NEVER SAY "i" (UNLESS YOU MUST): EMPLOYMENT-BASED OPTIONS FOR ADJUSTMENT OF STATUS THAT AVOID INA § 245(i)

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At times, a medicine produces too much misery, even if it promises a cure. Such is often the case with § 245(i) of the Immigration and Nationality Act ("INA"). If applicable, this provision of law will forgive past immigration violations and thus allow an otherwise ineligible non-citizen to adjust status and become a lawful permanent resident. But § 245(i) should not be recommended as readily as a dentist might recommend a root canal. Reliance on this provision should ordinarily take place only as a last resort. An acknowledgement of wrongdoing on an immigration form, in this case the Form I-485, Supplement A ("§ 245(i) application"), never dies, and can certainly come back to haunt the confessing alien or his current or former employers.[2]

Aside from an alien's disinclination to reveal past misdeeds, there is also a very mundane reason to avoid § 245(i): It's pricey! In these penurious times, with the Immigration and Naturalization Service ("INS or Service") clamoring for ever-higher user fees, why would an adjustment applicant spend an additional

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The authors struggled mightily to find a title that would capture the essential theme of this article, namely, the reluctance of aliens and their employers to admit immigration-related fault or wrongdoing despite an earnest desire to adjust the alien's status to lawful permanent residence. We considered and rejected "Never Having to Say i'[m] Sorry: No Love Lost on INA § 245(i)." But cloying memories of the saccharine sweethearts in Erich Segal's *Love Story* gagged us more than the unpalatability of § 245(i). So instead the phrase "never say 'i'" was chosen, but not as a rhyming variation of the stoic American sports motto, "never say die." No, "never say 'i'" made it to the top of the page because it harkens back to an admonition often taught in grammar school: When writing prose, one should avoid using "I," the first person singular. Although challenged today, the reasons for this supposed rule vary, but in general, the argument is that the work should not be about the author, but about the subject matter. For more on this topic, see Selected Writing Tips at http://orpheus-1.ucsd.edu/history/writing.htm.

[2] For example, fretful aliens may spend some sleepless nights after certifying on a § 245(i) application that they violated U.S. immigration laws by acknowledging one of the following:

1. That he or she did not enter the United States legally after having been inspected and admitted or paroled (question #3);
2. That he or she entered the United States as a stowaway or without inspection (question #4);
3. That he or she has been employed in the United States after 01/10/77 without INS authorization (question #8);
4. That he or she is applying for adjustment of status under the Immigration Nursing Relief Act and either was employed without INS authorization after 11/29/90 or has not maintained a lawful immigration status while in the United States after 11/05/86 (question #9); or
5. That he or she was not in lawful immigration status at the time of submission of the application or has not always maintained a lawful immigration status while in the United States after 11/05/86 (question #10).

$1,000 to pay the § 245(i) penalty fee unless it is absolutely necessary?[3] So this article will address the question that foreign workers[4] want to know: "Must I say 'i'?"

The authors will answer the alien's question with a typical lawyerly response: "It depends." This article covers ways in which aliens may adjust status – yet avoid filing an application under § 245(i) – by utilizing specific exceptions in the law to overcome bars to adjustment. It will focus on common issues involving bars to adjustment of status based on an alien's unauthorized work or failure to maintain nonimmigrant status.[5]

I. BACKGROUND

Recent legislation has established both new bars to adjustment of status for many employment-based applicants and a new exception to these bars. On the one hand, with the enactment of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA"), Congress added additional bars to eligibility for adjustment of status by establishing INA §§ 245(c)(7) and (c)(8).[6] These laws render an employment-based applicant ineligible to adjust status to permanent resident if the individual (a) is not in lawful nonimmigrant status at the time the adjustment application is submitted, (b) ever-accepted unauthorized employment, or (c) violated the terms of any nonimmigrant visa. On the other hand, Congress established a means for many employment-based applicants to qualify for adjustment of status despite prior violations of U.S. immigration laws with the addition of § 245(k) in 1997.[7] These changes in the law increase the due diligence required of the alien, the immigration practitioner and the sponsoring employer in assessing the factual and legal issues involved with employment-based applications to adjust status. As will be shown, INA §§ 245(c)(2), (c)(7), (c)(8), and (k) are especially important provisions to consider when evaluating the eligibility of employment-based applicants for adjustment of status.

