Adjustment of Status under INA § 245(a)

Burden of Proof

The applicant for adjustment of status bears the burden of establishing statutory eligibility and that relief is merited in the exercise of discretion. See Matter of Blas, 15 I&N Dec. 626, 629 (BIA 1974; A.G. 1976). The applicant's burden of proof is not altered by INA § 101(a)(13)(C), which allows returning LPRs seeking admission at a port of entry to be charged with inadmissibility under certain circumstances. Fernandez Taveras, 25 I&N Dec. 834 (BIA 2012).[1]

Statutory Eligibility

To be eligible for adjustment of status, the applicant must have been admitted or paroled into the United States. INA § 245(a). An applicant who has been granted conditional parole pursuant to INA § 236(a)(2)(B) has not been "paroled into the United States" for purposes of establishing eligibility for adjustment of status under INA § 245(a). See Matter of Castillo-Padilla, 25 I&N Dec. 257, 258-59 (BIA 2010). An applicant seeking to show that he/she has been "admitted" to the United States for purposes of INA § 245(a) must only show "procedural regularity" in his/her entry, which does not require the alien to have been questioned by immigration authorities or have been admitted in any particular status. See Matter of Quilantan, 25 I&N Dec. 285 (BIA 2010) (reaffirming the holding in Matter of Areguillin, 17 I&N Dec. 308 (BIA 1980)).

In addition, the applicant must satisfy three statutory requirements. INA § 245(a). First, the applicant must apply for adjustment of status. However, where an applicant has filed a previous application for adjustment of status, the Immigration Judge will not have jurisdiction under 8 C.F.R. § 1245.2(a)(1)(ii) to adjudicate the applicant's application if it is new and separate from the previously filed application. Brito v. Mukasey, 521 F.3d 160, 168 (2d Cir. 2008); see also Matter of Silitonga, 25 I&N Dec. 89 (BIA 2009) (Immigration Judges have no jurisdiction to adjudicate an application filed by an arriving alien seeking adjustment of status, with the limited exception of an alien who has been placed in removal proceedings after returning to the United States pursuant to a grant of advance parole to pursue a previously filed application).

Second, the applicant must be eligible to receive an immigrant visa and must be admissible to the United States for permanent residence. Thus, persons deportable but not inadmissible under INA § 212(a) may adjust status.[2] Matter of Rainford, 20 I&N Dec. 598 (BIA 1992). In that situation, the alien may apply for adjustment, and if the alien's status is adjusted, the charge of removability is, in effect, waived. See Rainford, 20 I&N Dec. 598. An alien may be eligible for

[1] *See also Matter of Nejat Ibrahim RUZKU*, 26 I&N Dec. 731 (BIA 2016) (finding that in visa petition proceedings, where the petitioner bears the burden of establishing the claimed relationship by a preponderance of the evidence, direct sibling-to-sibling DNA test results reflecting a 99.5 percent degree of certainty or higher that a full sibling biological relationship exists should be accepted and considered probative evidence of the relationship).

[2] *See also Matter of Jesus Ricardo VILLALOBOS*, 26 I&N Dec. 719 (BIA 2016) (alien seeking to acquire lawful permanent resident status through the legalization provisions of section 245A of the Act must establish admissibility, both at the time of the initial application for temporary resident status and again when applying for adjustment to permanent resident status under § 245A(b)(1)).

adjustment of status, even if otherwise inadmissible or removable, assuming he/she concurrently applies for and receives a waiver to excuse the charge of inadmissibility or removability. [3] Tibke v. INS, 335 F.2d 42 (2d Cir. 1964) (holding that respondent could seek a § 212(g) waiver in conjunction with adjustment of status); Matter of Gabryelsky, 20 I&N Dec. 750 (BIA 1993) (granting § 212(c) waiver and adjustment of status); Matter of Parodi, 17 I&N Dec. 608 (BIA 1980) (allowing a respondent to concurrently apply for a § 212(h) waiver and adjustment of status).

