opinion of the Attorney General at the time of application for admission or adjustment of status, is likely to be a public charge is inadmissible.”³⁷ There is a traditional test that states officials shall “at a minimum” consider the person’s age, health, family status, assets, resources, financial status, education and skills, and can also consider an affidavit of support.³⁸ Additionally, there is the I-864 rule for family-based petitions which was added in 1996 stating that a person *must* have an *affidavit of support, Form I-864* submitted on their behalf or they will be found inadmissible.³⁹ The I-864 affidavit of support requires the petitioner to have enough income or assets to show that they can maintain their household as well as the intending immigrant (if the immigrant is not part of the same household) at least 125% of the Federal Poverty Guidelines.

C. Immigrant visa immediately available

A third requirement to adjust status under 245(a) is that an immigrant visa is immediately available. Immediate relatives - a spouse, parent, or child⁴⁰ of a U.S. citizen - will always be able to meet this requirement because an immigrant visa is always available for immediate relatives, without any limit or wait-list. Other family beneficiaries—preference beneficiaries—cannot adjust until their priority date is current according to the “Final Action Dates” chart in the State

³² INA § 212(i)

³³ Available at <https://www.ilrc.org/alien-smuggling-what-it-and-how-it-can-affect-immigrant>.

³⁴ INA § 212(d)(11).

³⁵ Note that there is special rule in the case of Family Reunification in INA § 212(a)(6)(E)(ii), stating clause (i) does not apply in the case of individuals who are eligible under Family Reunification as defined by section 301(b)(1) of the Immigration Act of 1990.

³⁶ On October 10, 2018, the Department of Homeland Security (DHS) published a proposed rule related to public charge in the Federal Registry. The proposed rule seeks to expand the way a person can be considered a public charge, changing the standard of whether an applicant is “likely to become primarily dependent on the government for support” to a “person who receives one or more public benefit.” **The proposed rule is just a proposal. The law has not changed as of this publication.** Please see the ILRC’s page on Public Charge for updates and more detailed information at <https://www.ilrc.org/public-charge>.

³⁷ Cases at consulates will be evaluated by the consular officer. There have been changes to the Foreign Affairs Manual (FAM), governing consular processing cases, in January 2018, pertaining to public charge that have gone into effect. See ILRC, *Consular Processing Practice Alert on Public Charge and Affidavit of Support Issues*, (July 2018) https://www.ilrc.org/sites/default/files/resources/consul_process_pract_alert_pub_charge_affid-20180702.pdf.

³⁸ INA § 212(a)(4)(B).

³⁹ INA § 212(a)(4)(C).

⁴⁰ A child is “an unmarried person under twenty-one years of age.” INA § 101(b)(1).

Department Visa Bulletin.⁴¹ Those in a preference category should not file for adjustment until the Visa Bulletin indicates they are eligible to do so.⁴²

D. Warrant a favorable exercise of discretion

Ultimately, adjustment of status is discretionary. Generally, though, unless the applicant has serious negative factors, no special showing is required to prove an adjustment applicant warrants a favorable exercise of discretion. Therefore, unless your client has some type of criminal or immigration history that does not render them inadmissible but still reflects poorly on them, you do not need to submit anything extra to argue in favor of adjustment eligibility. If, however, your client has a history of DUIs for example, you may want to submit proof of positive equities to show that the positive factors outweigh the negative. Positive equities include rehabilitation (if applicable), family and community ties in the U.S., employment history, volunteering or donating to charities, and any other facts that show the applicant to be a “good” person or that people in their life will be negatively affected if they are not granted permanent immigration status.

E. Not fall under any adjustment of status bars

In addition to meeting the requirements for adjustment of status laid out at INA § 245(a), an adjustment applicant must not fall under any of the bars to adjustment at INA §§ 245(c)-(e). Section 245(c) applies to all adjustment applicants, whereas subsections (d) through (e) only apply to narrow subsets of adjustment applicants, such as K-1 fiance(e)s and individuals immigrating based on a marriage that occurred during the pendency of removal proceedings.

