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A Primer on Adjustment of Status in the United States

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Abstract

Adjustment of status, strictly speaking, is the procedure by which an alien who has been inspected and admitted or paroled into the United States is given the status of an alien lawfully admitted for permanent residence without having to depart the country.

A Primer on Adjustment of Status in the United States

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I. Introduction

Adjustment of status, strictly speaking, is the procedure by which an alien who has been inspected and admitted or paroled into the United States¹ is given the status of an alien lawfully admitted for permanent residence without having to depart the country. The term is generally used to refer to the procedure provided by Section 245 of the Immigration and Nationality Act of 1952, as amended (hereinafter referred to as the Act).² There are other provisions by which an alien acquires lawful permanent resident status while in the United States, which can be, and are also sometimes, referred to as adjustment of status. These are: a change of status from fiance to lawful permanent resident under Section 214(d) of the Act³, change of status from refugee or asylee to lawful permanent resident under Section 209 of the Act and change of status to lawful permanent resident under the Cuban Adjustment Act.⁴ Although not generally referred to as adjustment of status, an alien in the United States can acquire lawful permanent resident status under the provisions of Section 244(a)⁵ of the Act (suspension of deportation) and under Section 249 of the Act⁶ (registry).⁷

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The views expressed by the author are solely his own and do not necessarily represent the views of the United States Department of Justice or any of its offices.

1. All aliens coming into the United States must present themselves for inspection as aliens by an immigration officer. The INS officer, at that moment, can: admit the person, hold the alien in detention while proceedings to determine his admissibility are concluded, or enlarge the alien into the United States pursuant to section 212(d)(5) of the Act, current version at 8 U.S.C. § 1182 (Supp. 1988). The last option is termed "parole."

2. 8 U.S.C. § 1255 (Supp. 1988).

3. *Id.* § 1184(d).

4. Cuban Refugees Adjustment of Status Act of 1966, Pub. L. No. 89-732, 80 Stat. 1161.

5. 8 U.S.C. § 1254 (a) (Supp. 1988).

6. *Id.* § 1259.

7. The Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, §

Lawful permanent resident status confers upon the alien the right to remain indefinitely in the United States until such time as he becomes deportable due to certain events. These events generally, but not exclusively, relate to wrongdoing after acquisition of that status or subsequent discovery of a reason existing at the time of acquisition of lawful permanent resident status which would have been a ground to deny such status. Only aliens admitted for lawful permanent residence and some veterans covered by Section 329 of the Act⁸ can apply for United States citizenship. The lawful permanent resident has the right to apply for his wife and unmarried daughters and sons to become lawful permanent residents. A lawful permanent resident is free to pursue any type of employment, as long as he complies with the laws regulating them generally. Three exceptions must be noted: (1) employment with the federal government is generally restricted to citizens of the United States, (2) some law-enforcement occupations with state governments are reserved to citizens of the United States, and (3) aliens acquiring their status on the basis of need of their skills may become deportable if they leave the employment which gives rise to their eligibility for lawful permanent resident status without an explanation that negates a pre-conceived intent to abandon the employment as soon as practicable after acquisition of lawful permanent resident status.

II. Categories Eligible

Legal immigration into the United States, whether via the normal procedure of applying for an immigrant visa abroad or via the procedures described herein, is strictly limited. Besides the annual general and per country numerical limitations, which are in fact a bar to many who would otherwise qualify to immigrate lawfully, the qualification for a preference or immediate relative status under sections 203⁹ or

202(b)(2), 100 Stat. 3359, provides a mechanism by which certain aliens illegally present in the United States prior to January 1, 1982 (if the person has been designated a Cuban-Haitian entrant, prior to November 6, 1986) and certain other aliens present in the United States before January 1, 1986, and meeting certain employment requirements, may be allowed to legalize their status. Since these provisions do not immediately confer upon the alien the status traditionally termed lawful permanent resident status and these provisions are to be phased out in the near future, they are outside the scope of this article.

8. 8 U.S.C. § 1440 (Supp. 1988).

9. *Id.* § 1153.

201(b)¹⁰ of the Act is the starting point for almost all lawful immigration into the United States.¹¹

The normal procedure to immigrate into the United States presupposes some form of attachment with the United States prior to the alien being allowed to enter legally. Immediate relatives and aliens qualifying for first, second, fourth and fifth preference have the attachment via a relative who is a United States citizen or an alien already lawfully admitted for permanent residence. The third and sixth preferences and minister special immigrants, have the attachment through a United States employer who seeks their services. At present, truly normal immigration into the United States is solely for family reunification or for enhancement of the economy. The United States, at least legally, is closed to independent immigration.

Under present law, an alien who marries a citizen of the United States (male or female), and his or her children under 18 years of age at the time of the qualifying marriage of the alien parent, can apply for conditional lawful permanent resident status in the United States¹² if certain conditions are met. These are: (a) he has been inspected and admitted or paroled into the United States, (b) his status as the spouse of a United States citizen is recognized by the Immigration and Naturalization Service (hereinafter referred to as the INS), (c) he applies for such status, (d) he is not a person barred from the United States under other provisions of the law, and (e) he did not marry while deportation proceedings were pending against him unless he has spent two years abroad by the time he makes the application. Generally, after two years from the date of adjustment, the condition is removed absent a reason to believe the marriage was entered into to obtain immigration benefits. The alien is then deemed to have full lawful permanent resident status retroactive to the date he was originally granted

10. *Id.* § 1151(b).

11. A large body of law exists on the requirement that a family or employment relationship be recognized under the immigration laws to confer status on an alien. A detailed discussion of the specific requirements for the recognition of each of them is beyond the scope of this article.

12. Conditional lawful permanent resident status was introduced by the Immigration Marriage Fraud Amendments of 1986, Pub. L. No. 99-639, 100 Stat. 3537, to provide a "trial period" in light of the perceived abuse in the visa petitions based on marriages. A two-step procedure is envisioned before the applying alien acquires full lawful permanent resident status. Since the first case of the second step envisioned by this legislation is impossible before November 10, 1988, and the procedures are not yet fully implemented, we will ignore this curlicue for purposes of this article.

conditional lawful permanent resident status.

