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Immigrant Petition After Jan. 14 Deadline

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Aliens who missed the January 14, 1998 filing deadline may still file their visa petitions and labor certifications, but their cases will be adjudicated under Sec. 245(a) of the Immigration and Nationality Act.

This means that if they meet the requirements of the law, they may still file their adjustment of status applications when their priority date becomes current and because they will not be departing the U.S., they don't have to worry about the three and ten-year bars.

If, on the other hand, they don't meet the requirements, they will have to go home to be interviewed for their immigrant visa and would not be able to return to the U.S. for three or ten years, depending on how long they were previously unlawfully present in the U.S. The requirements are discussed below.

First, the alien must have entered the U. S. legally. (i.e., the alien's passport must have a stamp which indicates his or her nonimmigrant classification and the date through which he or she is allowed to remain in the U.S.) Note, however, that there are certain classes that are not eligible for adjustment of status even if they have entered legally. Examples: crew members admitted in the D nonimmigrant category and exchange visitors subject to the foreign residence requirement. A fiancé or fiancee of a U.S. citizen admitted in the K category is also not eligible, unless the marriage takes place within ninety days of admission.

Second, the alien should not, at any time, have engaged in employment in the U. S. without authorization. An exception to this rule would be when an alien engages in employment while awaiting approval of an extension of stay, whereby said alien is allowed to work for a period of no more than 240 days. This exception does not apply when the extension of stay application is filed by an alien in the H category who is changing employers. Unauthorized employment also occurs when an alien continued to work after his or her nonimmigrant status expired, departed the U.S. and was readmitted with a valid visa. It is also important to note that there are certain classes of nonimmigrants that are barred from working under any circumstances, like tourists, transit aliens and dependents of students and temporary workers.

Exempt from the requirement for employment authorization are immediate relatives (i.e. spouses, parents and unmarried children below the age of 21 of U.S. citizens), who may work without authorization, and are still eligible for adjustment of status, provided they entered the U.S. legally.

Third, the alien should not at any time be or have been out of status, or have violated the terms of his or her nonimmigrant visa. Any technical violations of status that are not the alien's fault will not render the alien ineligible for an adjustment of status. Examples of technical violations are when an individual or organization designated to act on behalf of the alien has failed to do so and acknowledges that it is their fault, and not the alien's; when the INS itself has failed to act upon an application for extension of status properly; and when the alien has been physically unable to request for an extension of status. (e.g., aliens hospitalized at that time).

Immediate relatives of U.S. citizens are also exempt from this requirement. They may still file for an adjustment of status even if they have violated the terms of their nonimmigrant visas.

A new law also accords the benefit of adjustment of status to beneficiaries of employment-based petitions under the first, second or third preference categories and also religious workers under the 4th preference category. Unauthorized employment, failure to maintain their status or violating the terms of their nonimmigrant visa, will not be a bar to adjustment of status provided these violations do not last for more than 180 days.