A fiancé(e) visa holder satisfies the visa eligibility and visa availability requirements of INA § 245(a) on the date he or she is admitted to the United States as a K-1 nonimmigrant, provided that the fiancé(e) enters into a bona fide marriage with the fiancé(e) petitioner within 90 days. Matter of Sesay, 25 I&N Dec. 431 (BIA 2011). Under INA § 245(d), a fiancé(e) visa holder and a conditional permanent resident who entered on a fiancé(e) visa can only adjust status based on the marriage to the fiancé(e) petitioner. Caraballo-Tavera v. Holder, 683 F.3d 49, 52-53 (2d Cir. 2012) (holding that INA § 245(d) precludes a conditional permanent resident who entered on a fiancé(e) visa from adjusting based upon an approved immigrant visa petition from his USC daughter); see also Sesay, 25 I&N Dec. 431 (BIA 2011) (superseding Matter of Zampetis, 14 I&N Dec. 125 (Reg. Comm'r 1972)). However, a fiancé(e) visa holder is eligible for adjustment regardless of whether the bona fide marriage still exists at the time the adjustment application is adjudicated if the applicant can demonstrate that he or she entered into bona fide marriage within the 90-day period to the fiancé(e) visa petitioner. Sesay, 25 I&N Dec. 431.

Third, an immigrant visa must be immediately available to the applicant at the time the application is filed. INA § 245(a). An approved visa petition, which has already been used by the beneficiary to obtain adjustment of status or admission as an immigrant, cannot be used as the basis for a subsequent application for adjustment of status. Matter of Villarreal-Zuniga, 23 I&N Dec. 886 (BIA 2006). INA § 201(f)(1), which allows the beneficiary of an immediate relative visa petition to retain his status as a "child" after he turns 21, applies to an individual whose visa petition was approved before the August 6, 2002, effective date of the Child Status Protection Act ('CSPA"), Pub. L. No. 107-208, 116 Stat. 927 (2002), but who filed an application for adjustment of status after that date. Matter of Avila-Perez, 24 I&N Dec. 78 (BIA 2007).[4]

Discretion

If eligibility is established, adjustment of status may be granted in the exercise of discretion, as "the grant of an application for adjustment of status is a matter of discretion and of administrative grace, not mere eligibility." Matter of Arai, 13 I&N Dec. 494 (BIA 1970); Matter

[3] *See also Matter of VILLALOBOS*, 26 I&N Dec. at 724-25 (alien who was inadmissible at the time of adjustment of status from temporary resident to permanent resident under § 245A(b)(1) of the Act was not lawfully admitted for permanent residence and was therefore ineligible for a waiver of inadmissibility under former § 212(c) of the Act).

[4] A lawful permanent resident (LPR) who filed a spousal second preference petition for LPR status for his wife more than five years after he acquired LPR status through a prior marriage is not required to establish by clear and convincing evidence that prior marriage was not fraudulent. Immigration and Nationality Act § 204, 8 U.S.C.A. § 1154(a); 8 C.F.R. § 204.2(a)(2)(1). Chen v. Bd. of Immigration Appeals, No. 1:15-CV-01269 (ALC), 2016 WL 831948 at *6 (S.D.N.Y. Feb. 29, 2016). The S.D.N.Y. Court found that "the statutory language of 8 U.S.C. § 1154(a)(2)(A) is plain and unambiguous and at odds with the regulation, 8 C.F.R. § 204.2(a)(2)(1)," and thus it held that decisions made by USCIS and the BIA which were based on this unlawful regulation should be set aside because they were "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. 5 U.S.C. § 706." Id. at *7.

of Ortiz-Prieto, 11 I&N Dec. 317, 319 (BIA 1965). Whether the Court should exercise its discretionary depends on the facts of the particular case. Matter of Blas, 15 I&N Dec. 626, 628 (BIA 1974; A.G. 1976). A favorable exercise of administrative discretion is warranted where positive factors, such as family ties, length of residency, and hardship, outweigh adverse considerations. Arai, 13 I&N Dec. at 496. An Immigration Judge may consider an applicant's adjudication as a "Youthful Offender" under New York state criminal law in evaluating an application for adjustment of status. Wallace v. Gonzales, 463 F.3d 135, 138 (2d Cir. 2006). Where adverse factors are present, it may be necessary for the applicant to present unusual or outstanding countervailing equities to merit a discretionary grant. Arai, 13 I&N Dec. at 496. pending motion to reopen or motion to reconsider, and who is prima facie eligible for adjustment of status under LIFE Legalization, may request that the proceedings be administratively closed or that the motion filed be indefinitely continued, in order to allow the alien to pursue a LIFE Legalization application with the Department. 8 C.F.R. § 245a.12(b)(1); see also Matter of Morales, 21 I&N Dec. 130 (BIA 1996).

