ADJUSTMENT OF STATUS vs CONSULAR PROCESSING

United States immigration regulations, procedures, and processing times are always changing. Important decisions have to be made by applicants desiring to obtain permanent resident status in light of such changes. The purpose of this memo is to provide recent information regarding changes in the process so that those in the process of becoming permanent residents can make an informed decision based on the available options. Specifically, the two options are: filing for adjustment of status in the U.S. through the U.S. Citizenship and Immigration Services (USCIS or Service) vs. filing for an immigrant visa through a U.S. Department of State (DOS) Consulate or Embassy abroad.

When the Form I-l40 employment-based immigrant visa petition is submitted to the USCIS Service Center having jurisdiction over the intended area of employment, the petitioner must indicate whether the beneficiary will apply for "consular processing" at an American Consulate overseas for an immigrant visa or will apply for adjustment of status (AOS or I-485) to permanent residence with the USCIS. If I-485 is selected, the beneficiary of the I-140 has the option of "concurrent filing" of the I-140 and I-485. Concurrent filing can involve simultaneous filing of the I-140 and the I-485, or initial filing of the I-140, then filing of the I-485 while the I-140 is still pending. Our policy on all I-140 filings where the beneficiary does not choose "concurrent filing" is to request that USCIS send notice of the approval to the National Visa Center (NVC): this allows the beneficiary to choose whether to apply for the AOS or consular processing after the I-140 has been approved.

A. Adjustment of Status - The Advantages

A1. Convenience. Since the application is filed by mail to the USCIS Service Center having jurisdiction over the alien's place of residence, there is no need to travel long distances and to incur the inconvenience and expense of an interview abroad at an American Consulate.

A2. Waiver of interview. A small percentage of all employment-based applications for adjustment of status are returned to the local USCIS district offices for interviews to ensure proper quality control. Otherwise the interview requirement is usually waived, and the Service will simply adjudicate the application based upon the forms and supporting documentation which have been furnished. All family-based and diversity visa (lottery) applications are interviewed.

A3. Employment Authorization for principal, as well as dependent family members. Adjustment applicants can apply for an Employment Authorization Document (EAD) concurrently with, or after filing of the AOS application. EAD applications involve processing times of approximately 90 days and are valid for a period of one year. H/L/O visa holders have the option of filing for extension of nonimmigrant work authorization instead of, or in addition to, filing for an EAD. The advantages to doing so include longer work authorization validity periods, and maintenance of nonimmigrant status in the unlikely event the AOS is denied. Our general office policy is to encourage filing of an EAD concurrently with the AOS application given its lengthy processing time, in the event it is needed at a later point. Not only principal AOS applicants but their dependents may apply for EADs. Therefore, H-4, O-3, and TD dependent family members, who were prohibited from engaging in employment in the United States, may apply for employment authorization as AOS applicants. EADs provide an essentially unrestricted right to engage in employment or to be self-employed. EADs may be extended in increments of one year until the AOS application is adjudicated.

A4. Permission to travel (advance parole authorization). All applicants for AOS may apply to the USCIS Service Center for permission to depart the United States temporarily after the adjustment application has been accepted for processing. It has been taking 90+ days to complete the processing of advance parole applications. Please note that the local USCIS district offices do retain jurisdiction to adjudicate advance parole applications for truly emergency and unforeseen reasons (i.e., sudden serious illness or death of an immediate family member). Additionally, USCIS regulations which became effective on July l, l999 permit AOS applicants who hold valid, multiple entry H/L visas to travel on those visas without the need to apply for advance parole authorization, provided that they do not violate their status as H-1B or L-1 nonimmigrants (this means that they must not have actually used an EAD card to accept employment other than with their H-l/L-1 employer, or stopped working for that employer). A similar rule applies to dependent AOS applicants: they cannot have actually used an EAD card to accept employment in order to continue to use their H-4/L-2 visas to travel. Note that other nonimmigrant visa holders, e.g. TNs and O-1s are excluded from this exception and are considered to abandon their adjustment applications if they use their nonimmigrant visas to travel.

A5. Portability. On October 17, 2000, the President signed into law the American Competitiveness in the 21st Century Act (AC-21). This change in immigration law creates another advantage to filing for adjustment of status rather than consular processing. Under AC-21, Section 106(c), if the AOS application has been pending for 180 days or more, the AOS applicant is permitted to change jobs with the same employer, or to switch to another entirely different employer as well as geographic location, provided that s/he continues to be employed in the "same or similar occupation." This is a radical departure from existing rules and allows great flexibility to adjustment applicants. USCIS does expect to be provided with notification of any change of employment and a description of how that change in employment is in compliance with AC21 in that it is within the "same or similar occupation".

A6. Police certificates not required. If you choose consular processing, you have to obtain police certificates, in countries where the Department of State (DOS) considers them available, from every locality of the country of your nationality or latest residence abroad where you lived since attaining the age of 16. If you opt for consular processing, you will also need to obtain police certificates from all other countries where you have lived for at least one year. AOS applicants instead provide their fingerprints for FBI and related agency processing, as well as arrest or conviction records if any.