Unmarried sons and daughters and spouses of aliens lawfully admitted for permanent residence, aliens eligible for lawful permanent residence on account of a profession or occupation, sons and daughters (whether or not married) of citizens of the United States, brothers and sisters of citizens of the United States and parents of citizens of the United States can acquire conditional (for spouses and stepchildren) or full (others) lawful permanent resident status in the United States if certain factors are met. These are, if (a) they have been inspected and admitted or paroled into the United States, (b) their status as a relative or the eligibility of the occupation for immigration benefits is recognized by the INS, (c) they apply for such status, (d) they are not persons barred from the United States under other provisions of law and (e) they are "in status," that is, they are legally in the United States at the time they make application for lawful permanent resident status.¹³

The granting of an application for adjustment of status is generally discretionary; even if the applicant meets all requirements, he does not have an absolute right to have his application approved. Currently, however, it is rare for applications for adjustment of status to be denied on discretionary grounds.¹⁴ It should be noted that a number of nonimmigrant categories, because of the pattern of abuse in the past, are barred from adjustment of status even though they meet the general prerequisites.

An alien who is denied adjustment of status by the INS has the right to renew his application before the immigration judge assigned to preside over the proceedings to determine whether he or she should be deported from the United States. If the immigration judge denies the application for adjustment of status and the denial is upheld in the administrative appeal, the alien can seek review of the denial in our regular federal judiciary as part of the challenge to the order requiring his or her enforced departure from the United States.¹⁵

Adjustment of status has traditionally been considered an excep-

13. This last requirement is not applicable to parents of citizens of the United States.

14. Many aliens who in the past would have been denied adjustment of status in the exercise of discretion are now statutorily barred from that relief. Immediate relatives can apply for adjustment of status even if present illegally (so long as they did not enter the United States without inspection). The Board of Immigration Appeals has stated that they should be granted adjustment of status absent serious adverse factors. See generally, *Matter of Ibrahim*, 18 I&N Dec. 55, 57 (BIA 1981).

15. See *Hitai v. INS*, 343 F.2d 466 (2nd Cir. 1965) *cert. denied*, 382 U.S. 816.

tional procedure to acquire lawful permanent resident status. The ordinary procedure originally envisioned was the issuance of an immigrant visa by a United States Consul abroad and the lawful admission for permanent residence with that immigrant visa. Recent legislation tends to promote this procedure.¹⁶

III. Adjustment of Status Under Section 245 of the Act

Present law and regulations provide that an alien must apply for the benefit of adjustment of status under section 245 of the Act¹⁷ in order to obtain lawful permanent resident status. However, in the vast majority of cases, another individual or entity must also interact with the immigration authorities by filing a visa petition to bring the applying alien within one of the classes of aliens eligible to acquire the status of an alien lawfully admitted for permanent residence.¹⁸

Timing is of the essence. Today, as the foregoing discussion suggests, adjustment of status under Section 245 of the Act for persons not immediate relatives requires at least that they be in status at the time they apply for the relief. Consequently, the sooner the ability to file, the higher the probability that an unintentional, but not merely technical, violation of the nonimmigrant status is not present.¹⁹

Due to the perceived pattern of abuse in the past, crewmen and aliens in transit without a visa are barred from adjustment of status even though they may meet the general statutory prerequisites for that benefit. To prevent abuse prospectively, the Act provides that aliens who enter the United States under the visa waiver program are to be implemented under Section 217 of the Act²⁰ and aliens allowed into

16. L. Wilde, *Consular Nonreviewability—A Reexamination*, 64 INTERPRETER RELEASES 1012-21, at 1012 (September 4, 1987).

17. 8 U.S.C. § 1255 (Supp. 1988).

18. There are two exceptions of limited applicability. An alien qualifying as a third preference immigrant may file a visa petition on behalf of himself, but he must establish that a United States employer seeks his services. A nonpreference immigrant who establishes that he is exempt from the labor certification required by section 212(a)(14) of the Act, 8 U.S.C. § 1182(a)(14) (Supp. 1988), need not have another person second his application to become a lawful permanent resident, but nonpreference visa numbers have long been unavailable.

19. The Act provides that an alien who fails to comply with the terms of his nonimmigrant status through no fault of his or her own for technical reasons is not barred from adjusting his status. The INS has issued regulations interpreting this language. See 8 C.F.R. § 245.1(c)(2)(1988).

20. 8 U.S.C. § 1187.

Guam without a visa under the provisions of Section 212(l) of the Act,²¹ are not to be eligible to adjust their status in the United States.²²

The regulations provide that the underlying visa petition and the application for adjustment of status can be simultaneously filed when circumstances are such that if the approval of the visa petition were to occur that same day, a visa number would be immediately available to the applicant for adjustment of status. If the facts justify a simultaneous filing, the alien is relieved from continuing to comply with the conditions of his nonimmigrant status as a prerequisite to securing adjustment of status. If the documentation filed shows *prima facie* eligibility, the INS immediately issues employment authorization.

Perfection is the key to the preparation of the application for adjustment of status. All the required forms must be fully and correctly answered and all supporting documentation must accompany the application package.²³ The failure to do this may result in the return of the application without processing, which may involve the loss of a priority date if a simultaneous filing was involved.²⁴ If the INS believes that incorrect information was supplied with the intent to deceive the adjudicator, it may raise a charge of ineligibility predicated on excludability under section 212(a)(19) of the Act.²⁵

If documents that are necessary under the regulations are not available, substitute secondary documentation may be submitted with an adequate explanation for the unavailability.²⁶ The regulations contemplate the unavailability, not the mere inconvenience of location and

21. 8 U.S.C. § 1182(1) (1970).

22. Immediate relatives would still be able to adjust under the visa waiver program. 8 C.F.R. 245.1(b)(15)(June 30, 1988; 53 F.R. 24898).

23. A single set of the forms mentioned in this article is available through the local INS District Office. Up to 25 copies may be obtained upon written request to the Regional Commissioner and, thereafter, copies can be obtained from the Government Printing Office.

