ADJUSTMENTOF STATUS

Adjustment of status (AOS) is the process used by a foreign national who is physically present in the United States to become a lawful permanent resident (LPR). AOS is an alternative to obtaining an immigrant visa through a U.S. consulate abroad, a process known as "consular processing" (CP). Depending on processing times at U.S. Citizenship and Immigration Services (USCIS) service centers, AOS may be preferred by foreign nationals over CP because: (1) it avoids the expense and inconvenience of travel to the home country; (2) AOS applicants, including dependent family members, are entitled to employment authorization and permission to travel while the AOS application is pending; (3) employment-based AOS applicants receive job mobility (*i.e.,* "portability") benefits provided under recent legislation; and (4) there are more options for reconsideration of an unfavorable decision by the USCIS.

AOS, if used, is the final step in the immigration process. AOS is considered to be a discretionary benefit. Although the applicant is statutorily eligible, USCIS may deny the application based upon a determination that discretion should not be favorably exercised.

REQUIREMENTS TO FILE AOS:

- The applicant must be physically present in the United States at the time the AOS application is submitted.
- The applicant, in most cases, must have been admitted or paroled to the United States following inspection by an immigration officer. Proof of admission is usually an I-94 card. Exceptions to this rule include certain special immigrants, who are considered to be paroled for the purposes of applying for AOS despite the manner of actual entry, and persons qualifying for AOS pursuant to Immigration & Nationality Act (INA) §245(i).
- Following lawful entry, the applicant also must have maintained his or her nonimmigrant status to be eligible to apply for AOS. Except for immediate relatives of U.S. citizens, special immigrants, and certain applicants protected by the provisions at INA, unauthorized work or other failure to maintain lawful status - such as overstaying the period of admission - will result in ineligibility for AOS. In most cases, departure from the United States will not "cure" prior violations of status or unauthorized employment. Therefore, the applicant's complete history must be examined to determine if the AOS application may be made.
- The applicant must be eligible to receive an immigrant visa and the immigrant visa must be immediately available for him or her to apply for AOS.
- The applicant must be admissible to the United States.
- In the case of immediate relatives of U.S. citizens, the Petition for Alien Relative (Form I-130) and the AOS application may be made simultaneously by direct mail to USCIS National Benefits Center (NBC) for initial processing, then adjudication by the governing USCIS district office. Additionally, concerning employment-based LPR applicants, as of July 31, 2002, the Petition for Immigrant Worker (Form I-140) and the AOS application may be filed concurrently at USCIS's service center if an immigrant visa is immediately available.

AVAILABILITY OF IMMIGRANT VISAS

Whether an immigrant visa is immediately available is determined with reference to the classification in which the applicant is attempting to immigrate. With the major exception of immediate relatives of U.S. citizens (who are subject to no numerical limitations), immigrant categories are assigned a limited number of visas each year. Moreover, the number of visas available in each category is allocated on a per-country basis. The result of this allocation system is that for some categories in which the demand for immigrant visas outstrips the supply, a waiting line is formed.

A person's place in the queue is determined by his or her "priority date," which is defined as the date upon which the immigrant petition (Form I-130, I-140 - or underlying labor application, if applicable) is properly filed. The priority dates before which visas are being granted are listed in the Department of State's (DOS) *Visa Bulletin*, published monthly.

However, the visa is not assigned until the AOS application is granted. Therefore, a visa must be immediately available *both* at the time the AOS application is made and on the date the application is granted. If a waiting line develops in the applicable category while the AOS application is pending, then the application will be held in abeyance until a visa becomes available. The applicant may maintain status as an AOS applicant for the entire time the AOS application is pending.

DERIVATIVE FAMILY MEMBERS

Most categories for immigration (with the major exception of immediate relatives of U.S. citizens) allow for AOS for certain family members along with the principal applicant. These family members are sometimes referred to as "derivatives" because their ability immigrate derives from the family member who is the principal applicant. The derivative family members include a spouse and unmarried children under 21.

GROUNDS OF INELIGIBILITY

Aliens who are ineligible to apply for AOS are divided into two categories: (1) Restricted aliens and (2) Ineligible aliens. "Restricted" aliens may apply for AOS if they qualify under INA §245(i), but "ineligible aliens" may not apply for AOS in any case.

APPLICATION PROCEDURE

The AOS application is made initially at the appropriate USCIS service center. Generally, the application is adjudicated at the district office having jurisdiction over the residence of the applicant if it is a family-based application, and at the service center if it is any other type of application. An AOS application made in the course of removal proceedings is made with the immigration judge.

The application is made on Form I-485, but several other forms such as Form I-765, Form I-131, etc. and documents such as marriage certificate, birth certificate, etc. must be submitted along with this form to comply with the regulations and to prove eligibility.

Each USCIS office has its own variation on the procedure for processing AOS applications. Generally, following the filing, the applicant, if age 14 or older, will receive a biometrics notice with an appointment for fingerprinting. Applicants will be required to appear in person at the nearest USCIS application support center to have their fingerprints taken and transmitted to the Federal Bureau of Investigation (FBI) for a background check. A photograph and signature may also be taken, as necessary. Some time later, the applicant is scheduled for an interview. In some cases, though, certain applicants for AOS will not be interviewed. These applicants can include employment-based applicants, as well as children and parents of U.S. citizens. This practice varies from one USCIS service center or district office to another.