A7. Attorney can be present if Interview is scheduled. In the event of an interview at a local USCIS office, an attorney from our office can be present at the interview. In contrast, an attorney will not be present at the immigrant visa interview if you choose consular processing.

A8. If something goes wrong. If there is a problem with an adjustment application, e.g. it is denied, we can appeal the decision or seek some other administrative relief. If there is a refusal of an immigrant visa by a Consul abroad, it is more difficult to obtain review. Also, if there is a processing delay while additional information/documentation is sought while an AOS application is pending, the applicant can continue to renew your EAD and advance parole documents until the issues are resolved. In contrast, if there is a problem at the Consulate, the applicant may be stranded outside the United States until the issues are resolved.

A9. Potential job flexibility for concurrent filings. In concurrent filing cases, if an employee is laid off or employment is otherwise terminated, or if the employee expects to be transferred to another, but similar, position (e.g., a promotion or change in job location) with the same employer, concurrent filing might protect his/her ability to continue to immigrate with the same I-140 petition and I-485 application on file with USCIS. To have this occur, USCIS would have to agree that the portability provisions of AC21 apply, even in the case of termination of employment, and that the new position is in the "same or similar occupation" to the position identified in the I-140. In this situation, the employee would need employment authorization to work for the new employer (either an EAD or a new H-1B petition by that employer).

A10. Potentially faster processing for concurrent filings. In concurrent filing cases, there may be shorter overall processing times. If the employee's long term goal is to assist family members to immigrate to the U.S., faster adjudication of the I-485 might speed up their applications. In addition, filing the I-485 earlier will also speed up a qualifying family member's request for work authorization.

B. Adjustment of Status - The Disadvantages

In 1998 - 2000, the USCIS allowed a huge backlog of AOS applications to accumulate, resulting in lengthy processing times. However, within the past few years, the USCIS Service Centers have begun to attack the backlogs, and we are seeing approvals on applications filed approximately 6-15 months ago. It is important to note that processing times vary among the USCIS Service Centers. For current USCIS Service Center processing times, please refer to processing times on our website.

B1. Unpredictable processing times. The primary disadvantage of AOS in the past has been lengthy and unpredictable processing times. As indicated above, USCIS has been giving a higher priority to processing AOS applications and the processing times are improving. However, AOS processing times continue to be longer than consular processing. The possibility of concurrent filing may actually serve to increase USCIS processing times. Longer processing times have the potential to prejudice the applications of dependent children. Under the terms of the Child Status Protection Act signed into law on August 6, 2002 however, dependents may be considered under 21 for the purpose of eligibility to apply for permanent residence. As a result, dependent children who were under the age of 21 when the application was initially submitted, but who become 21 years of age while the application is still pending, may or may not lose their eligibility for permanent resident status depending on the particular circumstance.

B2. Concurrent Filings:

a. Changes in the USCIS regulation. At this time, we are working with an interim rule and without any interpretive or implementing memorandum from the USCIS. If an employee proceeds with concurrent filing, there is no guarantee that USCIS will not make changes to the interim rule as it currently stands, or make interpretations that we have not anticipated.

b. Risk of denial of the I-140. Filing the I-485 application enables the employee and dependents to concurrently file applications for Employment Authorization Document [EAD or I-765], and Advance Parole travel authorization [AP or I-131]. Despite these independent bases for work and travel authorization, we recommend that AOS applicants maintain their underlying nonimmigrant status, (at least until the I-140 is approved). This will mean additional fees for the employer if nonimmigrant visa extensions are required, as well as possible unnecessary usage of limited time in H/L status. For this reason, we currently recommend that if the I-140 is supported by a strong labor certification, the I-485 should be filed concurrently. However, we recommend that an I-140 supported by a labor certification that has risks such as a "substituted" employee, or an I-140 that is not supported by a labor certification [e.g., an Outstanding Researcher petition, or Extraordinary Ability petition] should be filed separately, and the I-485 not be filed until the I-140 is approved. We believe that this recommendation gives the employee the best chance of avoiding a situation where the I-140 is denied months after a concurrent filing, leaving the employee and the employer with an

I-485 that has no legal basis. In that case, absent a valid non-immigrant status, the employee would be out-of-status and faced with the prospect of trying to reinstate status and employment authorization.

c. Possible inapplicability of AC21 "portability". It is unclear whether the AC21 "portability" rules will apply to concurrent filings. Therefore, it is unclear what action the USCIS would take if the I-140 was denied after the I-485 application was pending for more than 180 days. If USCIS decides that in such cases no portability is allowed, the AOS applicant would be required to ask the employer to begin the immigration process all over again, including a new non-immigrant visa petition (if eligible), a new labor certification (if required), a new I-140, etc. Given the limits on the amount of time one can remain in H or L status, the employee might have to leave the U.S. and complete the process from abroad. There is also the risk that a new employer would not be interested in supporting the immigration process at all.

