ADJUSTMENT OF STATUS VS CONSULAR PROCESSING

United States immigration procedures and processing times often change with little advance notice. Applicants for permanent residence must make important decisions when such changes occur. This memo compares two different paths toward completing the final step of the employment-based immigration process. When filing the I-140 immigrant visa petition, the final green card itself can be obtained through one of two ways:

(1) concurrently or consecutively filing for adjustment of status (AOS) within the United States, after mailing USCIS Form I-485 to US Citizenship and Immigration Services (USCIS), or

(2) applying for an immigrant visa with the Department of State (DOS), through a US consulate or embassy outside the United States.

If opting to file Form I-485, the intending immigrant may "concurrently" file both Forms I-140 and I-485 together, as long as the immigrant visa "priority date" is current. Concurrent filing can involve simultaneous filing of the Forms I-140 and I-485, or initial filing of the Form I-140, then filing of the Form I-485 while the Form I-140 remains pending.

A. Adjustment of Status - The Advantages

A1. Convenience. Because the Form I-485 is mailed to the USCIS Service Center within the United States, there is no need to depart the United States, or otherwise incur the inconvenience and expense of an interview abroad at a US consulate.

A2. Immediate employment authorization for AOS applicants along dependent family members. AOS applicants can apply for an Employment Authorization Document (EAD) concurrently with--or at any time after--the filing of Form I-485. Initial EADs can be valid for one to three years, and subsequent renewal EADs can be requested upon expiration. H-1B and L-1 visa holders may file for extension of nonimmigrant work authorization instead of, or in addition to, filing for an EAD via Form I-765. The advantages to maintaining nonimmigrant work authorization include: (1) potentially longer work authorization periods, as compared to the EAD, and (2) continuing valid nonimmigrant status, in the unlikely event the Form I-485 is denied. We always encourage filing an EAD concurrently with the Form I-485, given lengthy AOS processing times. That way, the AOS applicant has a "back up" means of employment authorization, untethered from the nonimmigrant visa. Dependents of AOS applicants may also apply for EADs. Therefore, family members on "dependent" nonimmigrant visas (e.g., O-3, TD, etc.), who were otherwise prohibited from employment in the United States, may seek employment authorization as AOS applicants. Even H-4 nonimmigrants who might already possess H-4 EADs should file for AOS-based EADs. These EADs provide an essentially unrestricted right to engage in employment or self-employment. EADs may be regularly extended, until the AOS application is approved.

A3. Permission to travel (advance parole authorization). All AOS applicants may apply to the USCIS Service Center for advance parole (AP) via USCIS Form I-131. Advance parole simply refers to USCIS permission to depart the United States temporarily after filing the Form I-485. USCIS regulations permit AOS applicants who hold valid, multiple-entry H-1B or L visas to travel abroad without needing to apply for AP, as long as their H-1B or L-1 nonimmigrant visa status remains valid. (For example, AOS applicants must not have used an EAD card to accept employment elsewhere, or have stopped working for their sponsoring employer). USCIS will consider those working in other nonimmigrant visa categories besides H-1B or L-1 (e.g., TN, E-3, O-1, etc.), to have abandoned their AOS applications if they use their nonimmigrant visas to travel. More recently, USCIS has been known to deny AP applications themselves, if even H-1B or L-1 workers travel while the Form I-131 application is pending. Therefore, international travel while the AP remains pending is inadvisable, even for H-1B and L-1 workers, if travel can be avoided. Similarly, AP renewal applications can be filed while the AOS remains pending, but international travel during the AP renewal process can result in a denial of the new I-131 application. While this could be remedied by simply refilling the Form I-131 application to request AP all over again, the point is that time and money could be wasted without careful coordination with travel schedules.