The regulations provide that an attorney may submit a copy of an original if he certifies the copy in accordance with 8 C.F.R. § 204.2(j)(3)(1988), but the INS may require production of the original to determine the document's authenticity and failure to submit the original is good ground to deny a visa petition. *Matter of Hilaire*, Int. Dec. 3048 (BIA 1988).

24. The Board of Immigration Appeals has sanctioned the denial of visa petition for lack of prosecution. *See Matter of Pearson*, 13 I&N Dec. 152 (BIA 1969). No published decision exists, however, on the specific point of loss of priority date for tardiness in resubmitting the returned visa petition.

25. 8 U.S.C. § 1182(a)(19) (Supp. 1988).

26. 8 C.F.R. § 103.2(b)(1) (1988).

production of the documentation, as an excuse for the failure to submit the preferred documentation. The absence of a document is a red herring, which results in the application being closely examined. The decision to allow processing without the document is made only if the document is deemed to be, in fact, unavailable to the applicant.

The basic document to commence an adjustment of status procedure is the Application for Permanent Residence,²⁷ executed by the alien seeking to adjust. It is required that it be accompanied by a questionnaire entitled Biographic Information²⁸ and a fingerprint chart.²⁹ Since it is assumed that an approval is likely, photographs for the alien registration receipt card³⁰ must be submitted with the adjustment application.³¹ A medical examination is required and the medical report from an approved physician must be submitted prior to the approval of the application for adjustment of status.³²

If a visa petition is filed concurrently by the relative, employer or, in the unusual case of a third preference immigrant whose employer does not wish to file a petition, the alien himself, the appropriate form must be filled out.³³ The appropriate supporting documentation of the family relationship claimed to entitle the applicant for adjustment of status must also be submitted. In the case of employment-related visa petitions, the labor certification issued by the Department of Labor or evidence of precertification pursuant to Schedule A³⁴ must be submitted. The visa petitioner must also submit the Biographical Information Form.³⁵

For the preference categories identified as first, second, fourth and

27. Immigration Form I-485.

28. Form G-325A.

29. Form FD-258.

30. Form I-551, commonly known as the green card.

31. Other documents are also required, but they may vary depending on the facts of each case. The reader is referred to the instructions on the form, which have the force of regulations. See 8 C.F.R. 103.2(a).

32. This document is transmitted by the physician to the Service *sub sigillo* through the applicant for adjustment of status.

33. Form I-130 or I-140 in the case employment-related petitions.

34. The Secretary of Labor publishes a list of occupations for which eligible applicants are deemed to be in short supply throughout the United States. If an alien meets the qualification for that occupation and that is the occupation that he is to engage in, he may be deemed precertified. This determination is by the District Director of the Service office with jurisdiction. As to which District Director has jurisdiction, see 8 C.F.R. § 204.1(a)(2)(1988).

35. Form G-325A.

fifth, the filing of the visa petition, if it is subsequently approved, establishes the priority date. For aliens subject to numerical limitations, this date is an essential element to determine whether a visa is immediately available at the time of filing for adjustment of status in the United States.³⁶ Immediate availability for simultaneous filing is only available for preference immigrants when the preference category appears as "current" on the Visa Bulletin³⁷ for the month the filing occurs.

For aliens seeking immigrant status under the third and sixth preference,³⁸ the priority date is established by the filing of the labor certification application with the Employment and Training Administration of the applicable state, if one is required, or the filing of a visa petition with sufficient documentation to justify precertification under Schedule A with the INS district director with jurisdiction.

Immediate relatives, that is, spouses, parents and unmarried children under the age of 21 of citizens of the United States,³⁹ have visa numbers immediately available to them at all times since they are not subject to the numerical limitations of the Act. Another group of aliens not subject to the numerical limitations is special immigrants, as defined in sections 101(a)(27) of the Act⁴⁰. The most important subgroup is ministers of religion and their accompanying children and spouses.

Before an application for adjustment of status is approved, an interview is scheduled. The interview is exhaustive or pro-forma depending on the assessment by the INS officer of the likelihood of fraud or mistake in the documentation submitted to apply for adjustment of status.

If the INS examiner agrees that eligibility has been established, he approves the application for the District Director and forwards an approval packet to the centralized office charged with the duty of issu-

36. Since there are more eligible applicants for immigration than numbers available within the numerical limitations, a queue has been established on the basis of the date of filing of documents justifying the qualifications of an alien to have his application for an immigrant visa considered.

37. Published monthly by the Department of State.

38. Nonpreference numbers have been unavailable for quite some time and they last benefited only persons who could qualify as investors. The battle between administrators and prospective immigrants without a claim to an approved avenue for legal immigration has been endless and tenacious. For an example of a tongue-in-cheek claim, see *Matter of Wang*, 16 I&N Dec. 528 (BIA 1978).

39. In the case of an applicant claiming to be the parent of a citizen of the United States, the qualifying offspring must be over 21 years of age.

40. 8 U.S.C. § 1101(a)(27) (Supp. 1988).

ing the Alien Registration Receipt Cards, commonly known as "green cards."⁴¹ If he does not believe eligibility has been established, he drafts an appropriate decision that puts an end to the adjustment application unless the applicant takes affirmative action to overcome the bases claimed by the examiner to prevent approval of the application for adjustment of status.

This decision may be predicated on total ineligibility because: (1) the family relationship claimed to exist has not been in fact established (if the posture of the case is one where a simultaneous filing of a visa petition and an adjustment application has taken place, the decision is a notice of intention to deny the visa petition) or (2) a ground of excludability exists which has not or cannot be overcome by a waiver of excludability. The decision can also be predicated on the statutory ineligibility to adjust status in the United States or the discretionary inadvisability to grant adjustment of status. In both of these latter cases, the alien can pursue his application for immigrant status via the visa application process abroad at a United States consulate.

When faced with this outcome, efforts can be made to overcome the denial either by submitting additional documentation to overcome the objections specified in the notice of intention to deny visa petition (if there is such a notice issued in a concurrent filing case) or submitting a motion to reopen and reconsider if there has been an adjudication of the adjustment application itself.