1. 245(c) bars non-immediate relatives who ever worked without authorization or failed to continuously maintain lawful immigration status, and others

The bars at INA § 245(c) prohibit adjustment of status under 245(a) if the person falls within certain categories, like those that failed to maintain lawful status, worked without authorization, or certain other categories.⁴³ These bars do not apply to immediate relatives. Immediate relatives include spouses, parents, and children of USCs.⁴⁴

However, individuals in a preference category are subject to the bars at 245(c) and cannot adjust under INA § 245(a) if they have fallen out of status (or never had lawful status) or have worked without authorization.⁴⁵

Example: Leon entered the United States without inspection when he was 15 years old in 2001. Leon was granted DACA in 2013 when he was 27, which he has renewed ever since. In 2016, he traveled on advance parole to visit his sick grandmother in Jamaica. He recently married his longtime girlfriend who is an LPR. Even though Leon’s advance parole travel allows him to meet the “inspected and admitted or paroled” requirement at INA §245(a), he would be ineligible to apply for adjustment because he worked several years without authorization and was without status prior to obtaining DACA. This is because he would be in a preference category since his wife is an LPR. If his wife were to naturalize, Leon would no longer be barred under 245(c) since he could then apply as an immediate relative.

⁴¹ To access the Visa Bulletin, which is issued monthly, go to <https://travel.state.gov/content/travel/en/lega/visa-law0/visa-bulletin.html>.

⁴² Sometimes, USCIS uses the “Dates for Filing” chart in the Visa Bulletin if it determines that there are fewer adjustment applicants than predicted. The Dates for Filing chart allows applicants to file their adjustment applications a little earlier than the Final Action Dates chart. Each month, USCIS announces which chart it will be using for the following month through a website created for this purpose: <https://www.uscis.gov/visabulletininfo>

⁴³ See INA § 245(c) for a complete list of individuals subject to the bar. Groups include crewmen, noncitizens admitted on transit without a visa under INA §212(d)(4)(c), nonimmigrants who violated the terms of their nonimmigrant visa, and S nonimmigrants, to name a few.

⁴⁴ Widows and widowers of USCs may also be treated as immediate relatives if the USC filed a petition before their death or if the widow(er) files a petition within 2 years of the citizen’s death. INA § 201(b)(A)(i).

⁴⁵ INA § 245(c),

Finally, the 245(c) bars do not apply to individuals adjusting status through 245(i), which will be discussed further below in section III. Additionally, some federal courts have suggested that a grant of TPS might also exempt a person from the 245(c) bars.⁴⁶

2. 245(d) bars conditional residents and K nonimmigrants

Section 245(d) bars conditional permanent residents (individuals granted conditional permanent residency based on a marriage that was not yet two years old) from adjusting status under 245(a), unless their conditional residence is terminated.⁴⁷

It also bars K nonimmigrants—K-1 fiance(e)s and K-3 spouses of U.S. citizens, and their K-2 or K-4 children—from adjusting status through any marriage other than to the U.S. citizen who filed the K visa petition.⁴⁸

3. 245(e) bars for applicants who marry during removal proceedings

This bar only applies to adjustment applicants based on marriage, where the marriage occurred while the noncitizen is in removal proceedings. However, a person can overcome this bar if they establish, by clear and convincing evidence, that the marriage was entered into in good faith.⁴⁹

III. Adjustment of Status under INA § 245(i)

INA § 245(i) permits adjustment for certain noncitizens in the United States who normally would not qualify for adjustment of status if they pay a “penalty fee” and meet certain requirements. In order for an individual to qualify for 245(i), they must have been the beneficiary of a family petition or labor certification that was properly filed on or before April 30, 2001. Below are a few key points on how someone would be 245(i) eligible for adjustment of status. For a more detailed explanation, see ILRC, *Practice Advisory: 245(i): Everything You Always Wanted to Know but Were Afraid to Ask* (June 2018).⁵⁰

Who can apply? Individuals who are beneficiaries of a family petition or a labor certification that was filed on or before April 30, 2001 can seek to adjust under INA § 245(i). There was an initial 245(i) provision that allowed beneficiaries of petitions filed on or before January 15, 1998 to adjust status. That was later extended, with additional provisions, to petitions filed on or before April 30, 2001. To be eligible to adjust, these individuals must demonstrate that they were physically present in the U.S. on December 21, 2000. This additional physical presence requirement does not apply where the petition was filed before January 15, 1998.