Adjustment of Status under the Legal Immigration Family Equity Act ("LIFE Act")

The Legal Immigration Family Equity Act ("LIFE Act") permits adjustment of status for certain aliens who would otherwise be ineligible to adjust their status under INA § 245(a).[5] LIFE Act, Pub. L. No. 106-553, 114 Stat. 2762 (2000), amended by Pub. L. No. 106-554, 114 Stat. 2763 (2000). Under INA § 245(i), adjustment of status was available to alien crewmen, aliens continuing or accepting unauthorized employment, aliens admitted in transit without visa, and aliens who entered the United States without inspection. INA §§ 245(i)(1)(A)(i)-(ii). To be eligible to adjust to lawful permanent resident status under INA § 245(i), the alien must demonstrate that he is not inadmissible to the United States or that all grounds of inadmissibility have been waived. INA § 245(i)(2)(A); 8 C.F.R. §1245.10(b)(3).[6] This provision sunset on January 14, 1998, but was revived under the LIFE Act, which extended INA § 245(i) through April 30, 2001. Except for those aliens who already grandfathered, INA § 245(i) is now expired.

To seek adjustment under INA § 245(i), the alien must submit a Form I-485 with a Supplement A, and the application must be accompanied by a fee (currently $1,000). 8 C.F.R. § 1245.2(a)(3)(iii). To be grandfathered in under INA § 245(i),[7] the alien must be the beneficiary

[5] The LIFE Act also made available a new temporary "V" visa for spouses and minor children of LPRs waiting more than three years for an immigrant visa based on a petition filed on or before December 21, 2000 (the date of the enactment of the LIFE Act), and a new temporary "K" visa for spouses and children of U.S. citizens living abroad.

[6]Adjustment of status under INA § 245(i) is unavailable to an alien who is inadmissible under INA § 212(a)(9)(B)(i)(II), absent a waiver. Matter of Lemus, 25 I&N Dec. 734 (BIA 2012) (clarifying Matter of Lemus, 24 I&N Dec. 373 (BIA 2007)). An alien who is inadmissible under INA § 212(a)(9)(C)(i)(I) is not eligible to adjust status under INA § 245(i). Mora v. Mukasey, 550 F.3d 231, 239 (2d Cir. 2008); Matter of Diaz and Lopez, 25 I&N Dec. 188 (BIA 2010).

[7] For an alien to independently qualify for adjustment of status under section 245(i) of the Immigration and Nationality Act, 8 U.S.C. § 1255(i) (2006), as a derivative grandfathered alien, the principal beneficiary of the qualifying visa petition must satisfy the requirements for grandfathering, including the physical presence requirement of section 245(i)(1)(C) of the Act, if applicable. Matter of Ilic, 25 I&N Dec. 717 (BIA 2012). A spouse or child accompanying or following to join a principal grandfathered alien cannot qualify as a derivative grandfathered alien for purposes of section 245(i) of the Immigration and Nationality Act, 8 U.S.C. § 1255(i)

of either a labor certification under INA § 212(a)(5)(A) or a petition under INA § 204 (including I-140, I-130, I-360, I-526) that was filed[8] on or before April 30, 2001; and if it was filed after January 14, 1998, the applicant must have been physically present in the U.S. on December 21, 2000.[9] INA § 245(i); LIFE Act § 1502(a)(1)(B), Pub. L. No. 106-553; 8 C.F.R. § 1245.10. For purposes of establishing eligibility for adjustment of status under section 245(i) of the Immigration and Nationality Act, 8 U.S.C. § 1255(i) (2006), an alien seeking to be "grandfathered" must be the beneficiary of an application for labor certification that was "approvable when filed." Matter of Butt, 26 I&N Dec. 108, 117 (BIA 2013).