In the case of a concurrent filing with a denial at the visa petition end of the filing, an administrative appeal may be available to the Board of Immigration Appeals or to the Associate Commissioner, Examinations. However, that administrative appeal does not prevent the INS from moving against the applicant for adjustment of status. There is no appeal from a decision denying the application for adjustment of status,⁴² only the possibility of renewing the application for adjustment of status with the Immigration Judge in the event deportation proceedings are instituted against the alien applicant.⁴³

41. Forms I-551.

42. 8 C.F.R. § 245.2(a)(5)(ii)(1988).

43. The regulations provide that in cases where the alien has been allowed to depart from the United States pending adjudication of the application for adjustment of status by the issuance of a Form I-512, which entitles the alien to be paroled into the United States upon his return, he is allowed to renew his denied application for adjustment of status before the immigration judge in exclusion proceedings. *See id.* § 245.2(a)(1).

IV. Cuban Refugee Act Adjustments

Aliens adjusting their status under the Cuban Refugee Adjustment Act⁴⁴ only have to establish general admissibility under the immigration laws and that they have been inspected and admitted or paroled after January 1, 1959 and more than one year before making their application for permanent residence. None of the prohibitions relating to status violations or employment apply to aliens adjusting their status under this special legislation. Furthermore, an alien may qualify for adjustment under this act due to his or her parent's marriage to a native or citizen of Cuba even while exclusion or deportation proceedings are pending against him.

A special form⁴⁵ has been issued by the INS to be utilized by aliens applying for adjustment of status under the Cuban Refugee Adjustment Act. This form is bilingual and is used by natives and citizens of Cuba, their spouses and unmarried children under the age of 21.⁴⁶ The Biographical Information Form⁴⁷ is again required. A medical examination is required and the examining physician must certify the results to the INS.⁴⁸

Since eligibility rests either on Cuban birth or citizenship or on the status as the spouse or child of a native or citizen of Cuba, documentary evidence of such facts must be submitted to the INS with the application for adjustment of status. Evidence of inspection and admission or parole must also accompany the application for adjustment of status since that is one of the basic prerequisites for adjustment of status.⁴⁹

44. Pub. L. No. 89-732, 80 Stat. 1161 (1966).

45. Form I-485A.

46. The Service office at Miami has taken the position that for the spouse and the unmarried child under 21 of a native or citizen of Cuba to adjust status under the Cuban Adjustment Act the native or citizen of Cuba must also adjust or have adjusted under that same legislation. No justification is apparent for this position.

47. Form G-325A.

48. On form I-693.

49. This fact is often overlooked by the third country Cubans who illegally cross the border of the United States from Canada and Mexico to find themselves in a legal limbo; many are unable to establish eligibility for asylum and they cannot adjust under the Cuban Adjustment Act for lack of the required inspection by an immigration officer.

V. Waivers

A. 212(g), (h) and (i) Waivers⁵⁰

Waivers are available to allow an alien otherwise ineligible to enter⁵¹ the United States to do so if certain conditions are met. The general waivers applicable to aliens applying for permanent residence are specified in sections 212(g), (h) and (i) of the Act.⁵² These waivers allow aliens to acquire the status of aliens lawfully admitted for permanent residence notwithstanding the fact that they may be excludable because they: (1) are mentally retarded, (2) are afflicted with tuberculosis, (3) have had one or more attacks of insanity, (4) have been convicted of a crime involving moral turpitude, or of two or more crimes or offenses whether or not the offenses involved moral turpitude, (5) have been involved or benefitted from prostitution, or (6) have engaged in fraud in connection with the acquisition of immigration documentation or entry in or application to enter the United States. Each of the waivers has a separate standard for its grant, a fact often confused by many since the same form, Form I-601, is utilized to apply for waivers under the three sections. A filing fee of \$35 is required to file for these waivers.

Waivers under section 212(g) of the Act⁵³ are mandatory once the statutory prerequisites are satisfied. The mentally retarded or the alien afflicted with tuberculosis who (A) is the spouse or the unmarried son or daughter (or the minor unmarried lawfully adopted child) of a United States citizen or of an alien lawfully admitted for permanent residence or of an alien who has been issued an immigrant visa or (B) has a son or daughter who is a United States citizen or an alien lawfully admitted for permanent residence or an alien who has been issued an immigrant visa is entitled, if otherwise admissible, to adjust his status in accordance with the conditions necessary to ensure the public. Such conditions relate to the medical state of the alien and the reason-

50. Current version at 8 U.S.C. §§ 1182(g), (i) (1970); § 1182(h) (Supp. 1988).

51. Entry is a defined term in the Act. See Section 101(a)(13) of the Act, current versions at 8 U.S.C. § 1101(a)(3) (1970). Only aliens who have entered the United States are entitled to a deportation hearing and to apply for suspension of deportation, an avenue to adjust status in the United States to be discussed later.

52. The waiver included in Section 212(e) of the Act, 8 U.S.C. § 1182(e) (Supp. 1988) (discussed later) applies only to aliens in one particular category and the waiver provided by Section 212(b) of the Act, *id.* § 1182(b)(1970) (also discussed later) is automatic.

53. Current version at 8 U.S.C. § 1182(g) (1970).

able assurance that no contagion or danger may result to the community of intended residence. The alien who is excludable because of a past history of mental illness is entitled to adjust his status if he has the same family relationships as are required for waivers to aliens afflicted with tuberculosis if the Public Health Service finds that he has been free of the mental illness for a period of time sufficient, in light of the mental illness history, to demonstrate recovery.

Section 212(i) of the Act⁵⁴ allows the Attorney General,⁵⁵ in his discretion, to waive an alien's excludability because he seeks to, sought to procure or actually procured a visa or other documentation, or entry into the United States, by fraud or misrepresentation or he admits the commission of perjury in connection therewith if the alien is the spouse, parent or child of a United States citizen or of an alien lawfully admitted for permanent residence.

