

Employment Immigration: How Section 245(K) Can Help Even If You Violate Your Status

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You are an employment-based immigration applicant who wants to get a “green card”, you read the title of this article, and you wonder why this attorney is using boring legal-speak. Well, there’s a reason. Section 245(K) of the Immigration and Nationality Act (INA) is an important provision that can help you adjust status to permanent resident even if you’ve violated your immigration status in the past.

So what does ‘adjust status’ really mean? Adjusting status is a method by which an intending immigrant can get a green card while remaining in the United States. Form I-485 Application to Adjust Status (“I-485”) is the last step of the U.S. employment-based permanent residency process and it can be filed if you have an approved I-140, a current priority date, and are legally present in the United States. Once the I-485 is approved, you are a U.S. permanent resident, and the USCIS mails you a green card.

But not everyone is eligible to file an I-485 application, nor can everyone be approved for one. One legal bar, or impediment, to this step in the process is having violated your status. There is one exemption to that bar, and it is a little known provision known as INA Section 245(K).

What does the law say?

Enacted in 1997, Section 245(K) allows foreign nationals who have violated their status by *less than an aggregate of 180 days following admission*, and who are physically present in the United States, to file for adjustment of status (if you are otherwise eligible to do so).

Who needs Section 245(K)?

Some examples of status violations, which are addressed in Section 245(K), refer to persons who have:

- Failed to maintain, continuously, a lawful status;
- Engaged in unlawful employment; and/or
- Otherwise violated the terms and conditions of his/her admission.

Section 245(K) applies *only* to aliens in one of the employment-based preference categories. It does not apply to family-based preference immigrants, diversity visa adjustment applicants, asylum or refugee adjustment applicants or adjustment applicants under the employment-based fifth preference (EB-5) investment category.

Only aliens in the following preference categories are eligible to take advantage of Section 245(K) if you otherwise meet the conditions mentioned above:

- **Employment-Based First Preference (EB-1)** – All priority workers.
- **Employment-Based Second Preference (EB-2)** – Professionals with advanced degrees or aliens of extraordinary ability (National Interest Waiver).
- **Employment-Based Third Preference (EB-3)** – Skilled workers, professionals or other workers.
- **Employment-Based Fourth Preference (EB-4)** – Religious workers (only).

The section also applies to spouses and children of eligible aliens.

How can Section 245(K) help you?

Imagine that you are a Canadian national in H-1B status, and your family has H4 visas. Your employer is sponsoring you for permanent residency, and you just found out that your I-140 has been approved. Your priority date is current, so your immigration attorney says you can now file I-485 adjustment applications for yourself, your wife, and your two children. However, your wife was employed for 3 months when she first arrived in the U.S., because she didn’t know she was not allowed to work. She has therefore violated her H4 non-immigrant status. You are very concerned that she is ineligible to adjust status to permanent

resident, because of her unauthorized employment. Your knowledgeable immigration attorney assures you it's going to be okay – your wife is protected under Section 245(K) because she has violated her status *by less than 180 days*. You breathe a sigh of relief and file those I-485s!

Section 245(K) is an important provision to keep in mind for any employment-based adjustment applicant who has violated their status in this manner.

It's frightening and stressful once you realize you or a family member has violated their status, but act quickly, consult your immigration attorney, and **make sure the violation is for less than 180 days**. You will still be eligible to file your I-485 Adjustment of Status application, and realize your dreams of becoming a Permanent Resident of the United States.

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