Advanced Issues in Adjustment of Status

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ADMITTEDLY CONFUSING

INA 101(A)(13) provides a statutory definition for admission

the lawful entry of the alien into the United States after inspection and authorization by an immigration officer

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BUT

Matter of Alyazji,
25 I&N Dec. 397 (BIA 2011)

adjustment of status constitutes an "admission" in some contexts, but not in others

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PRESENTLY PERPLEXING

INA 212(a)(9)(B)(ii) defines unlawful presence as:

presence in the United States after the expiration of a period of authorized stay, or without being admitted or paroled

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POINTS TO PONDER

Matter of Arrabally; Matter of Yerrabelly, 25 I&N Dec. 771 (BIA 2012)

The re-defining of "departure"

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AND

Matter of Lemus, 25 I&N Dec. 734 (BIA 2012) *a.k.a* Lemus II

Does passage of time cure the 3/10 year bars?

What about the permanent bar?

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MARITAL COMPLEXITIES

Can a K-1 visa holder adjust status based on marriage to someone other than the K-1 petitioner?
If not, can §245(i) help?

Matter of Sesay, 25 I&N Dec. 431 (BIA 2011)

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AND

In what situations can a K-1 visa holder adjust status after divorce?

- Timely and bona fide marriage
- Otherwise admissible
- Marriage took place more than 2 years earlier

Matter of Sesay

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AND

Can a K-1 visa holder adjust status after the death of the K-1 petitioner?

According to USCIS memo (12/16/2010), yes.

But is that right? See *Matter of Sesay*; INA §201(b)(2)(A)(i)

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DIFFICULT DERIVATIVES

Can a K-2 derivative adjust status if he or she is no longer a "child"?

Matter of Le, 25 I&N Dec. 541 (BIA 2011)

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DERIVING CLARITY?

A non-citizen is "grandfathered in" to §245(i) if he or she could have been a derivative beneficiary on a pre-sunset petition.

Yates Memo (03/09/2005)

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AND

A non-citizen who is not "grandfathered in" can still use §245(i) if adjusting status with a beneficiary who is "grandfathered in."

Yates Memo

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EMPLOYMENT-BASED PUZZLES

- An employment-based adjustment of status applicant may not adjust status, among other reasons, (1) following unauthorized employment, (2) if presently in unauthorized status, or (3) has not continuously maintained authorized status

INA §245(c)(2), (7), (8)

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BUT

1. Two significant statutory exceptions exist:
   - A failure to maintain continuously a lawful status since entry to the United States "through no fault of his own or for technical reasons".

INA §245(c)(2)

- *See also* 8 CFR 245.1(d)(2)(i)-(iv)(interpreting "no fault" and "technical reasons"), 245.1(d)(1)(defining "lawful status")

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AND

2. Subsequent to a lawful admission (not parole) has not for an aggregate period of 180 days --
   - Failed to maintain continuously a lawful status;
   - Engaged in unauthorized employment; or
   - Otherwise violated the terms and conditions of admission.

INA §245(k)

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GO FIGURE

- 15 years after 245(k)'s enactment - no regulations yet!
- Subregulatory guidance exists - Neufeld Memo, codified in the AFM
  - Only time since the last admission counts toward 180 days
  - Properly filed I-485 stops the 180-day clock
  - Pending application does not equal "lawful status"

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WHO KNOWS?

- What "lawful status" is necessary to adjust status?
  - Compare *Samirah v. Holder*, 627 F.3d 652 (7th Cir. 2010) and *El Badrawi v. DHS*, Docket No. 07-cv-1074-JCH (D.Conn. 04/11/2011), with *Bokhari v. Holder*, 622 357 (5th Cir. 2010).

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ADVISE CAUTIOUSLY

- The law is developing.
- Don't be afraid to stake out an aggressive position when the law supports it and when it benefits your client, but don't be foolhardy or sloppy.
- Know the relevant statutes, regulations, and decisions, and guidance memoranda.

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Questions & Answers

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