Pursuant to 8 C.F.R. § 245.10(j), "only the alien who was the beneficiary of the application for the labor certification on or before April 30, 2001, will be considered to have been grandfathered for purposes of filing an application for adjustment of status under section 245(i) of the Act. An alien who was substituted for the previous beneficiary of the application for the labor certification after April 30, 2001, will not be considered to be a grandfathered alien." The Second Circuit found that 8 C.F.R. § 245.10(j) and § 1245.10(j) provide a permissible construction of INA § 245(i)(1)(B)(ii) and that the statute confers grandfathered status on certain beneficiaries rather than particular applications, noting that the "focus of [the statute] . . . is on immigrants, not employers." Kar Onn Lee v. Holder, 701 F.3d 931, (2d Cir. 2012). The provision's apparent purpose is to provide immigrants with a limited opportunity to obtain and benefit from grandfathered status by the sunset date of August 30, 2001. Id.

(2006), by virtue of a spouse or child relationship that arose after April 30, 2001. Matter of Estrada, 26 I&N Dec. 180 (BIA 2013). An alien is not independently "grandfathered" under INA § 245(i) on account of his/her marriage to another alien who is "grandfathered" under INA § 245(i) for having been a derivative beneficiary of a visa petition. Matter of Legaspi, 25 I&N Dec. 328 (BIA 2010). If the original beneficiary of an application for labor certification was subsequently replaced by another alien on or before April 30, 2001, only the substituted beneficiary would be considered a grandfathered alien. 8 C.F.R. § 1245.10(j).

[8] A beneficiary can adjust status based on an immigrant visa petition or labor certification that was approved after April 30, 2001, so long as his/her petition or application for certification was "properly filed" (postmarked or received by the Department) on or before April 30, 2001, and "approvable when filed." 8 C.F.R. §§ 1245.10(a)(i)(A)-(B). "Approvable when filed" means the qualifying petition or application was properly filed, meritorious in fact, and non-frivolous ("frivolous" being "patently without substance"). 8 C.F.R. § 1245.10(a)(3). An alien will be presumed to be the beneficiary of a "meritorious in fact" labor certification if the application was "properly filed" and "non-frivolous" and if no apparent bars to approval of the labor certification existed at the time it was filed. Matter of Butt, 26 I&N Dec. 108, 116 (BIA 2013). To determine whether the petition or application was "approvable" at the time it was filed, the Court should consider the circumstances that existed at the time of filing. 8 C.F.R. § 1245.10(a)(3). In the case of a marriage-based visa petition, the applicant must prove that the marriage was bona fide at its inception in order to show that the visa petition was "meritorious in fact." Linares Huarcaya v. Mukasey, 550 F.3d 224 (2d Cir. 2008); Matter of Riero, 24 I&N Dec. 267 (BIA 2007). A petition that was properly filed and approvable when filed, "but later withdrawn, denied, or revoked due to circumstances arising after the time of filing, will preserve the alien beneficiary's grandfathered status if the alien is otherwise eligible to file an application for adjustment under section 245(i) of the Act." 8 C.F.R. § 1245.10(a)(3).

[9] Only the principal beneficiary (not his/her dependent family members) must show that he/she was physically present in the U.S. on December 21, 2000. 8 C.F.R. §§ 245.10(a)(1)(ii), 1245.10(a)(1)(ii). The applicant may submit several documents establishing his or her physical presents in the United States prior to, and after December 21, 2000, if no one documents that establishes the alien's physical presence on December 21, 2000. 8 C.F.R. §1245.10(n)(1).

The LIFE Act also allows for adjustment of status for aliens who filed before October 1, 2000, for class membership in one the "late amnesty" lawsuits.[10] LIFE Act, §§ 1104 and 1503, Pub. L. No. 106-553, 106-554; 8 C.F.R. § 245a.10-245a.22. The Department has jurisdiction over all applications for LIFE legalization benefits under the "late amnesty" lawsuits. 8 C.F.R. § 245a.12(b). An alien who is in exclusion, deportation, or removal proceedings, or who has a pending motion to reopen or motion to reconsider, and who is prima facie eligible for adjustment of status under LIFE Legalization, may request that the proceedings be administratively closed or that the motion filed be indefinitely continued, in order to allow the alien to pursue a LIFE Legalization application with the Department. 8 C.F.R. § 245a.12(b)(1); see also Matter of Morales, 21 I&N Dec. 130 (BIA 1996).

