# BEST OPTIONS WHEN A FAMILY-BASED PETITION OR APPLICATION IS DENIED

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*You can get it if you really want, but you must try, try and try, try and try.*

In his famous song,[1] Jimmy Cliff may have been overly optimistic that we will always "succeed at last." Nevertheless in this same spirit, this article provides some guidance on what next to do when, after helping your clients apply for a particular benefit, opposition comes your way and the application or petition is denied.

## I-130 PETITION

The appeal of an I-130 Petition for Alien Relative is to the Board of Immigration Appeals (BIA).[2] The petitioner must file the appeal—not the beneficiary.[3] It is filed on Form EOIR-29 from the Executive Office for Immigration Review (EOIR).[4] It is filed with the U.S. Citizenship and Immigration Services (USCIS) service center or district office where it is denied—not with the BIA, as would be the case when appealing an immigration judge's decision.[5] The filing fee is currently $110. The appeal must reach USCIS within 30 days of the date on which the decision denying the petition was mailed to petitioner. All these rules are on the form.[6] There are several issues to address when confronted with the denial of an I-130. The main question to ask is whether you should try to save the underlying petition or whether it would it be better simply to re-file. While you are making this decision, consider that nothing precludes appealing the initial denial of the I-130 to the BIA and simultaneously filing a new I-130. Here are some considerations.

### The Priority Date

Although preserving a priority date is not an issue in immediate relative petitions as a visa is immediately available,[7] preserving the priority date can be very important in preference category petitions. If you forgo appealing and file a new petition, you lose the priority date of the first petition, which could mean losing several years of waiting time depending on how long the I-130 was pending adjudication. If a child is involved as a beneficiary or a derivative beneficiary, the child could age out before a second petition becomes current.

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[1] You Can Get It if You Really Want," *Island Records*, 1972.

[2] 8 CFR §1003.1(b)(5).

[3] *Matter of Sano*, 19 I&N Dec. 299 (BIA 1985).

[4] 8 CFR §1003.3(a)(2).

[5] *Id.*

[6] www.justice.gov/eoir/eoirforms/eoir29.pdf.

[7] INA §201(b)(2)(A)(i). Immediate relatives include the spouses, children under age 21, and parents of U.S. citizens. If petitioning for a parent, the U.S. citizen must be at least 21 years of age.

**Processing Times for an Appeal Versus a New I-130 Petition**

The BIA does not publish its processing times, but experience shows that appeals can take more than a year before the BIA renders a decision.[8] As USCIS adjudicates most I-130 petition categories in five months or less,[9] there is a time advantage in re-filing an I-130 rather than relying on the appeal process in most, but not all, visa categories.

**The Likelihood of Success on Appeal**

If USCIS was correct in denying the petition because of defects at the time of filing, appeal is futile and re-filing is appropriate. For example, an I-130 must be approvable at the time of filing. If it was not, then appealing is fruitless and re-filing after curing the defect is the proper course of action. For example, in a marriage-based petition, the petitioner and beneficiary must be legally married at the time of filing. If the petitioner or beneficiary was previously married and not divorced before remarrying and filing the petition, the petition must be denied. Perfecting a divorce and remarrying after the filing of the new petition but before the petition is adjudicated, or during the appeal process, will not render the petition approvable.[10] Also, should an I-130 be denied because the petitioner failed to provide required documentation, seeking to provide that documentation to the BIA, which is essentially seeking a remand or reopening, will most likely be unsuccessful if the documentation was available but not supplied; the BIA will only consider new evidence that was "not available and could not have been discovered or presented" earlier.[11] Thus, if the petition was deficient or poorly supported in the first place, you are unlikely to succeed on appeal and a new petition should be filed that corrects the deficiencies of the previous filing.

Should financial concerns matter, if you believe your case is meritorious on appeal—that is, if you are convinced that USCIS is flat-out making a mistake and refuses to acknowledge and correct it, or if the case involves a novel issue that must be resolved by the BIA for your client—it is worth noting that the appeal to the BIA costs $110 while re-filing costs $420. Although in most categories re-filing is probably faster than waiting for the BIA to adjudicate the appeal, there is nothing to guarantee that USCIS will not simply make the same mistake a second time. Thus, having the BIA look at the case will be a better assurance of an approval of the petition.

