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I-485 (EAD, AP, FP)

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Aliens who are physically present in the United States already are allowed to immigrate without leaving the United States to apply for an immigrant visa. This process is called Adjustment of Status (AOS). The USCIS will permit an application for AOS to be filed only if an immigrant visa is immediately available to the alien. Section 245(a) of the Immigration and Nationality Act (INA) governs the general AOS provisions. Note that the AOS under 245(a) is viewed as a privilege granted by USCIS in the exercise of its discretion and therefore, even when an alien meets all of the requirements, AOS can be denied and the alien can be required to follow visa processing (consular processing) abroad. For USCIS to approve the AOS application the applicant must have passed the medical examination and have all security clearances.

An application for AOS is made on Form I-485. Once an application has been accepted, it will be checked for completeness, including submission of the required initial evidence. USCIS may request more information or evidence or may request applicant to appear at a USCIS office for an interview. Applicant may be required to answer questions under oath or affirmation. Applicant must carry their Arrival-Departure Record (Form I-94) and any passport or official travel document to the interview. There is no appeal on denial of AOS application but the alien may make motion to reopen or reconsider.

The AOS is filed based on an immigrant petition. One may apply AOS if:

- An immigrant visa number is immediately available based on an approved immigrant petition or if the application is filed with a completed relative petition, special immigrant juvenile petition or special immigrant military petition which, if approved, would make an immigrant visa number readily available to the applicant;
- It is based on being the spouse or child (derivative) at the time another AOS applicant (principal) files to adjust status or at the time a person is granted permanent resident status in an immigrant category that allows derivative status for spouses and children. If the spouse or child is in the U.S., the individual derivative may file their AOS with Form I-485 for the principal applicant, or file Form I-485 at any time after the principal is approved, provided a visa number is available. But if the spouse or child is residing abroad, the person adjusting status in the U.S. should file Form I-824 (application for Action on an Approved Application or petition) concurrently with the principal?s Form I-

485 to allow the derivative to immigrate to the U.S. without delay provided the principal?s AOS is approved;
- It is based on admission as the fiancée of a U.S. citizen and subsequent marriage (within 90 days of entry into USA) to that citizen. The K2 child of such fiancée may apply AOS based on parent?s Form I-485;
- It is based on asylum status granted in the United States provided the applicant has been physically present in the U.S. for one year after the grant of asylum and still qualify as an asylee or as the spouse or child of a refugee;
- It is based on refugee status after being admitted as a refugee and have been physically present in the U.S. for one year following the admission, provided that refugee status has not been terminated;
- It is based on Cuban citizenship or nationality and applicant was admitted or paroled into the U.S. after January 1, 1959, and thereafter have been physically present in the U.S. for at least one year after or applicant is the spouse or unmarried child of a Cuban described above and regardless of applicants nationality were admitted or paroled after January 1, 1959, and thereafter have been physically present in the U.S. for at least one year.
- The applicant is applying to change the date on which his/her permanent residence began. If applicant was granted permanent residence in the U.S. prior to November 6, 1966, and are a native or citizen of Cuba, or the applicant is the spouse or unmarried child of such an individual, he/she may ask to change the date of their lawful permanent residence began to the date of the applicant?s arrival in the U.S. or May 2, 1964, whichever is later.
- If it is based on applicants continuous residence in the U.S. since before January 1, 1972. This is known as ?Registry.?

Over the course of previous years, AOS provisions were expanded (Section 245(i)) covering previously ineligible aliens, including persons who entered without inspection, engaged in unlawful employment or otherwise overstayed, to adjust status. This limited ?grandfather? provision enacted in 2000 (the LIFE Act) allowed an alien whose sponsor filed a labor certification or an immigrant visa petition by April 30, 2001 thus preserving his/her eligibility to adjust status under 245(i) (as long as they were physically present in the United States on December 21, 2000). Such ineligible aliens, by paying a penalty fee apart from the normal fee, could take advantage of the AOS benefits.

Advantages of AOS

- Can avoid visa processing at US consulate abroad.
- Can avoid cost and inconvenience of a long trip abroad for visa.
- Can obtain employment authorization during the processing of the AOS.
- Can obtain advance parole if applicant needs to travel outside USA.
- Can get some access to U.S. courts if the AOS application is denied by USCIS.

Normal Eligibility Standards of AOS under Section 245(a)

- Alien must have been ?admitted? or ?paroled? into the United States;
- Alien must not have engaged in unlawful employment;
- Alien must have maintained status during all periods of stay in USA and must have not violated terms of nonimmigrant visa;
- Alien filing AOS on approved employment based visa petition must be in lawful

nonimmigrant status at the time of filing;
- Alien must be ?eligible? for immigration;
- An immigrant visa must be ?immediately available? to the alien; and
- Alien must be admissible and must merit a favorable exercise of discretion.