There is no particular level of equities required by the statute to allow the Attorney General to exercise his discretion favorably. A simple balancing test is utilized, or should be utilized, to grant this waiver in the absence of any other adverse factor. The existence of the statutorily required family relationship should be sufficient to have the waiver granted.⁵⁶

Section 212(h) of the Act⁵⁷ waives the criminal and prostitution complex grounds of excludability.⁵⁸ In addition to requiring that the alien must have a spouse or be the child of a United States citizen or of an alien lawfully admitted for permanent residence or have a son or daughter who is a United States citizen or an alien lawfully admitted for permanent residence, the statute requires that the exclusion from the United States of the applicant for this waiver result in extreme hardship to the specified relative and that the admission to the United

54. Current version at 8 U.S.C. § 1182(i) (1970).

55. Section 103 of the Immigration and Nationality Act, current version at 8 U.S.C. § 1103 (1970), charges the Attorney General with the administration and enforcement of the immigration laws of this country and authorizes him to delegate his duties and powers. The Attorney General has done the latter by regulations promulgated from time to time.

56. The waiver is designed to promote family unity. If granting the waiver would not promote family unity because the relative who gives eligibility does not and will not reside with the alien needing the waiver, the INS denies the waiver. *See Matter of Lopez-Monzon*, 17 I&N Dec. 280 (Comm'r 1979).

57. 8 U.S.C. § 1182(h) (Supp. 1988).

58. Other than narcotics offenses, with the exception of one conviction for simple possession of thirty grams or less of marijuana.

States of such alien would not be contrary to the national welfare, safety or security of the United States. Clearly, the statute is not designed to allow for the indiscriminate waiver of excludability.

"Extreme hardship" is a term that has been the subject of copious gloss in connection with the relief from deportation termed suspension of deportation. The term is not subject to a rigid definition and no particular factor is determinative as to whether the waiver should or should not be granted. Whether to grant or deny the relief depends on the totality of the circumstances that are claimed to justify a finding of extreme hardship to the relative who is a United States citizen or an alien lawfully admitted for permanent residence. Hardship to the alien only is insufficient to establish eligibility for the waiver.⁵⁹

The finding that the admission to the United States would not be contrary to the welfare, safety or security of the United States contemplates that the alien is completely rehabilitated and there is no likelihood that the alien will engage in criminal conduct.⁶⁰

B. An Automatic Waiver

The waivers discussed above require an application in order for the waiver to benefit the alien.⁶¹ Some waivers, however, operate automatically and the practitioner must possess knowledge of them for the case where the adjudicator is unfamiliar with the legal basis for the waiver.

The laws of the United States forbid the immigration into the United States of persons who are physically able to read and who are illiterate. Section 212(b) of the Act⁶² exempts from this bar the parent, grandparent, spouse, daughter or son of an admissible alien, or of any alien lawfully admitted for permanent residence or of any citizen of the United States if accompanying such admissible alien or coming to join such citizen or alien lawfully admitted for permanent residence. The waiver also applies, regardless of familial relationship, if the alien is seeking admission to the United States to avoid religious persecution by overt acts or by laws or regulations that discriminate against members

59. See *Matter of Shaughnessy*, 12 I&N Dec. 810, 812 (BIA 1968).

60. *Matter of H-*, 14 I&N Dec. 185 (R.C.1972).

61. Section 212(k) of the Act, 8 U.S.C. § 1182 (Supp. 1988), provides for a waiver of excludability under sections 212(a)(14), (20) and (21) of the Act. But by its very nature it is inapplicable to aliens applying for adjustment of status in the United States. The regulations, however, appear to take a contrary view. See 8 C.F.R. § 245.1(e) (1988).

62. 8 U.S.C. § 1182(b) (1970).

of the applicant's religion because of their faith.

C. Waiver of the two-year foreign residence requirement

Section 212(e) of the Act⁶³ provides a bar of the acquisition of lawful permanent resident status in the United States to any alien who entered the United States as an exchange visitor⁶⁴ or acquired such status after entry, whose participation in the exchange program was financed in whole or in part by the government of the United States or the government of his country of nationality or last residence, if the program falls in a field of specialized knowledge or skill the Secretary of State by regulation has designated as being clearly required in that country unless the person resides and is physically present in the country of his nationality or last residence for two years after participation in the program. The two-year foreign residence requirement also applies to the exchange visitor who participates in a program designed to impart graduate medical education or training regardless of the source of financing.

The two-year foreign residence requirement may be waived by the Attorney General upon the favorable recommendation of the Secretary of State in the following circumstances: (1) exceptional hardship would be imposed upon the alien's spouse or child who is a citizen of the United States or a lawful permanent resident alien or (2) persecution would befall the alien because of race, religion or political opinion if he is returned to the country of nationality or last residence. The Attorney General is also authorized to waive the two-year foreign residence requirement of an exchange visitor, other than one who receives graduate medical education or training, upon the favorable recommendation of the Secretary of State whenever the foreign country furnishes to the Secretary of State a statement in writing that it has no objection to such a waiver regarding that particular alien.

The Application for Waiver of the Foreign Residence Requirement⁶⁵ is the form designated by the INS to apply for the waiver of the two-year foreign residence requirement. A filing fee of \$50 is required to file the waiver application.⁶⁶ Upon receipt of the application, the

63. *Id.* § 1182(e)(Supp. 1988).

64. J-1 classification.

65. Form I-612.

66. 8 C.F.R. § 103.7(c)(1) (1988), provides for the waiver of any fee other than one not waivable by statute whenever the inability to pay the fee is duly substantiated.

INS interviews the applicant for the waiver if it is deemed appropriate, and then it may refer the matter to the Department of State for consultation.⁶⁷ An application for adjustment of status cannot be filed prior to the issuance of a waiver of the two-year foreign residence requirement where one is required.

The regulations⁶⁸ promulgated by the INS to implement the provisions of section 212(e) of the Act⁶⁹ to consider waiver applications give detailed instructions as to the documentation that must accompany the waiver application. A decision denying the waiver application must state the reasons for the denial and may be appealed administratively in all cases except where the denial is predicated upon the lack of a favorable recommendation from the Secretary of State.