A4. Portability. "Portability" of the I-140 immigrant petition means that the AOS applicant may change jobs with the same employer, or switch to an entirely different employer, or to a new geographic location, provided that (1) the I-140 immigrant petition is approved (or "approvable"), (2) the I-485 application has been pending for at least 180 days, and (3) the AOS applicant remains employed in the “same or similar occupation” as described on the original I-140 immigrant petition. While this benefit is theoretically possible to certain consular immigrant visa applicants, it is in practice unavailable at US consulates unless the immigrant visa applicant had first filed for adjustment of status via Form I-485.

A5. Police certificates not required. Consular immigrant visa processing requires the immigrant visa applicant to first obtain police certificates from every locality of your home country (or latest residence abroad) where you have ever lived, since attaining the

age of 16. You would also need to obtain police certificates from any other countries where you may have lived for six months or longer. By contrast, AOS applicants merely need attend a biometrics appointment at a location within the US convenient to them, in order to conduct their police records check.

A6. Attorney can be present if interview is scheduled. An attorney can accompany AOS applicants to USCIS I-485 interviews. In contrast, an attorney cannot be present at the consular immigrant visa interview.

A7. Optionality if something goes wrong. If there is a problem with an AOS application, (e.g., a denial) the AOS applicant may file a Motion to Reopen that decision, or seek other administrative relief. However, it is virtually impossible to seek re-review of a denied immigrant visa application at a US consulate. Also, delayed AOS applications are less painful to the applicant, because AOS applicants can simply continue renewing EAD/AP until the delays are resolved. By contrast, immigrant visa processing delays at a US consulate may leave the applicant stranded outside the United States until the issues are resolved.

A8. Potentially faster processing for concurrent AOS filings. Concurrently filed I-140 immigrant visa petitions and I-485 AOS applications may experience shorter overall processing times. If the employee's long-term goal is to help family members immigrate to the US, a faster adjudication of their own AOS application might speed up the immigration process for the entire family. In addition, filing the Form I-485 earlier will speed up a qualifying family member's request for work authorization via EAD.

B. Adjustment of Status - The Disadvantages

USCIS recently announced that it will require interviews of all AOS applications filed on or after March 6, 2017. This changes a long-standing USCIS policy where interviews were almost always waived for the vast majority of employment-based AOS applications. We predict a substantial slowdown in all AOS processing times may develop as a result.

B1. Unpredictable processing times. AOS processing times depend upon the USCIS service center having jurisdiction over the I-485 application, and the local USCIS district offices where interviews will be conducted. Longer processing times at either the USCIS service centers or the local USCIS district offices may delay the immigration process even longer than if opting for consular immigrant visa processing. Such delays could adversely impact AOS applicants, if for example, they are at risk of losing their job, or if they have dependent children who might be reaching the age of 21, etc.

B2. Concurrent Filings: Risks if the I-140 petition should be denied. Filing the AOS application enables the employee and dependent family members to concurrently file applications for EAD and AP. Despite the EAD/AP providing an independent basis for work and travel authorization, it would be safest for employers of AOS applicants to continue extending underlying nonimmigrant work visa status throughout the AOS process. The I-485 should typically be filed concurrently if the I-140 immigrant visa petition is supported by an approved PERM 9089 labor certification. However, an I-140 immigrant visa petition unsupported by a PERM 9089 labor certification [e.g., a first-preference employment-based immigrant visa petition, such as for a multinational manager] should not necessarily be filed concurrently with Form I-485. Waiting first for I-140 immigrant visa petition approval allows the employee to avoid risks that could arise from an AOS application denied at the same time as the Form I-140, if the I-140 should be denied for any reason. Otherwise, a denied I-140 for an applicant also relying upon a pending I-485 application could leave the employee with an automatically denied I-485, potentially impacting the ability of the employee or the employee's family members to lawfully reside in the United States. In the event of a denied I-485 application, the employee could become unlawfully present in the United States, if he or she was not maintaining lawful nonimmigrant work visa status.