Example: Juan is an LPR who submitted an I-130 for his wife Aria in January of 2001. Aria entered the U.S. without inspection in 1995. She is not eligible for 245(a) because she entered without inspection. But because the I-130 was submitted on or before April 30, 2001, Aria is eligible for adjustment under § 245(i). Since Aria’s petition was submitted after January 15, 1998, she will need to establish her physical presence in the U.S. on December 21, 2000.

Who can benefit? Individuals who entered without inspection, overstayed their nonimmigrant visas, and/or worked unlawfully can benefit from eligibility for adjustment through 245(i). Individuals who adjust through 245(i) are exempt

⁴⁶ See e.g., *Figuroa v. Rodriguez*, No. CV 16-8218 PA (JCX), 2017 WL 3575284, at *4 (C.D. Cal. Aug. 10, 2017); *Leymis V. v. Whitaker*, No. 18CV00733JNESER, 2018 WL 6107387, at *3 (D. Minn. Nov. 21, 2018).

⁴⁷ *Matter of Stockwell*, 20 I&N Dec. 309 (BIA 1991).

⁴⁸ However, a K nonimmigrant may be able to file an I-360 VAWA self-petition based on abuse by the K visa petitioner.

⁴⁹ INA § 245(e)(3).

⁵⁰ Available at https://www.ilrc.org/sites/default/files/resources/245i_everything_you_want_to_know-20180628.pdf.

from the 245(c) bars and do not need to meet the “admitted” or “paroled” requirement of 245(a). The provision helps non-immediate relatives who would normally be barred under 245(c) to adjust despite being in unlawful status.

Which visa petitions can be used for 245(i) adjustment? A beneficiary of any immigrant visa petition or labor certification filed by the 245(i) deadlines may adjust under 245(i) even if the basis for the adjustment is a different petition.⁵¹ 245(i) eligibility attaches to the individual, not the petition. In order to benefit from 245(i) protection, otherwise known as being “grandfathered,”⁵² an individual’s petition must have been “approvable when filed.”⁵³ This means that the individual was eligible at the time of the original filing. The person will have to provide evidence of the prior petition to prove they are protected under 245(i) when they file for adjustment.

Example: Lamar, a USC, petitioned for his brother Teo in 1997. Teo, who entered the U.S. without inspection, married Lana, who is also a USC, in May 2013. Lana then submitted an immediate relative petition for Teo. Although the second I-130 (the one Lana submitted for Teo) was submitted after April 30, 2001, USCIS will allow Teo to adjust in the United States under 245(i) because Teo is “grandfathered” by his brother’s petition.

Who is considered to be a derivative beneficiary? In certain circumstances, a spouse or a child of someone who is protected under 245(i) can also adjust status under 245(i).

- A **spouse or child of a relationship that existed at the time of filing**, on or before April 30, 2001, are grandfathered independent of the original beneficiary. This means they are able to adjust under 245(i) even if the relationship with the principal beneficiary changed or ended. Therefore, a spouse can remain grandfathered even after losing that marital status due to divorce or a child can remain grandfathered even after turning 21 years of age.
- A **spouse or child relationship that is established after April 30, 2001**, sometimes referred to as “after-acquired,” is not grandfathered and may not independently benefit from 245(i). However, these individuals can adjust under 245(i) if the relationship to the principal beneficiary continues to exist at the time the principal beneficiary adjusts status, and the beneficiary adjusts through the same petition as the principal beneficiary.
- A **spouse or child relationship established after the principal beneficiary adjusts status through 245(i)** **cannot** obtain any benefits from the principal’s 245(i) eligibility and would need some independent basis for grandfathering.