Furthermore, there are at present two United States government agencies that are interested in certain types of waiver applicants. These are the Department of Health and Human Services and the Department of Defense.⁷⁰ The Department of Health and Human Services has set up a board to process requests by aliens for intervention by the Department in support of their applications for waivers of the two-year foreign residence requirement.⁷¹ Obviously, an alien who secures the favorable intervention of a United States government agency in support of his waiver application substantially increases the likelihood of its being granted.

VII. Fiance Adjustment of Status

An alien who has been issued a visa as the fiance or fiancée of a citizen of the United States, and the minor children of such fiance(e) accompanying or following to join him, and who marries the petitioning citizen within 90 days after entry in that nonimmigrant category (K classification) may have his status adjusted to that of an alien lawfully admitted for permanent residence under the provision of section 214(d)

67. The Secretary of State has delegated to the Director of the United States Information Agency his authority in the exchange visitor program. A board was created by the regulations published on February 27, 1987 to process the requests for favorable recommendations in the event of a particular sensitivity. See 52 Fed. Reg. 5952 (1987). The applicable regulations are codified at 22 C.F.R. Part 514.

68. 8 C.F.R. § 212.7(c) (1988).

69. 8 U.S.C. § 1182(e) (Supp. 1988).

70. Operations Instructions 212.8(e)(2).

71. See 45 C.F.R. Part 50 (1987).

of the Act.⁷²

To be eligible to adjust status under this provision, it is essential that the alien enter the United States with a fiance(e) nonimmigrant visa. Section 214(d) of the Act⁷³ provides that the United States consul may not issue the visa in the fiance(e) classification unless he has received the visa petition⁷⁴ filed by the prospective United States citizen spouse duly approved by the Attorney General. The Immigration Marriage Fraud Amendments of 1986⁷⁵ added the requirement that the petitioning United States prospective citizen spouse meet the prospective alien fiance(e) within the two years immediately preceding the filing of the visa petition. The Attorney General may waive the requirement that a personal meeting occur within the two-year period preceding the filing of the petition.⁷⁶ Of course, the parties must be legally able to marry within the 90-day period following entry of the alien as a fiance(e).

The Board of Immigration Appeals has indicated that this adjustment application is not automatic and that the Attorney General's action in recording the lawful admission for permanent residence of a fiance(e) is not a purely ministerial act.⁷⁷ The alien at the time of filing his application for recordation of lawful admission must establish general admissibility under the immigration laws. If the alien is excludable under any of the waivable grounds of exclusion, he or she is free to file the appropriate waiver application. Once the petitioning alien establishes the conclusion of a legally binding marriage and admissibility as an immigrant, the Attorney General has no power to deny the application as a matter of discretion.

VII. Refugee Adjustment

Section 209 of the Act⁷⁸ provides for the adjustment of status to that of an alien lawfully admitted for permanent residence of persons (1) admitted to the United States as refugees under section 207 of the Act⁷⁹ or (2) granted asylum in the United States pursuant to section

72. 8 U.S.C. § 1184(d) (Supp. 1988).

73. *Id.*

74. Form I-129F.

75. Pub. L. No. 99-639, 100 Stat. 3537.

76. Immigration Marriage Fraud Amendments of 1986 § 3(a)(1) (1986).

77. *Matter of Dawson*, 16 I&N Dec. 693, 696 (BIA 1979).

78. 8 U.S.C. § 1159 (Supp. 1988).

79. *Id.* § 1157.

208 of the Act.⁸⁰ To be eligible to apply for this relief, the alien must have been physically present in the United States for one year before the filing of the application for adjustment of status.

No form other than Biographic Information Form⁸¹ and the fingerprint chart⁸² is prescribed for the refugee applying for adjustment of status under Section 209(a) of the Act.⁸³ The asylee, in addition to these forms, has to submit an Application for Permanent Residence.⁸⁴ No fee is required from either type of applicant.

A refugee or asylee applying for adjustment of status may be waived by the Attorney General any ground of excludability other than those covered by Sections 217(a)(27), (29), and (33) of the Act⁸⁵ and that part of section 212(a)(23) of the Act⁸⁶ that relates to trafficking in narcotics. The exclusion grounds enumerated under Sections 212(a)(14), (15), (20), (21), (25) and (32) of the Act⁸⁷ are inapplicable to aliens applying for adjustment of status under this section of the Act. Furthermore, refugees and asylees are not subject to the foreign residence requirement of Section 212(e) of the Act.⁸⁸ The Application of Waiver of Grounds of Excludability⁸⁹ has been promulgated by the INS for aliens requiring a waiver in order to adjust their status under this section of the Act. No fee is required of the applicant eligible to apply for this waiver.

The alien conditionally admitted as a refugee under section 207 of the Act⁹⁰ whose application for adjustment of status is denied under this section is amenable to exclusion from the United States as if he were, at that point in time, an applicant for admission.⁹¹

80. *Id.* § 1158.

81. Form G-325A.

82. Form FD-258 .

83. 8 U.S.C. § 1159 (Supp. 1988).

84. Form I-485.

85. 8 U.S.C. § 1182(a)(27), (29), (33).

86. *Id.* § 1182(a)(23).

87. *Id.* § 1182(a)(14) (Supp. 1988), §§ 1182(a)(15), (20), (21), (25) and (32) (1970).

88. *Id.* § 1182(e).

89. Form I-602 .

90. 8 U.S.C. § 1157 (Supp.1988).

91. *See* Matter of Garcia, Int. Dec. 3018 (BIA 1986).

VIII. Registry

Registry is the procedure by which an alien, regardless of his manner of entry and merely because of his prolonged presence in the United States, can be granted the status of an alien lawfully admitted for permanent residence if certain factors are met. He must (1) have entered the United States, legally or illegally, prior to January 1, 1972, (2) have had his residence in the United States continuously since such entry, (3) be a person of good moral character, (4) not be ineligible for citizenship and (5) not be inadmissible under those subsections of section 212(a) of the Act⁹² that relate to criminals, procurers and other immoral actors, subversives, violators of the narcotics laws or smugglers of aliens for gain. The grant of lawful permanent residence under this provision of the Act is discretionary.