The application period for a "late amnesty" filing for adjustment began on June 1, 2001, and ended on June 4, 2003, during which time an alien had to file a Form I-485 with the Department. 8 C.F.R. §§ 245a.11, 245a.12. However, under the terms of settlement agreements reached with the Department, the filing deadline for certain legalization applicants under the terms of CSS and LULAC was extended through December 31, 2005.[11]

In order to qualify, the alien must have entered the U.S. before January 1, 1982, and resided continuously in the U.S. in an unlawful status since that date through May 4, 1988. 8 C.F.R. § 245a.11. He/she must also have been continuously present in the U.S. from November 6, 1986,

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[10] Catholic Social Services, Inc. v. Meese, vacated sub nom., Reno v. Catholic Social Services, Inc., 509 U.S. 43 (1993) ("CSS"); League of United Latin American Citizens v. INS, vacated sub nom., Reno v. Catholic Social Services, Inc., 509 U.S. 43 (1993) ("LULAC"); or Zambrano v. INS, vacated, 509 U.S. 918 (1993).

An alien may be an eligible CSS class member pursuant to the January 23, 2004 Settlement Agreement if he: (1) lived continuously and illegally in the U.S. from before January 1, 1982, until sometime between May 5, 1987, and May 4, 1988, when the alien (or his parent or spouse) visited the INS or a Qualified Designated Entity ("QDE") to apply for the 1986 amnesty program; and (2) the alien (or his parent or spouse) was turned away by the INS or QDE because he (or his parent or spouse) had, or the INS thought he had, traveled outside of the U.S. after November 6, 1986, without INS permission, and was otherwise eligible for legalization. To apply for class membership and legalization, the alien must file a Form I-687. See Important CSS Class Notice, Catholic Social Services, Inc. v. Ridge, No. Civ S-86-1343-LKK (E.D. Cal. Jan. 23, 2004).

An alien may be an eligible Newman (LULAC) class member pursuant to the February 18, 2004 Settlement Agreement if he: (1) lived continuously and illegally in the U.S. from before January 1, 1982, until some time between May 4, 1987, and May 4, 1988, when the alien (or his parent or spouse) visited the INS or a Qualified Designated Entity ("QDE") to apply for the 1986 amnesty program; and (2) the alien (or his parent or spouse) was turned away by the INS or QDE because he (or his parent or spouse) had, or the INS thought he had, traveled outside of the U.S. after January 1, 1982, and returned to the U.S. using a tourist visa, student visa, or some other INS-issued document. To apply for class membership and legalization, the alien must file a Form I-687. See Important Newman (LULAC) Class Notice, Newman v. U.S. Citizenship and Immigration Services, Civ. No. 87-4757-WDK (CWx) (C.D. Cal. Feb. 18, 2004).

[11] See Order Approving Settlement of Class Action, Catholic Social Services, Inc. v. Ridge, No. Civ S-86-1343-LKK (E.D. Cal. Jan. 23, 2004); Order Approving Settlement of Class Action, Newman v. U.S. Citizenship and Immigration Services, Civ. No. 87-4757-WDK (CWx) (C.D. Cal. Feb. 18, 2004); Press Release, U.S. Citizenship and Immigration Services, USCIS Announces Extension of Deadline for Filing Applications Pursuant to the CSS and LULAC (Newman) Settlement Agreements (May 16, 2005), available at http://www.uscis.gov/files/pressrelease/CSS_LULAC16May05.pdf.

through May 4, 1988,[12] must not have been convicted of a felony or of three or more misdemeanors in the U.S., and must not have engaged in persecution of others. 8 C.F.R. §§ 245a.11, 245a.16, 245a.18. The alien must demonstrate that he/she is admissible except with regard to grounds of inadmissibility under INA §§ 212(a)(5) and (7)(A).[13] 8 C.F.R. § 245a.18(b). Further, he/she must be registered under the Military Selective Service Act, if so required, and have or demonstrate basic citizenship skills. 8 C.F.R. § 245a.11(d)(3), (e).