Ineligible classes

Following classes are ineligible for AOS even though they have been ?admitted? at a port of entry (POE):

- Alien admitted in transit without a visa through the United States to another country;
- Alien entered the United States as a nonimmigrant crewman;
- Alien was not admitted or paroled following inspection by an immigration officer;
- Alien?s authorized stay expired before he/she could file AOS;
- Alien was employed in the United States without USCIS authorization prior to filing AOS application;
- Alien failed to maintain his/her nonimmigrant status, other than through no fault of his/her own or from technical reasons; unless he/she is applying because he/she: is an immediate relative of a U.S. citizen (parent, spouse, widow, or unmarried child under 21 years old) or a K-1 fiancée or a K-2 fiancée dependent who married the U.S. petitioner within 90 days of admission; or an H or I nonimmigrant or special immigrant (foreign medical graduates, international organization employees, or their derivative members);
- Alien was admitted as a K-1 fiancée, but did not marry the U.S. citizen who filed the petition for him/her or alien was admitted as the K-2 child of a fiancée and his/her parent did not marry the U.S. citizen who filed the petition;
- Alien is or were a J-1 or J-2 exchange visitor and are subject to the two-year foreign residence requirement and have not complied with or been granted a waiver of the requirement;
- Alien have A, E, or G nonimmigrant status or have an occupation that would allow him/her to have this status, unless he/she completes Form I-508 to waive diplomatic rights, privileges, and immunities and, if he/she is in an A or G nonimmigrant visa, unless he/she completed Form I-566;
- Alien was admitted to Guam as a visitor under the Guam visitor waiver program;
- Alien was admitted to the U.S. as a visitor under the Visa Waiver Program, unless he/she is applying because he/she is an immediate relative of a U.S. citizen (parent, spouse, widow, widower, or unmarried child under 21 years of age); and
- Alien is already a conditional permanent resident.

Employment Authorization (EAD)

All aliens who have a pending AOS application are eligible to apply for an EAD using Form I-765. An alien is not authorized to work until he/she has an EAD issued (unless they have another status like H-1B, that allows them to work). The alien, upon issuance of the EAD, may work for any employer. Under the recent changes, USCIS will issue two-year EAD to aliens who are unable to adjust their status due to immigrant visa numbers not immediately available. A renewal of the EAD application can be made only within 120 days of expiration of the existing EAD.

Advance Parole

All aliens who have a pending AOS application are eligible to apply for an advance parole

using Form I-131. This allows them to come back after traveling outside USA for any bona fide personal or business reasons. Any alien (except H, L, K-3, K-4 and V visa holders) leaving the United States while their AOS application is pending is deemed to have abandoned their AOS application until they have received an advance parole before leaving the U.S. Usually, advance parole is granted for one year with multiple entries allowed. The departure from the U.S. (including brief visits to Canada and Mexico) constitutes an abandonment of the AOS application unless advance parole is granted and applicant is inspected upon return to the U.S. Exceptions are granted to H, L, V or K3/K4 non-immigrants. Refugees and asylees may travel outside the U.S. on their valid refugee travel document without the need of an advance parole.

3/10 Year Bar

Any unlawful presence accrued by the alien (depending on the length of unlawful presence) prior to the filing of the AOS application may subject the alien to 3/10 year bar. Under this bar, if the alien has been unlawfully present in the United States for a period of more than 180 days, who voluntarily departed the United States before removal proceedings were commenced are inadmissible for a period of three or 10 years from the date of departure. Only unlawful presence that was accrued on or after April 1, 1977, counts towards the three and ten year bar under section 212(a)(9)(B)(i) of the Immigration and Nationality Act (?Act?). If a person becomes inadmissible under section 212(a)(9)(B)(i) of the Act while their AOS is pending, they will need a waiver of inadmissibility under section 212(a)(9)(B)(v) of the Act before their AOS can be approved. This waiver, however, is granted on a case-by-case basis and in the exercise of discretion and also requires a showing of extreme hardship to his/her U.S. citizen or lawful permanent resident spouse or parent, unless he/she is a refugee or asylee. For refugees and asylees, the waiver may be granted for humanitarian reasons to assure family unity or if it is otherwise in the public interest.

American Competitiveness in the Twenty-first Century Act (AC 21) Portability

Under the American Competitiveness in the Twenty-first Century Act of 2000, individuals who have filed their AOS and whose cases have been pending for more than 180 days could change jobs or employers without affecting the validity of the underlying I-140 petition or labor certification, as long as the new job is in the same or similar occupational classification.

Child Status Protection Act (CSPA)

A permanent residence application on the basis of AOS or an application for an immigrant visa had to be acted upon and the immigration status granted before the applicant reached 21 years of age. So, a child applying as the dependent of a parent, for instance, had to remain a ?child? under immigration law until the immigration status was granted. Due to the huge delays in AOS application processing, such applicants had ?ageing-out? problems. The Child Status Protection Act enacted in 2002 provided for continued classification of certain aliens as children in cases where they turn 21 years of age (age-out) while awaiting immigration processing.

AOS processing to Consular Visa processing

If an AOS application is filed and then the applicant prefers to process visa abroad, the

applicant has to take steps (must file Form I-824 with the USCIS) to have his/her case processed abroad at a U.S. Consulate. The applicant should list in the I-824 the consular post that should receive notification of the visa petition approval. Note: Filing of the I-824 may be treated as a request to withdraw the AOS application that was filed by the applicant. He/she may lose the employment authorization as well as the advance parole that was issued by the USCIS.

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