The procedure by its very terms exempts the alien from having to establish that he is not excludable from the United States on grounds not specifically made applicable by that section of the Act. Thus, an alien could fall under any of the exclusion grounds other than 212(a)(9), (10), (11), (12), (13), (22), (23), (27), (28), (29) and (31) of the Act⁹³ and still be granted registry.

The form to apply for this relief is the Application for Permanent Residence,⁹⁴ the same form to apply for adjustment of status under section 245 of the Act. The same filing fee, \$50, is payable. The Biographical Information Form⁹⁵ must be submitted with the application as well as the photographs and fingerprinting chart.⁹⁶ No medical examination is required since the medical and public charge exclusion grounds are inapplicable to determine eligibility for this type of relief.

The INS has in the past stated that waivers of excludability are available for aliens applying for relief under section 249 of the Act.⁹⁷ Furthermore, known grounds of deportability existing at the time the alien is granted relief under section 249 of the Act,⁹⁸ and that would not be a bar to admissibility not waivable under a waiver provision of

92. 8 U.S.C. § 1182(a) (Supp. 1988).

93. *Id.* §§ 1182(a)(9), (10), (11), (12), (13), (22), (23), (27), (28), (29), and (31).

94. Form I-485.

95. Form G-325A.

96. Form FD-258.

97. *Matter of S-*, 8 I & N Dec. 288 (A.C. 1959).

98. 8 U.S.C. § 1259 (Supp. 1988).

the Act, are deemed waived upon the grant of relief.⁹⁹

Although the statute does not appear to list section 212(a)(33) of the Act¹⁰⁰ as a bar to relief under section 249 of the Act,¹⁰¹ and notwithstanding the original position of the INS to the effect that known grounds of deportability are waived upon a grant of relief under this section, it would be incongruous to grant relief under this section to a person ineligible for relief under section 243(h) of the Act.¹⁰² The latter section of the Act is designed to prevent the deportation of an alien who has established a clear probability that his life or freedom would be threatened on account of his race, religion, nationality, membership in a particular social group or political opinion if he is deported from the United States.

IX. Suspension of Deportation

Suspension of deportation under section 244(a)(1) and (a)(2) of the Act¹⁰³ is the procedure by which an alien in the United States acquires lawful permanent resident status based on his long residence in the United States and the hardship to himself and his immediate relatives who are citizens of the United States or lawful permanent residents. This form of relief is discretionary; the mere fulfillment of the statutory prerequisites does not entitle the alien to that relief. The relief may be applied for only in deportation proceedings. Aliens eligible for this relief are divided into two subcategories, depending on which is the ground of deportation being charged by the INS.

An Application for Suspension of Deportation¹⁰⁴ is the designated form to file for this relief. A Biographical Information Form¹⁰⁵ and a fingerprinting chart¹⁰⁶ must be submitted, as well as photographs. A filing fee of \$100 is payable.

For aliens whose deportation is not charged under sections 241(a)(4), (5), (6), (7), (11), (12), (14), (15), (16), (17), or (18) of the Act,¹⁰⁷ eligibility is established for suspension of deportation under

99. *Matter of L-F-Y-*, 8 I&N Dec. 601 (A.C. 1960).

100. 8 U.S.C. § 1182(a)(33) (Supp. 1988).

101. 8 U.S.C. 1259 (Supp. 1988).

102. 8 U.S.C. § 1253(h) (Supp. 1988).

103. *Id.* §§ 1254(a)(1) and (2).

104. Form I-256A.

105. Form G-325A.

106. Form FD-258.

107. 8 U.S.C. §§ 1251(a)(4)-(7) and (11)-(18) (Supp. 1988).

Section 244(a)(1) of the Act¹⁰⁸ if the alien proves that he has been continuously physically present in the United States for at least seven years prior to filing for the relief, for that period of time he has been a person of good moral character and his deportation would result in extreme hardship to himself or to his spouse, parent or child who is a citizen of the United States or an alien lawfully admitted for permanent residence. The last of these is a discretionary determination by the Attorney General or his delegates.

For many years, the statutory requirement of continuous physical presence was construed by the administrative authorities and the lower federal courts as not being interrupted by a brief, casual and innocent departure which did not meaningfully interrupt presence in the United States.¹⁰⁹ In 1984, the United States Supreme Court disapproved that construction and held that any absence from the United States interrupts continuous physical presence for purposes of this relief.¹¹⁰ Congress abrogated this construction in the Immigration Reform and Control Act of 1986.¹¹¹ Consequently, the case law prior to the Supreme Court's decision in *INS v. Phinpathya*¹¹² remains good law and should be consulted in the event an alien applying for this relief has made departures from the United States during the seven years immediately preceding his application for suspension of deportation.

The terms "parent," "child," and "spouse" are defined in section 101(a) of the Act.¹¹³ The Supreme Court has ruled that those terms must be applied in the manner defined in the Act, *sub silentio* disapproving lower court decisions giving expansive readings to these terms when adjudicating applications for suspension of deportation.¹¹⁴

"Extreme hardship" is a term which does not have a fixed or inflexible meaning. The following factors are to be considered in determining whether or not extreme hardship is present in any particular case: (1) age of the alien, (2) family ties in the United States and abroad, (3) length of residence in the United States, (4) condition of health, (5) conditions in the country to which the alien is returnable,

108. *Id.* § 1254(a)(1).

109. The case that commenced this line of case law is *Wadman v. INS*, 329 F. 2d 812 (9th Cir. 1964), the reasoning of which was adopted by the Board of Immigration Appeals in *Matter of Wong*, 12 I&N Dec. 271 (BIA 1967).

110. *INS v. Phinpathya*, 464 U.S. 183 (1984).

111. Pub. L. No. 99-603, 100 Stat. 3359.

112. 464 U.S. 183.

113. 8 U.S.C. § 1101(a) (Supp. 1988).

114. *INS v. Hector*, 479 U.S. 85 (1986).