The Family Unity provisions of the LIFE Act apply to "late amnesty" applications. LIFE Act, § 1504, Pub. L. No. 106-554; 8 C.F.R. § 245a.31. An alien currently in the U.S. may obtain Family Unity benefits if he/she establishes that he/she is the spouse or unmarried child under the age of 21 of an eligible alien at the time the Family Unity application is adjudicated; he/she entered the U.S. before December 1, 1988, and resided in the U.S. on that date; and, if applying for Family Unity benefits on or after June 5, 2003, he/she is the spouse or unmarried child under the age of 21 of an alien who has filed a Form I-485. 8 C.F.R. § 245a.31. An alien is ineligible for Family Unity benefits if he/she has been convicted of a felony or of three or more misdemeanors, has engaged in the persecution of others, has been convicted of a particularly serious crime or a serious nonpolitical crime outside the U.S., or if there are reasonable grounds to believe that he/she is a "danger to the security of the United States." 8 C.F.R. § 245a.32.

Adjustment of Status under the Cuban Refugee Adjustment Act of 1966

Under the Cuban Refugee Adjustment Act of 1966, a native or citizen of Cuba, who has been inspected, admitted, or paroled into the United States after January 1, 1959, and has been present in the United States for more than one year, may apply for permanent residency.[14] Pub. L. No. 89-732, 80 Stat. 1161, as amended. The Attorney General may, in his discretion, adjust the alien's status to that of a lawful permanent resident if the alien is eligible to receive an immigrant visa and is admissible to the United States. Pub. L. No. 89-732, 80 Stat. 1161, as amended. Any spouse or child who resides[15] with the alien, including after-acquired spouses or children, is eligible to adjust under the provisions of the Cuban Refugee Adjustment Act. Pub. L. No. 89-732, 80 Stat. 1161, as amended. There are no restrictions as to the number of times an individual may acquire lawful permanent resident status under this law, nor is there a cut-off date for applicants. See Pub. L. No. 89-732, 80 Stat. 1161, as amended.

[12] An alien may maintain continuous physical presence in the U.S. despite "brief, casual, and innocent absences from the United States." 8 C.F.R. § 245a.16(b).

[13] The Attorney General may waive certain other provisions of section 212(a) of the Act under INA § 245A(d)(2)(B), although not those provisions relating to crimes involving moral turpitude, multiple criminal convictions, or others enumerated in 8 C.F.R. § 245a.18(c)(2). See 8 C.F.R. § 245a.18(b)(1). The alien may also apply for a waiver of inadmissibility under INA §§ 212(a)(9)(A) and (C). 8 C.F.R. § 245a.18(c)(1).

[14] Cubans who were paroled into the United States under INA § 212(d)(5), 8 U.S.C. § 1182(d)(5) (1976), between April 1, 1980, and May 18, 1980, are considered to have been admitted as refugees pursuant to the Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102. See Matter of L-T-P-, 26 I&N Dec. 862 (2016).

[15] A battered spouse or child need not reside with the qualifying alien in order to be eligible for the Cuban Refugee Adjustment Act. In this regard, the provisions of INA § 204(a)(1)(J) are applicable. Pub. L. No. 89-732, 80 Stat. 1161, as amended.

Under 8 C.F.R. §§ 245.2(a)(1) and 1245.2(a)(l)(ii) (2009), an Immigration Judge has no jurisdiction to adjudicate an application filed by an arriving alien seeking adjustment of status under the Cuban Refugee Adjustment Act, with the exception of cases involving an alien who has been placed in removal proceedings after returning to the U.S. pursuant to a grant of advance parole to pursue a previously filed application. Matter of Silitonga, 25 I&N Dec. 89, 91 (BIA 2009); Matter of Martinez-Montalvo, 24 I&N Dec. 778, 778 (BIA 2009) (recognizing Matter of Artigas, 23 I&N Dec. 99 (BIA 2001) as superseded by regulations, 8 C.F.R. §§ 245.2(a)(1) and 1245.2(a)(l)). However, "the lack of jurisdiction over [the adjustment of status under the Cuban Refugee Adjustment] does not negate [the Immigration Judge's] jurisdiction over […] removal proceedings under 240 of the Act" against an arriving alien. Matter of E-R-M- & L-R-M-, 25 I&N Dec. 520, 520 (BIA 2011).