II. The Killer "(c)"'s: §§ 245(c)(2), 245(c)(7) and 245(c)(8)

[3] In addition to the $1,000 penalty fee, there are other substantial fees associated with the filing of an adjustment of status application. The application for adjustment of status, Form I-485 fee is $220. The fee for the employment authorization document, Form I-765, is $100. The fee for an application for advance parole, Form I-131, is $95. In addition to these fees, there are fees for family members. Moreover, INS has proposed increases to fees. *See* 66 Fed. Reg. 41456-41462 (Aug. 8, 2001)*, as published on* AILA InfoNet, Doc. No. 01080933 (Aug. 9, 2001).

[4] This discussion will focus on employment-based adjustment of status options as alternatives to § 245(i). It will not address the wisdom or folly of pursuing § 245(i) in other areas of immigration law. For a discussion of this provision and its applicability as a means to adjust the status of asylees, parolees, aliens with qualifying family relationships, and persons who entered the United States without inspection, *see, e.g.*, Lorna Rogers Burgess, *Advanced Practice\Removability\Unlawful Presence and Bars to Admissibility,* Immigration & Nationality Law Handbook, Vol. II (AILA 1998-99); Stanley Mailman, *The New Adjustment of Status Law, Background and Analysis*, 44 *Interpreter Releases 1505* (Nov. 14, 1994).

[5] The article will not discuss the concept of "unlawful presence" under INA § 212(a)(9). For a discussion of the topic, *see* J. Ira Burkemper, *Unlawful Presents: Congress' Gifts' to Unwary Foreign Workers*, AILA California Chapters Conference Handbook (1999).

[6] Pub. L. 104-208, 110 Stat. 3009, § 375.

[7] Pub. L. No. 105-119, 111 Stat. 2458, Sec. 111.

A. INA § 245(c)(2)

Enacted on October 20, 1976, and made effective on January 1, 1977, § 245(c)(2)[8] bars a non-citizen from adjusting status to lawful permanent resident if, prior to filing an application for adjustment of status, the alien worked without authorization in the United States on or after January 1, 1977. A later amendment of this subsection[9] also bars a non-citizen from adjustment of status if the alien has "failed (other than through no fault of his [or her] own or for technical reasons) to maintain continuously a lawful status since entry into the United States."[10] An alien fails to maintain a lawful status continuously if he or she remains in the United States after the expiration date of the alien's period of authorized stay.[11]

In general, the INS has narrowly construed § 245(c)(2) in a manner that ensnares more aliens and limits the availability of the forgiveness provisions (no-fault-of-alien or for technical reasons). For example, purely as a matter of textual analysis, the INS could have found that the language prohibiting adjustment of status for aliens who failed to maintain continuously a lawful status *since entry* applies only to one who fails to maintain continuously lawful status since his or her *last entry.* This interpretation of the subsection would be reasonable. Instead, the INS – in an informal letter to an immigration attorney – has interpreted the language to include a failure to maintain continuously a lawful status *at any time after any prior entry*.[12]

In addition, the INS has also promulgated regulations that narrowly construe the exception to the bar for failure to maintain continuously a lawful status. INS regulations provide that the parenthetical phrase "other than through no fault of his own or for technical reasons" is limited to the following:

(1) Inaction of another individual or organization designated by regulation to act on behalf of an individual and over whose actions the individual has no control, if the inaction is acknowledged by that individual or organization as, for example, a case where a designated school official or

[8] Pub. L. 94-571, 90 Stat. 2703, § 6.

[9] Pub. L. 99-603, 100 Stat. 3359, § 117.

[10] INA § 245(c)(2) makes ineligible for adjustment of status, "subject to subsection (k) of this section, an alien (other than an immediate relative as defined in [8 U.S.C.] section 1151(b) of this title or a special immigrant described in [8 U.S.C.] section 1101(a)(27)(H), (I), (J), or (K) of this title) who hereafter continues in or accepts unauthorized employment prior to filing an application for adjustment of status or who has failed (other than through no fault of his own or for technical reasons) to maintain continuously a lawful status since entry into the United States." The bar to adjustment of status for aliens who have failed to maintain continuously a lawful status is limited to aliens who submit an application for adjustment of status on or after November 6, 1986. 8 C.F.R. § 245.1(b)(6).

