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).

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 that was denied by USCIS).

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. 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 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. 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).[1]

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).[2]

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 of Ortiz-Prieto, 11 I&N Dec. 317, 319 (BIA 1965). In what manner the Court should exercise its discretion 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

[1] A waiver of inadmissibility under section 212(h) of the Immigration and Nationality Act, 8 U.S.C. § 1182(h) (2006), is not available on a "stand-alone" basis to an alien in removal proceedings without a concurrently filed application for adjustment of status, and a waiver may not be granted nunc pro tunc to avoid the requirement that the alien must establish eligibility for adjustment. Matter of Rivas, 26 I&N Dec. 130 (BIA 2013).

[2] 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.

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.