**Fraud Considerations**

If USCIS is alleging fraud on the part of your client in a marriage-based petition, the prohibition against approving a new petition when there was a finding of fraud by a beneficiary in a previous marriage-based petition[12] gives a strong incentive to not ignore a fraud finding, but rather to contest the fraud allegation on appeal. This is true even though USCIS cannot simply rely on a prior fraud finding to deny a new petition,[13] or that the restriction on approving a new marriage-based petition if there was a prior fraudulent one does not apply if the new petition is by the same petitioner for the same beneficiary.[14]

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[8] 8 CFR §1003.1(e)(8)(i) requires the BIA to reach a decision within 90 or 180 days of completion of the record on appeal (depending on whether it is a single member or a panel decision), but this is not the case in reality. The BIA's regulations are clear that failure to adjudicate an appeal in this time frame does not provide a basis for a cause of action. 8 CFR §1003.1(e)(8)(vi) ("The provisions of this paragraph (e)(8) establishing time limits for the adjudication of appeals reflect an internal management directive in favor of timely dispositions, but do not affect the validity of any decision issued by the Board and do not, and shall not be interpreted to, create any substantive or procedural rights enforceable before any immigration judge or the Board, or in any court of law or equity.").

[9] The USCIS service centers post their processing times at: *https://egov.uscis.gov/cris/processTimesDisplayInit.do;jsessionid=cbactdj7Co_zwbb8hNs1s*

[10] *Matter of Izumii*, 22 I&N Dec. 169(BIA 1998); *Matter of Atembe*, 19 I&N Dec. 427 (1986); *Matter of Drigo*, 18 I&N Dec. 223 (BIA 1982); *Matter of Bardouille*, 18 I&N Dec. 114 (BIA 1981).

[11] 8 CFR §1003.2(c).

[12] INA §204(c).

[13] *Matter of Tawfik*, 20 I&N Dec. 166 (BIA 1990).

[14] *Matter Of Isber*, 20 I&N Dec. 676 (BIA 1993).

### Motion to Reopen Versus Appealing

USCIS has a mechanism for reconsidering its decisions, namely motions to reopen and reconsider, filed on Form I-290B. In the case of I-130s, the motion must be filed within 30 days of the mailing of the decision.[15] The cost is an astronomical $630, compared with $110 for an appeal to the BIA. The standards are defined by regulation.[16] The regulations provide for reopening based on "new facts to be provided in the reopened proceeding and be supported by affidavits or other documentary evidence."[17] The standard for reconsideration is that "the decision was incorrect based on the evidence of record at the time of the initial decision."[18]

Although this is not entirely clear,[19] as an appeal to the BIA of a visa petition denial is first sent to USCIS, it is likely that USCIS reviews the appeal first, essentially adjudicating it like a motion to reopen or reconsider. Thus, it makes good sense to spend $110 that will get USCIS to look at the case before sending it to the BIA, rather than spending $630 for USCIS to look at the case and sending it nowhere for additional review if it declines to reverse its decision. Only if the petitioner files an appeal, spending another $110 in filing fees, will the case be sent to the BIA. Bear in mind that the period for filing an appeal is 30 days from the date of the initial denial, so relying on an I-290B and not filing an appeal within the requisite time period will result in the forfeiture of the right to appeal to the BIA.

### Judicial Review

The federal district courts can consider denials of I-130 petitions.[20] To get to the district court, the petitioner must first appeal to the BIA or risk dismissal of the action for failure to exhaust administrative remedies.

## I-601 PETITION

Form I-601 is used to file for waivers of inadmissibility. For aliens adjusting status, the denial of the I-601 is reviewable first in immigration court, then at the BIA, after the alien is placed in proceedings. Further review is then available in a petition for review if the alien is ordered removed as a result of not obtaining a waiver. It is vital to remember that the courts of appeal cannot review discretionary determinations when

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[15] 8 CFR §103.5(a)(1)(i).