What are the legal requirements to adjust under 245(i)? In order for someone to adjust under INA 245(i), they must meet the following requirements:

- Be the beneficiary of a visa petition or labor certification that was filed on or before April 30, 2001 and that was approvable when filed;
 - If the petition was filed after January 14, 1998, the principal beneficiary must have been physically present in the United States on December 21, 2000.
- An immigrant visa must be immediately available to them;
 - Either the original petition is now current, and has not been withdrawn, denied, or revoked **or**
 - They are also the beneficiary of another petition that is current. Note that the original petition need not have been granted to be make the applicant 245(i) eligible, just that it was properly filed and meritorious in fact.⁵⁴

⁵¹ See agency memoranda dated January 26, 2001, June 10, 1999; and April 14, 1999, currently posted at www.uscis.gov/files/pressrelease/245i.pdf.

⁵² 8 CFR § 245.10(a)(1) provides the definition of a “grandfathered alien.”

⁵³ See 8 CFR § 245.10(a)(3) for definition of “approvable when file” meaning that at the time of filing, the petition was properly filed, meritorious in fact, and non-frivolous. The determination is based on the circumstances that existed at the time the qualifying petition or application was filed.

⁵⁴ *Id.*

- Be admissible under all inadmissibility grounds, except INA § 212(a)(6)(A).

What grounds of inadmissibility and other bars does 245(i) forgive? Individuals protected by 245(i) are not subject to the bars at 245(c). Additionally, 245(i) does not require that a person have entered the United States after being “inspected” so long as their application was filed prior to April 30, 2001.⁵⁵ Applicants are required to pay a \$1,000 penalty fee with their application and to submit Supplement A to Form I-485, Adjustment of Status Under Section 245(i), showing their eligibility for 245(i).⁵⁶ All other inadmissibility grounds apply to applicants for adjustment of status under 245(i).

IV. Preparing and Submitting the Adjustment Packet:

Every applicant for adjustment of status, will need to submit a complete packet to USCIS with all required materials. In light of the changes to USCIS policy, it is important that advocates ensure all initial required documentation is included and that applicants are aware of these changes. Below is a brief overview what documentation is needed, and changes to USCIS policy that will impact requests for adjustment of status.

Caution: Applicants who are not immediately eligible to adjust, either as a previously *“inspected and admitted or paroled” immediate relative, an immediate relative eligible for 245(i), or a preference beneficiary whose preference category is “current”* do NOT submit the adjustment application together with the visa petition. It is critical to determine if your client is presently eligible to adjust before deciding to file an adjustment of status application.

A. Adjustment of Status Application:

An adjustment of status application packet will include USCIS forms (application) and documentation showing eligibility. The includes:

1. **A copy of the notice approving the visa petition** or, if filing the petition simultaneously, a completed I-130, Petition for Alien Relative, packet with supporting documentation, and proper filing fee.⁵⁷
2. **I-485, Application to Register Permanent Residence or Adjust Status**, with all supporting documentation. A list of initial required documents for I-485 can be found on the USCIS website under Checklist of Required Initial Evidence for Form I-485 at <https://www.uscis.gov/i-485Checklist>.

Form I-485 asks detailed questions aimed at identifying possible grounds of inadmissibility. While potential inadmissibility issues should be identified and analyzed prior to filling out the form, completing the form provides another opportunity to assess your client’s eligibility and identify any red flags.

3. **Prove that the applicant was “inspected and admitted or paroled”** to show eligibility for INA §245(a) adjustment (I-94, entry stamp from passport, Advance Parole I-512L paperwork, etc.).

Note: Applicants filing under 245(i) will need to submit Form Supplement A to the I-485 Form, and \$1,000 penalty fee, plus supporting documents showing eligibility for 245(i).