[11] 8 C.F.R. § 245.1(d)(1) provides: "For purposes of section 245(c)(2) of the Act, the term 'lawful immigration status' will only describe the immigration status of an individual who is: (i) In lawful permanent resident status; (ii) An alien admitted to the United States in nonimmigrant status as defined in section 101(a)(15) of the Act, whose initial period of admission has not expired or whose nonimmigrant status has been extended in accordance with part 214 of this chapter; (iii) In refugee status under section 207 of the Act, such status not having been revoked; (iv) In asylee status under section 208 of the Act, such status not having been revoked; (v) In parole status which has not expired, been revoked or terminated; or (vi) Eligible for the benefits of Public Law 101-238 (the Immigration Nursing Relief Act of 1989) and files an application for adjustment of status on or before October 17, 1991."

[12] Letter, Miller, Deputy Asst. Comm., Adjudications, CO 245-C (Jan. 8, 1990), *reprinted in* 67 *Interpreter Releases* 151 (Feb. 5, 1990).

exchange program sponsor fails to provide required notification to the Service of continuation of status, or fails to forward a request for continuation of status to the Service.

(2) A technical violation resulting from inaction of the Service, as for example the case where the applicant properly filed a timely request to maintain status but the Service has not acted on the request.

(3) A technical violation caused by the physical inability of the applicant to request an extension of nonimmigrant stay from the Service either in person or by mail, provided the applicant submits to the Service a letter from a hospital or physician which explains the circumstances involved.

(4) A technical violation resulting from the Service's application of the maximum five/six year period of stay for certain H-1 nurses only if the applicant was subsequently reinstated to H-1 status in accordance with the terms of Public Law 100-658 (Immigration Amendments of 1988).[13]

Although the INS maintains that the four regulatory exceptions to the grounds of ineligibility for adjustment of status found in INA § 245(c)(2) are all-inclusive as written, *Mart v. Beebe*[14] provides an argument that additional exceptions should be permitted. In *Mart v. Beebe*, the B-2 visa status of Plaintiff Veronica Mart[15] expired while her husband's application for political asylum was pending with the INS. The District Court found that she never applied for an extension of status because she was unaware of the need to do so. Her husband's asylum application was eventually denied. Subsequently, Ms. Mart and her family received word from the Department of State that they had been selected to apply for a visa under the Diversity Immigrant Visa Program. She submitted an application to adjust status, but the INS denied her application under § 245(c)(2) because she had failed to maintain continuously a lawful status after the expiration of her B-2 status. The Court found that 8 C.F.R. § 245(d)(2) limited excusable unlawful status to four narrowly defined circumstances, none of which applied to Ms. Mart's case. However, the Court agreed with the plaintiffs that the cited regulation impermissibly limits the applicability of the words "or for technical reasons" found in INA § 245(c)(2).

The Court also agreed with the plaintiffs' assertion that the regulation defied Congress' intent that individuals such as the plaintiffs, who have diligently tried to obey the law and have since their arrival contributed substantially to the United States (through their work and community involvement) ought not be precluded from adjustment because they were unaware of their duty to keep their non-immigrant status current while awaiting the INS' decision on their request for asylum.

The INS may not acquiesce in the *Mart* decision, but the case should nevertheless be cited by adjustment applicants as persuasive authority for the proposition that the INS' regulatory exceptions to the § 245(c)(2) adjustment bars are too narrowly drafted. Indeed, there are sound reasons to challenge

[13] 8 C.F.R § 245.1(d)(2).

[14] *Mart v. Beebe*, No. Civ. 99-1391-JO, 2001 WL 13624 (D. Or. Jan. 5, 2001).

[15] Ms. Mart's husband and two children were also Plaintiffs.

these regulations. INA§ 245(c)(2) clearly states that its provisions barring adjustment of status for those who have failed to maintain continuously a lawful status since entry into the United States should not apply in two *alternative* situations. Thus, even if the alien is at "fault," the other saving grace (for "technical reasons") could conceivably apply.