[16] 8 CFR §103.5(a)(2) *Requirements for motion to reopen.* A motion to reopen must state the new facts to be provided in the reopened proceeding and be supported by affidavits or other documentary evidence. A motion to reopen an application or petition denied due to abandonment must be filed with evidence that the decision was in error because:

(i) The requested evidence was not material to the issue of eligibility; (ii) The required initial evidence was submitted with the application or petition, or the request for initial evidence or additional information or appearance was complied with during the allotted period; or (iii) The request for additional information or appearance was sent to an address other than that on the application, petition, or notice of representation, or that the applicant or petitioner advised the Service, in writing, of a change of address or change of representation subsequent to filing and before the Service's request was sent, and the request did not go to the new address.

(3) *Requirements for motion to reconsider.* A motion to reconsider must state the reasons for reconsideration and be supported by any pertinent precedent decisions to establish that the decision was based on an incorrect application of law or Service policy. A motion to reconsider a decision on an application or petition must, when filed, also establish that the decision was incorrect based on the evidence of record at the time of the initial decision.

[17] 8 CFR §103.5(a)(2).

[18] 8 CFR §103.5(a)(3).

[19] According to 8 CFR §103.5(a)(8), in discussing the handling of an I-290B, "The official who denied an application or petition may treat the appeal from that decision as a motion for the purpose of granting the motion." Inasmuch as I-130 petitions are not appealed on Form I-130, it is not clear that USCIS must first consider an appeal as a motion to reopen or reconsider before sending it on to the BIA. However, inasmuch as the entire file is assembled by USCIS and its adjudication will be scrutinized by a separate body, the BIA, it makes sense that USCIS will look at the appeal and consider it like a motion to reopen or reconsider before sending it on to the BIA.

[20] *Ruiz v. Mukasey*, 552 F.3d 269, 274–76 (2d Cir. 2009); *Ayanbadejo v. Chertoff*, 517 F.3d 273, 277–78 (5th Cir. 2008); *Bangura v. Hansen*, 434 F.3d 487 (6th Cir. 2006); *Ogbolumani v. Napolitano*, 557 F.3d 729, 733 (7th Cir. 2009); *Ginters v. Frazier*, 614 F.3d 822, 828 (8th Cir. 2010); *Hanif v. DHS*, 472 F. Supp. 2d 914, 920–22 (E.D. Mich. 2007).

discretion is provided to the government by statute.[21] In cases involving immigration at a consulate, the denial of a waiver is handled by USCIS's Administrative Appeals Office with the filing of an I-290B.[22]

As with the I-130 denial, in consular processing cases, an option exists to re-apply rather than appeal. However, unlike the case of an I-130 denial, the alien must first have the entire immigrant visa application readjudicated by the consulate before USCIS will readjudicate an I-601. Because of the lack of a mechanism for re-sending a petition to the Department of State's National Visa Center, to have your case readjudicated a new I-130 may need to be filed. Fortunately, unless the old petition was cancelled or revoked, the old priority date will be preserved if it is in the same preference classification.[23] Make sure to ask for reaffirmation of the old priority date when filing the new petition and provide a copy of the old approval notice. One must go through the entire immigration process again, from I-130 adjudication to denial of the visa at the consulate to the filing of an I-601 and wait for its adjudication. However the costs of this process and the time it takes generally makes filing an appeal the more sensible path. Further, if the documentation and basis for the waiver are essentially the same, you risk receiving the same outcome after going through the process the second time.

## I-485 PETITION

The vast majority of I-485 Adjustment of Status application denials cannot be appealed, but motions to reopen or reconsider can be filed.[24] The applicant for adjustment under INA §245, including INA §245(i), has the right to renew his or her application in removal proceedings,[25] followed by judicial review through a petition for review if necessary. The caveat about the unavailability of review of discretionary determinations applies to adjustment of status applications where the relief is discretionary by statute.[26] LIFE Act adjustment applications are filed on Form I-485, but an alien cannot renew a denied application in immigration court.[27] Rather, the denial of a LIFE Act adjustment is appealable to the Administrative Appeals Office.[28]

The unavailability of appeal is somewhat troubling in the cases of aliens who have an underlying status and are thus not removable after their adjustments are denied. One such category is refugees and asylees who cannot appeal denials of adjustment of status applications,[29] but who do not lose refugee or asylee status simply because an adjustment of status is denied.[30] Another category includes H-1B, H-1C, and L nonimmigrants who can apply to adjust status and still maintain nonimmigrant status.[31]