(6) business and occupation of the alien, (7) possibility of other means of adjustment of status, (8) whether the alien has been of special assistance to the United States or community, (9) immigration history and (10) position in the community.¹¹⁵ The Board of Immigration Appeals in published decisions has repeatedly stated over the years that mere economic hardship does not meet the requirement of extreme hardship for suspension of deportation purposes.¹¹⁶

Some classes of aliens are not eligible for suspension of deportation. These are: exchange visitors subject to the two-year foreign residence requirement; crewmen who entered the United States after June 30, 1964; exchange visitors, whether or not subject to the two-year foreign residence requirement if the status was predicated on graduate medical education or training; and aliens who are deportable under section 241(a)(19) of the Act¹¹⁷ (Nazi persecutors).¹¹⁸

An alien who enlisted or was inducted while in the United States and who served a minimum of 24 months in an active duty status in the Armed Forces of the United States does not have to comply with the "physically present" requirement. This alien, if separated from the military at the time of application for relief, must have separated from such service under honorable conditions. Furthermore, this alien has only to show good moral character at the time he makes his application for suspension of deportation. Of course, all aliens must be able to show good moral character between the time of application and final adjudication of their application for suspension of deportation.¹¹⁹

Those aliens charged with a ground of deportation which prevents them from applying for suspension of deportation under section 244(a)(1) of the Act,¹²⁰ must establish continuous physical presence in the United States for the ten years immediately preceding their application for suspension of deportation, good moral character throughout that period of time, and that their deportation would occasion exceptional and extremely unusual hardship to themselves or their spouses, children or parents who are United States citizens or aliens lawfully admitted for permanent residence.

115. See *Matter of Anderson*, 16 I&N Dec. 596 (BIA 1978).

116. See, e.g., *Matter of Chumpitazi*, 16 I&N Dec. 629, 635 (BIA 1978).

117. 8 U.S.C. § 1251(a)(19) (Supp. 1988).

118. For an application of the Holtzman Amendment which gave rise to the Nazi exclusion and deportation grounds, see *Matter of Laipenieks*, 18 I&N Dec. 433 (BIA 1983).

119. *Matter of Peralta*, 10 I&N Dec. 300 (BIA 1963).

120. 8 U.S.C. § 1254(a)(1) (Supp. 1988).

The term "exceptional and extremely unusual hardship" as used in section 244(a)(2) of the Act¹²¹ places a heavy burden on the alien. Recognizing that the burden is exceptional, the INS in appealing cases opts to charge the alien with deportability under a section of the Act not requiring him to meet that heavier burden in order to qualify for suspension of deportation. The Board of Immigration Appeals has ruled that the hardship standard of section 244(a)(2) of the Act¹²² is not the applicable standard in cases where the INS does not charge the alien with deportability under a section requiring the heightened standard of hardship even though the facts would justify the charge.¹²³

X. Other Procedures

Over the years, Congress has provided for adjustment of status for certain groups of persons allowed to enter the United States for humanitarian reasons or foreign policy considerations. Because of the limited applicability of those procedures at the present time, they are deemed outside the scope of this article.¹²⁴

XI. Rescission of the Adjustment of Status

Any alien who has had her status adjusted in the United States to that of an alien lawfully admitted for permanent residence may have that status rescinded under the provisions of section 246 of the Act.¹²⁵ The rescission proceeding must be commenced by the INS within the 5-year period immediately following the actual grant of adjustment of status.¹²⁶ The Board of Immigration Appeals has stated that there is no particular time period within which those proceedings must be concluded so long as they are commenced within the five-year period.¹²⁷

121. *Id.* § 1254(a)(2) (Supp. 1980)

122. *Id.*

123. *Matter of Ching*, 12 I&N Dec. 710 (BIA 1968).

124. The only one of these procedures with any active relevance is the Cuban Refugee Adjustment Act discussed earlier.

125. 8 U.S.C. § 1256 (1970).

126. The Board of Immigration Appeals has ruled that Cubans entitled to a so-called "roll-back" date for the date from which they are to be deemed lawful permanent residents can have their status rescinded for five years from the date of actual grant. *Matter of Carrillo-Gutierrez*, 16 I&N Dec. 429 (BIA 1977).

127. *Matter of Awwal*, Int. Dec. 3056 (BIA 1988).

The regulations¹²⁸ provide that rescission of adjustment of status, except in the case of an alien who acquires lawful permanent resident status through section 244(a)¹²⁹ of the Act,¹³⁰ shall be automatic if the alien fails to respond to the notice of intention to rescind. The notice of intention to rescind initiates the proceeding to rescind adjustment of status. If the alien challenges the notice, a hearing before an immigration judge is mandatory. The INS bears the burden of establishing clearly, convincingly and unequivocally that adjustment of status should not have been accorded.¹³¹ The immigration judge's decision on the rescission proceeding is appealable to the Board of Immigration Appeals in accordance with the regulations applicable to proceedings before immigration judges.¹³²

XII. Conclusion

Although recent legislation has restricted the availability of procedures by which aliens, after entry into the United States, can acquire lawful permanent residence, those procedures are still available. Since many of the statutory provisions may overlap for a particular alien, and each of the various avenues to adjust status offer advantages and disadvantages, whether to choose a particular avenue depends on the facts and circumstance of each case. A thorough knowledge of the various options is essential to properly choose the best course of action, which is ultimately what a lawyer's work is all about.

128. 8 C.F.R. § 246 (1988).

129. 8 U.S.C. § 1254 (Supp. 1988).

130. The statute provides for action by Congress in order to rescind a grant of lawful permanent resident status under section 244 of the Act. This is clearly inoperative in light of *INS v. Chadha*, 462 U.S. 919 (1983). However, there is no doubt in the writer's mind that the INS will continue to report the cases to Congress and defer action to finally strip the alien of status until the time periods specified in the statute for action by Congress elapse.

131. *Matter of Vilanova-Gonzalez*, 13 I&N Dec. 399 (BIA 1969). It should be noted that rescission proceedings are not designed to challenge the exercise of discretion in granting adjustment of status. Statutory ineligibility at the time of grant is the only permissible area of inquiry.

132. 8 C.F.R. § 3.12 - .38 (1988).