An alien whose application under the Cuban Refugee Adjustment Act is approved effectively acquires lawful permanent resident status thirty months prior to the date of his/her application, or on the date of his/her last entry into the United States, whichever occurs later. Pub. L. No. 89-732, 80 Stat. 1161, as amended; see also Matter of Rivera-Rioseco, 19 I&N Dec. 833, 835-36 (BIA 1988) (applying the "roll back" provision of the Cuban Refugee Adjustment Act (i.e., thirty months prior to application) to determine that the respondent had met the seven year requirement under INA § 212(c)). An alien who has adjusted status to that of a lawful permanent resident pursuant to the Cuban Refugee Adjustment Act, has been admitted to the U.S. and is subject to charges of removability under INA § 237(a). Matter of Espinosa Guillot, 25 I&N Dec. 653, 653 (BIA 2011). In determining whether an alien whose status was adjusted pursuant to section 1 of the Cuban Refugee Adjustment Act is removable as an alien who has been convicted of a crime involving moral turpitude committed within 5 years after the alien's "date of admission," the admission date is calculated according to the rollback provision of section 1, rather than the date adjustment of status was granted. Matter of Carrillo, 25 I&N Dec. 99, 100 (BIA 2009).

Rescission of Adjustment of Status and Removal Proceedings

Pursuant to INA § 246(a), lawful permanent resident status may be rescinded within five years of adjustment if it appears that the alien was ineligible at the time his/her status was adjusted. See Matter of Masri, 22 I&N Dec. 1145, 1149 (BIA 1999) (holding that the Attorney General's authority under INA § 246 extends to rescission proceedings involving an alien who has been granted adjustment of status pursuant to INA § 210). As INA § 246(a) relates only to proceedings to rescind lawful permanent resident status acquired through adjustment of status, the five-year statute of limitations in that section is not applicable to bar the removal of an alien who was admitted to the United States with an immigrant visa. Adams v. Holder, 692 F.3d 91, 96-101 (2d Cir. 2012); Matter of Cruz De Ortiz, 25 I&N Dec. 601 (BIA 2011) (distinguishing Garcia v. Attorney General of the United States, 553 F.3d 724 (3d Cir. 2009)). The Board of Immigration Appeals has held that the Department is not required to complete rescission proceedings within five years, as the statutory period will be tolled by the issuance of a Notice of Intent to Rescind. See Matter of Pereira, 19 I&N Dec. 169, 171 (BIA 1984); Matter of Onal, 18 I&N Dec. 147, 149-50 (BIA 1981, 1983). The failure of the Department to rescind permanent resident status within the five-year statutory period does not preclude removal proceedings from being instituted if grounds of removal exist. See Matter of Belenzo, 17 I&N Dec. 374, 374 (BIA 1980, 1981; A.G. 1981) (holding that the five-year rescission limitation does not bar subsequent deportation

proceedings even where the alleged grounds for deportation were acts committed in the procurement of adjustment of status); see also Matter of S-, 9 I&N Dec. 548, 557 (BIA 1961, 1962; A.G. 1962) (finding that the five-year rescission limitation does not preclude subsequent deportation proceedings against adjusted aliens who, before adjustment was made, committed acts justifying deportation).

Jurisdiction over rescission proceedings vests with the Immigration Judge if rescission is not complete before removal proceedings commence. See Matter of Masri, 22 I&N Dec. 1145, 1149 (BIA 1999). An order of removal from an immigration judge is sufficient to rescind resident status. INA § 246(a). As such, the Department is not required to rescind an alien's status before the commencement of removal proceedings. INA § 246(a).

The Department bears the burden of proving by clear, unequivocal, and convincing evidence that the alien was ineligible for adjustment of status to rescind an alien's lawful permanent resident status. See Matter of Hernandez-Puente, 20 I&N Dec. 335, 337 (BIA 1991); Matter of Pereira, 19 I&N Dec. 169, 171 (BIA 1984). If the Department alleges that an alien has abandoned lawful permanent resident status due to an absence from the United States of more than one year, and the applicant presents a colorable claim to returning resident status, the Department bears the burden of proving abandonment by "clear, unequivocal and convincing evidence." Matadin v. Mukasey, 546 F.3d 85, 90-91 (2d Cir. 2008) (citing Hana v. Gonzales, 400 F.3d 472, 476 (6th Cir. 2005); Khodagholian v. Ashcroft, 335 F.3d 1003, 1006 (9th Cir. 2003)). The decision of the Immigration Judge shall order either that the proceeding be terminated or that the adjustment of status be rescinded. See 8 C.F.R. § 1246.6.