Yet the INS regulations do not permit an exception for *all* technical reasons or for *all* status violations caused solely by entities or individuals *other than* the alien (i.e., where the alien is above reproach). For example, a nonimmigrant worker should not be ineligible for adjustment of status solely because a petitioning employer incorrectly completed or filed a Form I-129 petition for an extension of stay in H or L or some other nonimmigrant work visa status, even though there is no exception to this violation under 8 C.F.R. § 245.1(d)(2).[16] The employer is required under penalty of perjury to state information correctly on this form.[17] The nonimmigrant is not responsible for filling out the form or filing it.[18] Therefore, in a given case, the employer may be solely at fault for a rejected petition or a denial based on incorrectly stated information or a faulty filing. If, because of this type of error, the nonimmigrant is found to have remained in the United States beyond the period of authorized stay, this overstay occurred through no fault of the alien. It also may have occurred because of a technical violation (such as the failure of an employer to sign a check to cover a filing fee). Therefore, the adjustment applicant can argue that these circumstances constitute an exception that excuses the status violation because it was caused through no fault of the alien or for technical reasons.

Adjustment applicants may also challenge 8 C.F.R. § 245.1(d)(2)(i) as an impermissible limitation on the statutory phrase "through no fault of his own" found in § 245(c)(2). This regulation excuses past unlawful status if it was caused by the inaction of another individual or organization designated by regulation to act on behalf of the alien, *but only "if the inaction is acknowledged by that individual or organization*." If the adjustment applicant can show that the alien's failure to maintain continuously a lawful status was caused by the inaction of such an individual or organization, and not because of any action or inaction on the applicant's part, it should not be necessary to obtain an acknowledgement of fault from the responsible party.[19] Indeed, in the right factual situation, the applicant could conceivably show, by submitting other

[16] The alien beneficiary's signature is not required on a Form I-129.

[17] *See* Form I-129, Part 6.

[18] Indeed, if the petition is denied, the alien (although clearly a party in interest) is not allowed legal standing to appeal the denial. See 8 C.F.R.§ 103.3(a)(1)(iii)(B)("'[a]ffected party' (in addition to the [Immigration and Naturalization] Service) means the person or entity with legal standing in a proceeding. It does not include the beneficiary of a visa petition").

[19] The litigious society that is America in the second millennium does not produce many individuals willing to express regret or fault, and thus face the foreseeable outcome of a tort lawsuit with an easily proven admission against interest. The INS' insistence on acknowledgment of fault is thus unreasonable and more exacting than the statute requires. Perhaps, the INS – taking a nod from certain state legislatures who now appear more inclined to allow drivers and doctors to express regret without fear of tort suit – would accept merely an "I'm sorry" rather than an "I'm responsible" from the culpable party. *See e.g.*, Linda O. Prager, *New Laws Let Doctors Say "I'm Sorry" for Medical Mistakes*, r*eported in* AmNews*,* Vol. 43, No. 31 (August 21, 2000) @ www.ama-assn.org/sci-pubs/amnews/pick_00/prsa0821.htm.; *see also, e.g.*, AB 957 (pending legislation in California that would make inadmissible in court apologies from motorists involving automobile accidents).

evidence, that the status violation was caused through no fault of the alien.[20] This showing satisfies the exception to ineligibility under the plain meaning of the statute.[21]

B. INA § 245(c)(7)

Section 245(c)(7) prevents an alien from adjusting status through an employment-based immigrant visa petition if he or she is not in a lawful nonimmigrant status.[22] Thus, aliens in parolee or refugee status are ineligible to seek adjustment of status based on an employment-based petition approval. One exception to this rule is that aliens who submit an employment-based application for adjustment of status while in nonimmigrant status, but who later apply for admission to the U.S. as a parolee pursuant to an advance parole document, remain eligible to adjust status.[23]

C. INA § 245(c)(8)

An alien is ineligible to adjust his status to that of a permanent resident if the individual was employed as "an unauthorized alien."[24] An unauthorized alien is an alien who is employed at a time when he or she is neither a lawful permanent resident nor an alien authorized to be so employed under the Immigration and Nationality Act or by the Attorney General.[25] The language of § 245(c)(8) does not explicitly provide a time frame for examination of when the alien was "so employed." The INS has determined, however, that this language refers to any time period before the actual adjudication of an application for adjustment of status. Thus, INS will find an alien ineligible to adjust status if the proscribed violation occurs anytime before or after the application to adjust status is submitted but before adjudication.[26] INA § 245(c)(8) also precludes adjustment of status if the alien violates the terms of a nonimmigrant visa. The Service has

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[20] One example of this circumstance might be a case where an attorney, designated to act on behalf of a nonimmigrant worker based on a properly executed Form G-28, refuses to acknowledge in writing his or her legal error in filing an application on behalf of an alien.