C. Consular Processing - The Advantages

C1. Shorter Processing Times. As noted above, the primary advantage of consular processing has been shorter processing times compared to AOS; although, as USCIS processing times get shorter, this particular advantage becomes less and less important. If the USCIS properly and timely forwards the approved I-l40 employment-based preference petition to the National Visa Center of the U.S. Department of State, it is conceivable that an immigrant visa appointment at an American Consulate could be scheduled within no more than one year, depending upon the particular Consulate's workload. If the applicant for an immigrant visa is in possession of a valid nonimmigrant visa, the individual may travel freely while waiting for the visa appointment to be scheduled. Please note, however, that TN nonimmigrants must be more cautious with international travel, since they must establish at the time of each TN re-entry into the United States that they are working temporarily in this country and that they have a residence abroad which they have no intention of abandoning. This can be difficult if they have started the green card process. Shorter processing times are particularly advantageous to the applications of dependent children. Under the terms of the Child Status Protection Act signed into law on August 6, 2002 however, dependents may be considered under 21 for the purpose of eligibility to apply for permanent residence. As a result, dependent children who were under the age of 21 when the application was initially submitted, but who become 21 years of age while the application is still pending, may or may not lose their eligibility for permanent resident status depending on the particular circumstance.

D. Consular Processing – The Disadvantages

D1. Inconvenience/cost. The primary disadvantages are the inconvenience and expense of traveling to the American Consulate to appear for the required interview. Unlike the USCIS, DOS does not waive the interview requirement and it applies to all family members seeking immigrant visas irrespective of age. The interview may well be scheduled at a time that does not fit well with employment considerations and personal schedules in the United States; rather, the interview is scheduled at a time that is convenient to the Consulate, not the applicant. Appointment dates are generally difficult to change and will result in additional delays in the application process. While attorneys of record may routinely appear at interviews for which their clients are scheduled by the USCIS, the same does not hold true for DOS; attorneys are normally barred from appearing with their clients in the interview room, and may be barred from even entering the Consulate itself.

D2. Documentary requirements. Documentary requirements are different and generally more onerous for consular processing applicants. Most nationals must obtain police clearances from all countries in which they have resided for more than six months since reaching the age of 16 if the U.S. Department of State considers such records to be available. Those who have served in a foreign military organization must obtain a record of their military service. For information regarding whether DOS considers police, military, and other vital records available, please review the DOS website at **http://travel.state.gov/visa/fees/fees_3272.html**. The medical examination will be scheduled with an approved physician or medical clinic selected by the Consulate and may require the applicant and accompanying family members to appear in the foreign country up to one week in advance of the interview date; medical examinations conducted by USCIS-approved physicians or clinics are not acceptable.

D3. No work authorization for dependent family members. The EAD application available to AOS applicants is not available to applicants for immigrant visas through the consulate. Therefore accompanying family members in H-4, O-3 and TD status who have not been able to work in the United States will continue to be unable to work until their immigrant visas have been issued and they have been readmitted to the United States as permanent residents. Since the EAD card can normally be obtained within three months, and the immigrant visa interview may well take a year to be scheduled, this can result in a considerable delay in obtaining employment authorization.

D4. No AC21 "portability". AC21 section 106 allows for portability for AOS applicants if there are changes in the job offer so long as the new job is for a “same or similar occupation” and so long as the AOS is pending for at least 180 days. This relief only applies to adjustment applicants. Therefore, someone who opts for CP rather than AOS is forgoing the possibility of porting their application for permanent residence to another employer or to another job if such an event occurs. If someone chooses to process through CP, major changes which may occur in the nature of the job duties or geographical location of employment before the CP interview, or prior to admission as an immigrant following the CP interview, can serve to render the approved labor certification and/or I-140 petition invalid. If the employer goes out of business, or is

acquired by another company which has no intention of continuing the permanent resident process, there will be no basis for approval of the CP application for a permanent resident visa. For CP cases, the offer of employment which provided the initial basis of the filing of the CP application must continue in effect until the applicant has been granted lawful permanent resident status.

This memorandum is based on information and processing time estimates provided to us by the USCIS. It is possible that USCIS may change their priorities in the future in such a way that processing times for adjustment of status may be reduced or lengthened.

As this memorandum hopefully makes clear, this is not a "one size fits all" situation. Many factors have to be taken into account before an applicant for permanent resident status makes the decision to either apply for adjustment of status with the USCIS or for an immigrant visa at a U.S. consulate abroad, and neither option is going to be a perfect fit. All applicants should consult with their immigration attorney before making a final decision to pursue either option. By instructing the Service in item 4 of the Form I-140 to "send the petition to NVC" where concurrent filing is not desired, we are providing applicants with the maximum amount of flexibility and are leaving their options open to either adjust or go through consular processing.