C. Consular Processing - The Advantages

C1. No advance parole means no travel restriction. If the applicant for an immigrant visa through consular processing holds a valid nonimmigrant visa, the immigrant visa applicant may travel abroad freely while waiting for the immigrant visa appointment to be scheduled. However, nonimmigrants who do not hold H-1B or L-1 visa status must be cautious with international travel. That is because each new re-admission to the United States would require them to demonstrate they have a residence abroad which they have no intention of abandoning. This can be difficult for certain nonimmigrant visa holders (i.e., those who do not hold an H-1B or L-1 visa) once an I-140 immigrant petition has been filed.

C2. Potentially faster overall processing time. Given the new USCIS policy of interviewing all employment-based AOS applicants, the I-485 processing times can expect to lengthen over time. As a result, given the relatively smaller number of employment-based immigrant visa applications processing at the US consulates relative to employment-based AOS applications, there is a chance that – depending upon country of origin and other factors – that consular processing may come to prove a faster way to obtain permanent resident status. There is no way to know as of late 2017 whether this is true, but asking about relative processing times is something to keep in mind.

D. Consular Processing – The Disadvantages

D1. Inconvenience/cost. Traveling to a US consulate to appear for the required immigration interview is inconvenient and expensive for an applicant residing in the United States on a nonimmigrant visa. The consular immigrant visa interview may be scheduled at a time that does not fit well with employment considerations or personal schedules in the United States. Consular interview appointment dates are generally difficult to change, and could result in unpredictable delays to the immigrant visa application process. Attorneys are barred from appearing with their clients in the consulate interview room, and may be barred from even entering the consulate itself.

D2. Documentary requirements. Documentary requirements are often more challenging for consular processing than for AOS. Most nationals must obtain police clearances from all countries in which they have resided for more than 6 months since reaching the age of 16, if the DOS 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.

D3. Medical examination. The medical examination will be scheduled with an approved physician or medical clinic in the foreign country selected by the US Embassy or Consulate. The examination may require the applicant and accompanying family members to appear in the foreign country for days or weeks in advance of the interview date. Medical examinations conducted by USCIS-approved US physicians or US clinics are unacceptable. Because far fewer civil surgeons are authorized by the DOS in your home country than those authorized by the USCIS in the United States, you may find very limited choice in civil surgeons to perform the medical examination, if you opt for consular processing, and that the process of traveling abroad for a medical examination is inconvenient and expensive.

D4. No work authorization for dependent family members. The EAD available to AOS applicants is unavailable to consular immigrant visa applicants. Therefore, accompanying family members in, say, H-4, O-3 or TD status, etc., who have not been able to work in the United States. will remain unable to work in the United States until their immigrant visas are issued. Because the immigrant visa interview may well take a year or longer to be scheduled after filing the necessary paperwork, employment authorization may be a long time coming.

D5. Little to no "portability" of the immigrant petition in the event of job change. AOS applicants may safely "port" their approved I-140 immigrant petition to a new role, if there are changes to the sponsored job, so long as the new job within the “same or similar occupation,” the I-140 immigrant petition is approved (or "approvable" at the time of filing), and the AOS is pending for at least 180 days. This relief applies only to AOS applicants. Therefore, someone who opts for consular processing rather than AOS forgoes the possibility of safely changing their jobs before they immigrate. If someone chooses to process through consular processing, major changes to the job duties or geographical location of employment before the consular interview, could invalidate the approved I-140 petition. If the employer goes out of business, or is acquired by another company which will not continue sponsoring the immigration process, there will be no basis for approval of the consular processing application for an immigrant visa. For consular processing cases, the employment offer upon which the immigrant visa application is based must remain in effect until the applicant has been granted lawful permanent resident status.

There is no "one-size-fits-all" strategy for obtaining a green card. An intending immigrant must take many factors into account before deciding to either apply for AOS within the USCIS, or for an immigrant visa at a US consulate abroad. Neither option is going to be a perfect fit for all people in all instances, though on balance, the AOS process will provide the most flexibility and protection to the intending immigrant. All intending immigrants should consult with their immigration attorney before making a final decision to pursue either option.