[21] Courts have found that, while an administrative agency is usually entitled to deference in promulgating or interpreting its own regulations, *see Chevron USA v. Natural Resource Defense Council*, 467 U.S. 837 (1984), or respect according to its persuasiveness, *see U.S. v. Mead*, 533 U.S. ___, (June 18, 2001), the agency's interpretation is not controlling if it is plainly erroneous. *See, e.g., Tapis International v. INS*, CV No. 98-11807-JLT, 2000 WL 620180 (D. Mass. April 24, 2000).

[22] This subsection prohibits adjustment of status for the following individuals:

> "[A]ny alien who seeks adjustment of status to that of an immigrant under section 1153(b) of this title and is not in a lawful nonimmigrant status."

[23] *See* 8 C.F.R. § 245.1(b)(9)(which provides that an employment-based applicant for adjustment of status is ineligible for adjustment of status if the alien is not maintaining a lawful nonimmigrant status *"at the time he or she files an application for adjustment of status*." Thus, this subsection of the regulation does not require the applicant to maintain nonimmigrant status after submission of an application for adjustment of status.

[24] INA § 245(c)(8).

[25] 8 C.F.R. § 274a.1(a).

[26] 8 C.F.R. § 245.1(b)(10)(alien is ineligible for adjustment of status if he or she "was ever" employed in U.S. without the authorization of the Service).

found that this bar to adjustment of status can be triggered by a violation committed after the filing of an adjustment of status application.[27]

While a violation of the terms of a nonimmigrant visa is normally a bar to adjustment of status, the INS has acknowledged exceptions to this bar in the following cases:

1. The violation occurred through no fault of the applicant or for technical reasons. There are four circumstances the INS recognizes that will satisfy this exception.[28]

2. The alien filed an untimely request for a change of nonimmigrant status that was excused and granted by the Service in its discretion.

3. The alien filed an untimely request for an extension of nonimmigrant status that was excused and granted by the Service in its discretion.

4. The alien filed a timely request for an extension of nonimmigrant status that was approved after the alien's authorized nonimmigrant status expired.

5. The alien was granted reinstatement to student status on the basis of circumstances beyond the student's control.[29]

There may be instances where foreign workers are deemed to violate the terms of a nonimmigrant visa without any awareness of the violation. For example, a nonimmigrant employee may violate the terms of a nonimmigrant visa by remaining in the U.S. for a short time after suddenly and unexpectedly being terminated by an employer. If the employer agrees to provide the nonimmigrant with normal salary and benefits for one or two months after termination, the nonimmigrant might perceive that this severance period is a time in lawful status that may be used to find a new H-1B employer.

The INS, however, would likely not agree that the nonimmigrant worker is authorized to remain in the United States during this period. In a non-binding advisory letter, an INS official has stated that the agency would find a status violation in this circumstance. This advisory letter adds that as soon as the nonimmigrant's services for the H-1B employer have been terminated, the individual is no longer in valid nonimmigrant status.[30] Thus, according to this advisory letter, if a nonimmigrant worker remains in the

[27] 8 C.F.R. § 245.1(b)(10)(alien is ineligible for adjustment of status if "at any time" he or she violated the terms of his or her admission to the U.S.).

[28] *See* 8 C.F.R. § 245.1(d)(2) for a list of these exceptions.

[29] Memo, Crocetti, Assoc. Comm., INS, HQ 50/5.12, 96 Act. 034 (May 1, 1997), *reprinted in* 74 *Interpreter Releases* 791-94, 793 (May 12, 1997).

[30] *See* Letter from Thomas W. Simmons, Chief, INS Business and Trade Services Branch, to Harry Joe, (undated), *reproduced in* 76 *Interpreter Releases* 387 (March 8, 1999), which states that the sole purpose of admission of a nonimmigrant H-1B worker is for the worker to provide services to the petitioning employer; thus, when the services cease to be rendered, the purpose of the admission is over, and H-1B status is terminated.