Once the AOS application is approved, the applicant must obtain temporary evidence of permanent resident status. The approval notice alone is not sufficient evidence for admission to the United States or for employment authorization. An I-551 temporary stamp in the alien's unexpired passport or a temporary resident card can be issued at the nearest USCIS district office for both family-based and employment-based applicants. These are generally valid for one year, which is normally ample time for the applicant to receive the actual permanent resident card, Form I-551, (the infamous green card).

ANCILLARY BENEFITS

AOS applicants are entitled to the ancillary benefits of employment authorization and travel permission abroad/entry document (advance parole) while awaiting adjudication of their case. It is not always necessary or advisable for all AOS applicants to apply for these benefits. For example, if the applicant is in valid H or L status, she may continue to travel and continue to work under the terms of her underlying status and work authorization. If the H or L status is maintained, denial of the AOS application does not result in the loss of authorized status and consequent unlawful presence.

For another example, if the applicant has incurred more than 180 days of unlawful presence, he or she will trigger the bar to admissibility by traveling outside the United States even with an advance parole document. Therefore, a request for ancillary benefits must be considered carefully.

EMPLOYMENT AUTHORIZATION

Applicants for AOS are eligible for employment authorization. In most circumstances, USCIS is required by regulation either to adjudicate the Application for Employment Authorization (Form I-765) within 90 days of filing or issue an interim employment authorization. USCIS will grant employment authorization in increments not exceeding one year during the period the application is pending (including periods of administrative appeal or judicial review). An employment authorization document (EAD) may be extended annually as long as the application for AOS remains pending.

Employment-based AOS applicants are eligible for employment authorization without prejudice to their underlying nonimmigrant status. H-1 or L-1 nonimmigrant workers or their dependents who obtain an EAD based on the AOS application, but who

do not obtain employment with the EAD, are not in violation of their nonimmigrant status.

ADVANCE PAROLE & TRAVEL

Most AOS applicants should not leave the United States without first obtaining advance parole. USCIS regulations deem an application abandoned if an applicant leaves the United States while his or her adjustment application is pending without first obtaining advance parole. Applicants for AOS who have been unlawfully present in the United States for 180 days or more at the time of filing an adjustment application should not seek permission to travel abroad while their application is pending to avoid the three- and ten- year bars to immigration.

An employment-based AOS applicant need not apply for advance parole for travel, however, if he is maintaining H or L status and has or can obtain a visa for re-entry, provided he has the AOS receipt. Note that if an AOS applicant applies for an EAD and engages in "open market" employment, the H or L status is then violated and can no longer provide a basis for work or travel. Family members are dependent on the principal applicant for their H-4 or L-2 status. So if the principal applicant uses an EAD outside the bounds of the H or L approval, the dependent family members are no longer in valid H-4 or L-2 status either.

AC-21 & PORTABILITY

The American Competitiveness in the 21st Century Act (AC21) improved the flexibility of the AOS process and increased its attractiveness over CP.

AC21 permits an individual whose AOS application has been pending for 180 days or more to change jobs without jeopardizing the validity of the underlying approved I-140 filed by the previous employer, *"if the new job is in the same or a similar occupational classification as the job for which the petition was filed."*

AGE-OUT CASES

AOS applicants whose status is derivative of their parents and who turn 21 years of age prior to the adjudication of their application lose eligibility to adjust their status based upon the principal's original application. USCIS service centers and district offices generally will expedite an AOS application involving a child who is aging-out if the problem is clearly identified and brought to their attention.

The Child Status Protection Act (CSPA) provides relief from age-outs in certain situations.

SPECIAL CIRCUMSTANCES IN WHICH AOS MAY BE REQUESTED

Regulations provide for a number of means to adjust status other than through the preference (family – and employment-based) categories. A few of the major options are discussed here.

Asylees and Refugees

If an alien has held refugee or asylee status for at least one year, he or she may be eligible to adjust status to that of an LPR. Derivative asylees and refugees can also apply to adjust status.

Battered Spouse or Child

Under the Violence Against Women Act of 1994 (VAWA), spouses and children of U.S. citizens or LPRs may self-petition to obtain permanent residence. VAWA allows certain battered immigrants to file for immigration relief without the abuser's knowledge or assistance in order to seek safety and independence from the abuser.

Diversity Lottery

The Diversity Lottery (DV) program was enacted to provide a more diverse immigrant pool by creating a means of immigration for those foreign nationals without employment sponsorship or family ties in the United States. It is available to people who come from countries with low admission rates. Under the DV program, 55,000 annual immigrant visas are allotted to qualified foreign nationals. Spouses and children shall receive an immigrant visa if accompanying or following-to-join the spouse or parent.

LIFE Act

The Legal Immigration and Family Equity Act of 2000 (LIFE Act) extended INA §245(i) by replacing the old eligibility cutoff date of January 14, 1998, with a new date of April 30, 2001. This allowed more persons eligible for permanent residence based on a family relationship or job offer to become permanent residents without leaving the country. Most people who entered the United States without inspection, overstayed an admission, acted in violation of the terms of their status, worked without authorization, entered as a crewman, or were admitted in transit without a visa, are considered out of status and would be unable to adjust status to LPR without §245(i).

Eligible aliens had until April 30, 2001, to file an immigrant visa petition (an I-130, I-140, or I-360) with USCIS or a labor certification with DOL in order to take advantage of this provision. LIFE Act added a new "physical presence" requirement for people who filed a petition or labor certification after January 14, 1998, but on or before April 30, 2001. Specifically, aliens were required to prove that they were in the United States on December 21, 2000.

A penalty fee of $1,000 is paid with the filing of Form I-485 Supplement A, which is submitted with the standard Form I-485 AOS application. This fee is imposed along with any other USCIS filing fees.