4. **I-864, Affidavit of Support** with supporting evidence of financial support according to the requirements of INA § 213A signed by the petitioner. There are some exemptions⁵⁸ to this requirement and those who

⁵⁵ INA § 245(i)(1)(A).

⁵⁶ 8 C.F.R. 245.2(a)(3)(iii).

⁵⁷ A checklist of initial documentation can be found under the “Checklist of Required Initial Evidence” at <https://www.uscis.gov/i-130>.

⁵⁸ Applicants can file an I-864W if they have earned or can receive 40 quarters of coverage under the Social Security Act (SSA); if they are child who will become a USC upon admission under INA 320; if they are filing for a immigrant visa as a self-petitioning widow, special immigrant, battered spouse of child using Form I-360.

qualify for the exemptions will need to file an I-864W. A complete list of required documents can be located on the USCIS website under Checklist of Required Initial Evidence, at <https://www.uscis.gov/i-864>.

5. **I-765, Employment Authorization**, if the applicant wants work authorization while their adjustment application is pending.
6. **131, Application for Advance Parole**, with separate supporting documents if the applicant plans to travel while the adjustment application is pending.
7. **I-693, for medical examination**. This will be the results of the medical examination and will be given to the applicant in a sealed envelope. This must be submitted to USCIS without being opened. The medical exam must be conducted by a civil surgeon designated by USCIS.⁵⁹ The client can wait to submit the medical exam closer to the interview and many prefer to wait to ensure the medical exam will be valid at the time of the interview.

Note: USCIS recently issued a Policy Alert updating the validity of the medical examination report. The new policy states that a Form I-863 is valid only when a civil surgeon signs it no more than 60 days before the date an applicant files the application for the underlying immigration benefit. It also states that the I-693 is valid for two years.⁶⁰

8. **Filing fees**⁶¹. As of the writing of this, an adjustment application had a filing fee of \$1225. This includes the cost of the employment authorization application and the biometrics fee. Applicants who will be filing a “one-step adjustment”⁶² will have an additional fee of \$535 for Form I-130. ***Always check the USCIS website for the latest filing fee information before you file to ensure you have the correct amount.***
9. **Note: I-601, Application for Waiver on Grounds of Inadmissibility, if needed**. Only submit a waiver with the adjustment packet if you are **certain** it is needed. Be sure to understand if the person is really inadmissible and if a waiver is necessary and possible. There is separate filing fee of \$930 for the waiver.

USCIS will process the application once they have received all required initial documentation with the correct filing fee. USCIS will then send the applicant a receipt notice showing their application is being processed. This receipt will include a number that applicants and advocates can use to check the status of the case. Applicants will also be sent a biometrics appointment and scheduled for an interview. After the interview, USCIS will issue a decision. Advocates should note that there have been changes to when USCIS will issue Request for Evidence (“RFE”) and Notice of Intent to Deny (NOID) as well as when and who will issue a Notice to Appear (NTA). These changes are noted below with how they can impact an adjustment of status application.

B. Changes to USCIS Policy

1. Policy for Issuing NTAs:

⁵⁹ For the most current list of civil surgeons in your client’s area, you can check the USCIS Civil Surgeons Locator at https://egov.uscis.gov/crisgwi/go?action=offices.type&OfficeLocator.office_type=CIV or by telephone from the USCIS National Customer Service Center at 1 (800) 375-5283.

⁶⁰ 8 USCIS-PM B. Also see, USCIS Policy Alert: *Validity of Report of Medical Examination and Vaccination Record (Form I-863)*, <https://www.uscis.gov/policymanual/Updates/20181016-I-693Validity.pdf>.

⁶¹ These are the filing fees for family-based adjustments, different types of adjustment have different fee and fee waiver options.

⁶² One-Step adjustment refers to applicants who are eligible to submit both the I-130 and I-485 together. This is the case for individuals filing as immediate relatives.