U.S for one day after his or her termination, INS could find that the nonimmigrant worker violated the terms of a nonimmigrant visa and is no longer in valid nonimmigrant status.[31]

The INS has hinted that it will use its discretion[32] somewhat generously in deciding whether to forgive a status violation that occurs when a nonimmigrant worker remains in the United States for a short period of time after a sudden termination.[33] There is no official grace period, however, in these circumstances. The INS reportedly has been known to grant a change of employer/extension of status petition when the nonimmigrant is able to file a new petition within a short time after the termination,[34] and the agency has acknowledged its authority to do so when adjudicating untimely filed requests for change or extension of status that invoke H-1B portability.[35]

Aside from a positive exercise of discretion by the INS, possible solutions to the hypothetical situation exist. Under INA § 245(k), described below, a trip outside the United States after the status violation, with a subsequent lawful admission, could eliminate the negative consequences of the status violation.[36] If departing and re-entering the United States is not a practical solution, the adjustment applicant should carefully consider the statutory exceptions that would forgive the status violation and allow adjustment of status. As discussed above, the individual may be eligible for adjustment of status based on an assertion that the violation occurred through no fault of his or her own or for technical reasons. The circumstances of this situation do not appear to meet the four narrow circumstances in 8 C.F.R. § 245.1(d)(2). If, however, the alien was genuinely unaware of the obligation to take affirmative steps to maintain his nonimmigrant visa status upon termination, perhaps the argument can be made that lapse of lawful status was excusable as a mere technicality under the reasoning in *Mart*. Another possible argument is that the

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[31] The adjustment applicant may be able to argue that such a violation would not necessarily result in a failure to maintain continuously a lawful status for purposes of § 245(c)(2). In regard to § 245(c)(2), an alien fails to maintain lawful status only if the alien remains in the United States after the expiration date of his or her period of authorized stay. 8 C.F.R. § 245.1(d)(1). Thus, as long as the alien's period of authorized stay, stated on the Form I-94, has not expired, the adjustment applicant may argue that the bar to adjustment of status in INA § 245(c)(2) is not triggered.

[32] Pursuant to 8 C.F.R. § 214.1(c)(4), the INS has discretion to approve an untimely application for an extension of status if, at the time of filing: (1) The delay was due to extraordinary circumstances beyond the control of the applicant or petitioner; (2) The alien has not otherwise violated his or her nonimmigrant status; (3) The alien is a bona fide nonimmigrant; and (4) The alien is not the subject of deportation or removal proceedings.

[33] Memorandum from Michael A. Pearson, Executive Associate Commissioner, Office of Field Operations, *Initial Guidance for Processing H-1B Petitions as Affected by the "American Competitiveness in the Twenty-First Century Act" (Public Law 106-313) and Related Legislation (Public Law 106-311) and (Public Law 106-396)*, File No. HQ 70/6.2.8 (June 19, 2001) (hereinafter "Pearson Memo"). Though this memorandum affirms there is no official grace period, it expresses the INS' willingness to explore implementation of a regulation that would grant H-1B employees a reasonable period of time, such as 60 days, in which to begin work with an employer after leaving the initial H-1B employer.

[34] *See e.g.*, Angelo A. Paparelli, Alan Tafapolsky, Ted Chiappari, Susan Cohen, and Stephen Yale-Loehr, "*It Ain't Over Till It's Over:" Immigration Strategies in Mergers, Acquisitions and Other Corporate Changes,* V.5, No. 20, Bender's Immigration Bulletin 849, 860 (October 15, 2000).

[35] *Pearson Memo*, *supra,* N.33.

[36] Under § 245(k), as long as the alien, subsequent to the last lawful entry, has not, for an aggregate period of time exceeding 180 days, failed to maintain, continuously, a lawful status, engaged in unauthorized employment, or otherwise violated the terms and condition of the alien's admission, the alien is eligible to adjust status notwithstanding INA §§ 245(c)(2), (c)(7), and (c)(8). INA § 245(k).

alien has not committed a status violation because the overstay was not caused by his or her own conduct.[37]

D. INA § 245(k)

Congress enacted § 245(k) by passing H.R. 2267, a massive appropriations bill, on November 26, 1997. Enactment occurred at a time when some legislators were attempting to abolish § 245(i) entirely. The addition of § 245(k) and the grandfathering provisions for § 245(i) thus were part of a compromise to allow § 245(i) to expire.[38]

While § 245(k) is not nearly a complete remedy for immigration provisions barring adjustment found in § 245(c), it is a powerful remedy for many employment-based applicants facing bars to adjustment. Specifically, § 245(k) allows aliens eligible to receive an employment-based visa to adjust status notwithstanding past violations under §§ 245(c)(2), (c)(7), and (c)(8). Thus, if applicable, § 245(k) permits applicants to become permanent residents even if they have accepted unauthorized employment, failed to maintain continuously a lawful status, failed to be in lawful nonimmigrant status when applying for permanent residence, or violated the terms of a nonimmigrant visa.

To be eligible to benefit from § 245(k), an adjustment applicant must meet the following conditions:

(1) The applicant must, on the date of filing an application for adjustment of status, be present in the United States pursuant to a lawful admission; and

(2) The applicant, subsequent to such lawful admission must not have, for an aggregate period exceeding 180 days –

A. Failed to maintain, continuously, a lawful status;

B. Engaged in unauthorized employment; or

C. Otherwise violated the terms and conditions of the applicant's admission.

The language of § 245(k) appears to render unauthorized employment, status violations, and violations of the terms of a nonimmigrant visa taking place after an adjustment application is filed irrelevant for purposes of adjustment of status eligibility.

Section 245(k) specifically provides that an employment-based applicant for adjustment of status "may adjust status notwithstanding subsection (c)(2), (c)(7), and (c)(8)," if the "alien, *on the date of filing an application for adjustment of status*," meets the elements of § 245(k). Thus, if an employment-based applicant for adjustment of status meets the elements of § 245(k) at the time his or her adjustment of

[37] See *Matter of Siffre*, 14 I&N 444 (BIA 1973)(when an alien is admitted to U.S. for fixed period of stay, "within that period his stay is not unlawful unless *by his own conduct* he violates one of the conditions of his admission" [italics added]).

[38] *See* 46 *Interpreter Releases* 1841 (Dec. 8, 1997).

status application is filed, continued violations of INA § 245(c)(2), (7), and/or (c)(8) will not render the applicant ineligible for adjustment. The INS General Counsel has stated the following position with regard to this issue:

> "For purposes of section 245(k), an alien may adjust under section 245(a) as long as the alien, *as of the date of filing*, has not violated status, has not engaged in unlawful employment, and has not had any violations of the terms and conditions of nonimmigrant admission, for a period in excess of 180 days in the aggregate subsequent to the alien's last admission under which she is presently in the United States"[italics added].[39]

Two recent developments will undoubtedly make the availability of INA § 245(k) especially important. The first is the recent proliferation of termination notices for H-1B and other nonimmigrant workers.[40] When nonimmigrant workers are suddenly, without warning, terminated, they immediately face a crisis situation: They must choose to leave the U.S. immediately or speedily find another petitioning employer. Nonimmigrant workers choosing to remain in the U.S. to find a new employer subject themselves to a possible INS determination that they have failed to maintain continuously a lawful status because, as discussed above, INS does not recognize an official grace period in these situations to find new employment.

The second development is the enactment of portability provisions for H-1B workers. New provisions that allow H-1B workers to change employers before INS adjudicates a change of employer petition may – depending on the facts – increase the risk that a nonimmigrant worker will be found by INS to have violated immigration laws.[41] Under the American Competitiveness in the 21st Century Act ("AC21") § 105, an H-1B nonimmigrant may now begin working for a new H-1B employer immediately after the new employer files an H-1B petition on the nonimmigrant's behalf if the following conditions are met:

1. The nonimmigrant has been lawfully admitted into the United States;

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[39] Letter from H. Ronald Klasko, *INS General Counsel List of Resolved Issues,"* (December 10, 1999), *posted on* AILA Infonet, December 22, 1999. The adjustment applicant must be careful not to place too much confidence in the General Counsel position. General Counsel opinions are not binding on INS officials. Although the Office of the General Counsel is required to provide legal advice to INS authorities, the regulations do not grant it authority to establish binding legal precedent. *See* 8 C.F.R. § 100.2(a)(1) and 8 C.F.R. § 103.1(b)(1); *Matter of Izummi,* Int. Dec. #3360 (BIA 1998). Moreover, there are indications that some INS officials may not agree with the General Counsel position. The Nebraska Service Center's recent requests for employment confirmation letters from adjustment applicants after they have filed their employment-based adjustment of status applications may indicate this Service Center's intention to investigate for post-filing employment authorization violations.