On June 28, 2018, USCIS issued a memorandum expanding its ability to issue an NTA upon denying certain immigration applications.⁶³ This memo is being implemented incrementally, and currently includes denials of humanitarian forms of relief, Form I-539, Applications to Extend or Change Nonimmigrant Status, and Forms I-485, Applications for Adjustment of Status.

This policy will apply to all I-485s adjudicated after October 1, 2018, regardless of when they were filed with USCIS.⁶⁴ USCIS will issue an NTA if it denies a I-485 application and the applicant is not lawfully present.⁶⁵ Advocates should note USCIS will generally not issue an NTA until a denial is final, and the appeal process is complete.⁶⁶ In the event that USCIS denies an application, advocates should exhaust all appeals with USCIS.

It is imperative that advocates thoroughly screen their clients for any red flags and inform them of the risks of applying. For a more detailed explanation of these changes and to review practice tips, please see ILRC, *Practice Advisory: Updated Guidance for the Referral of Cases and Issuance of Notices to Appear* (Dec. 2018).⁶⁷

2. Policy for Issuing RFE/NOIDS:

As of September 11, 2018, USCIS adjudicators can deny an application or petition without first issuing an RFE/NOID.⁶⁸ USCIS, in its discretion, may deny an application if all required initial evidence is not submitted with the benefit request for failure to establish eligibility. USCIS stated that in cases where the regulations, the statute, or form instructions require the submission of an official document or other form or evidence establishing eligibility at the time of filing and there is no submission, it can issue a denial without an RFE/NOID.⁶⁹

In order to ensure that a complete application is submitted, advocates should use the checklist that USCIS has for Form, I-485, and other pertinent applications in the adjustment of status packet. These checklists can be found on the form site, under “Checklists of Required Initial Evidence,” some of which we have listed above. In addition, advocates are encouraged to submit the checklists with their filing, place the checklist on top of the filing, and indicate that all required evidence is included.

V. Conclusion

Family-based immigration remains a key option for many immigrants seeking permanent status. While many immigrants may have a family member who can petition them, not all of them will be eligible for adjustment of status. Although there are a limited number of ways that an individual can apply for permanent residence through a family member, it is important to screen individuals thoroughly about their adjustment options. Adjustment of status before USCIS is preferable to consular processing thus making it important to explore all adjustment options carefully. Before moving forward with any adjustment application, advocates should ensure that clients will meet all of requirements for adjustment, including whether a waiver is available and needed.

⁶³ USCIS Policy Memorandum: *Updated Guidance for the Referral of Cases and Issuance of Notices to Appear (NTA) in Cases Involving Inadmissible and Deportable Aliens* (June 28, 2018), <https://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/2018/2018-06-28-PM-602-0050.1-Guidance-for-Referral-of-Cases-and-Issuance-of-NTA.pdf>.

⁶⁴ USCIS Teleconference on Notice to Appear (NTA) Updated Policy Guidance (September 27, 2018)

https://www.uscis.gov/sites/default/files/files/nativedocuments/USCIS_Updated_Policy_Guidance_on_Notice_to_Appear_NTA.pdf.

⁶⁵ *Supra*, note 63

⁶⁶ *Supra* note 64.

⁶⁷ Available at: <https://www.ilrc.org/updated-guidance-referral-cases-and-issuance-notices-appear-tips-and-strategies-working-clients>.

⁶⁸ USCIS, *Policy Memorandum: Issuance of Certain RFEs and NOIDs; Revisions to Adjudicator’s Field Manual (AFM) Chapter 10.5(a), Chapter 10.5(b)* (July 13, 2018), https://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/AFM_10_Standards_for_RFEs_and_NOIDs_FINAL2.pdf.

⁶⁹ *Id.* at 3.

**San Francisco**

1458 Howard Street
San Francisco, CA 94103
t: 415.255.9499 f: 415.255.9792

ilrc@ilrc.org www.ilrc.org

Washington D.C.

1015 15th Street, NW, Suite 600
Washington, DC 20005
t: 202.777.8999 f: 202.293.2849

About the Immigrant Legal Resource Center

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