[40] See Yoshiko I. Robertson, *Avoiding the Abyss: H-1B Strategies When Facing Reductions in Force*, V.2 Immigration & Nationality Law Handbook 76 (AILA 2001-2002).

[41] For a discussion on H-1B portability provisions, see Angelo A. Paparelli and Janet J. Lee, "*A Moveable Feast": An Analysis of New and Old Portability Under AC 21 § 105*, V.6 No. 3 Bender's Immigration Bulletin 126 (February 1, 2001).

2. The new employer files a nonfrivolous petition for new employment or extension of status before the expiration of the nonimmigrant's authorized period of stay; and

3. The nonimmigrant has not been employed without authorization in the United States.

If the new H-1B petition is denied, employment authorization "shall cease." [42]

This new "portability" provision provides nonimmigrant H-1B workers with flexibility to change employers while working in H-1B status. However, many questions remain unanswered with regard to this new law. For example, what happens if the INS finds that the new employer has filed a petition that is frivolous based on the employer's mishandling of the case?[43]

At this time, there are no regulations on AC 21 portability provisions.[44] Nor is there a regulation that allows a laid-off nonimmigrant worker a reasonable grace period in which to find a new job. Therefore, there is considerable uncertainty for nonimmigrants who are abruptly terminated or who take advantage of H-1B portability provisions.[45]

If a problem arises in one of these areas, the adjustment applicant may be able to cure an immigration law violation by filing a § 245(i) application; however, when applicable, the applicant should try to rely on § 245(k) instead of § 245(i). Unlike the case with INA § 245(i), an alien may benefit from the ameliorative effects of § 245(k) without filing a separate application or paying a supplemental fee. Moreover, an applicant for adjustment of status will avoid certifying on an official document that he or she violated a U.S. immigration law, if the violation is cured under INA § 245(k).

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[42] See Pub. L. No. 106-313, 114 Stat. 1251, §105, *codified as* INA § 214(m)(1)(2).

[43] The INS has not comprehensively defined the term "nonfrivolous" in the context of the new H-1B portability laws. INS offers only vague definitions of this term, stating that a nonfrivolous H-1B petition is one with "some basis in law or fact." INS Press Release, *Changes to the H-1B Program* (Nov. 21, 2000), *available at* www.ins.usdoj.gov/graphics/publicaffairs/questsans/H-1Bchang.htm. INS also defines nonfrivolous in this context to mean an H-1B petition that is "not without basis in law or fact." Pearson Memorandum, *supra*, n. 33. For a discussion of this issue, see Angelo A. Paparelli and Janet J. Lee, "*A Moveable Feast": An Analysis of New and Old Portability Under AC 21 § 105, supra* at 133-134.

[44] Pearson Memorandum, *supra,* N. 31 provides little guidance on how INS will ultimately define issues of unauthorized employment and violations of nonimmigrant status under AC 21 §105. The Memorandum does state that until the final regulations addressing these matters are issued, Service personnel must decide each matter in consultation with INS Headquarters on a case-by-case basis prior to denying benefits or issuing Notices to Appear.

[45] When INS ultimately issues proposed regulations on these matters, applicants, employers, and practitioners should comment and argue for regulations that take account of individual responsibility. An employer should not have unilateral power to trigger a failure by the alien to maintain status. Because the United States is a country that places great weight on the notion of personal responsibility, nonimmigrant workers should not be held responsible for an employer's decision on employment termination about which they have no advance notice, say, or control. In this situation, the alien should be granted a reasonable grace period in which to find a new employer. In addition, if an employer takes advantage of the new portability provision to hire an H-1B employee before the H-1B petition is approved, a mistake made by the petitioner rendering the petition frivolous should not redound to the detriment of the employee.

III. CONCLUSION

As has been shown, some adjustment applicants may be motivated by a fondness for preserving greenbacks, others by a reluctance to admit misdeeds in a government document with a long shelf-life. Whatever the reason, the lemming-like (and rather ungrammatical) rush to say "(i)" may be entirely unnecessary and downright harmful to the adjustment applicant's life, liberty and ongoing pursuit of happiness. Instead, a stroll down to the apothecary on "(k)" street may produce a more salubrious elixir, forgiveness without pain, and permanent residence without breaking the bank.