### To Renew with the Immigration Court, USCIS or ICE Must File a Notice to Appear

For aliens who are denied adjustment of status, having the opportunity to renew the adjustment application requires that USCIS initiate removal proceedings by issuing a Notice to Appear. Until this happens, the alien can re-file his adjustment with USCIS. In cases where a denial was because of some procedural defect that

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[21] INA §242(b); *Kucana v. Holder*, 130 S. Ct. 827 (U.S. 2010).

[22] 8 CFR §212.7(a)(3); USCIS website, "Appeals of Denied Petitions Under the Jurisdiction of the Administrative Appeals Office (AAO) by subject matter." At 8 CFR §103.3(a)(ii) the regulation indicates that a list of case types that are appealable are listed at 8 CFR §103.1(f)(2). Lamentably, no such section exists.

[23] 8 CFR §204.2(h)(2).

[24] Under 8 CFR §103.5.

[25] 8 CFR §1245.2(a)(5)(ii).

[26] INA §245(a) explicitly states that adjustment under this section is discretionary. Adjustment for refugees and asylees under INA §209, on the other had, does not have a discretion component.

[27] 8 CFR §245a.20(e).

[28] 8 CFR §245a.20(a)(2).

[29] 8 CFR §§209.2(e) and (f).

[30] INA §§207(c)(4) and 208(c)(2) discusses how a refugee's or asylee's status can be terminated. Denial of adjustment of status is not a reason cited.

[31] 8 CFR §§214.2(h)(16)(i) and 214.2(*l*)(16)(i). The same issue may apply to E-1s and E-2s. *See*, Memo, Virtue, Acting Exec. Assoc. Comm. (Aug. 5, 1997) (E-1s and E-2s can apply for extensions of their status after filing for adjustment of status).

could not be cured with a motion to reopen or reconsider, this is a way to attain adjustment without the hassle, stress, and time consumption of adjusting in immigration court, although it is rather expensive—an adjustment application currently costs $1490 to file, counting the I-485 ($985 plus $85 for biometrics capture) and the I-130 ($420) in an immediate relative case. A word of caution: nothing precludes USCIS from placing the alien in proceedings after the second adjustment application is filed, thus presenting the client with a situation that is the worst of both worlds—having incurred the re-filing costs and also ending up in immigration court.

If the alien is placed in removal proceedings, the same adjustment application is readjudicated by the immigration judge and fees need not be paid again. In situations where the alien wants to renew the case in immigration court, either to save money on filing fees or because the issue is one where a favorable resolution by USCIS the second time is unlikely (such as where USCIS finds the person ineligible for adjust status based on its interpretation of the law or it declines to waive a waivable ground of inadmissibility), and USCIS does not initiate proceedings, it is incumbent upon the alien to reach out to USCIS to initiate proceedings. Many USCIS districts have policies to oblige an alien who wants to be placed in removal proceedings after the denial of an adjustment application.

**Visa Waiver Adjustment Applicants May Be Ineligible for Renewal of an Adjustment in Immigration Court**

One large group of aliens who cannot seek review of an adjustment of status application in immigration court or the courts of appeal are visa waiver entrants who did not file an adjustment of status application before their periods of stay ended. More and more visa waiver adjustment applicants are being denied adjustment and being deported. The visa waiver program[32] allows citizens of certain countries[33] to come to the United States for up to 90 days without first obtaining a visa. In return for this privilege, visa waiver entrants cannot extend their stay, change their status to other temporary statuses,[34] or adjust status to that of permanent residence.[35] However, there is an exception for aliens seeking adjustment of status as an immediate relative—that is, as the spouse of a U.S. citizen, the child (under 21 years old) of a U.S. citizen, or the parent of a U.S. citizen.[36] Also, a visa waiver entrant waives any right "to contest, other on the basis of an application for asylum, any action for removal of the alien."[37] This waiver is referred to as the "no contest statute." There is an exception: the visa waiver entrant can apply for asylum.[38]

The Ninth Circuit, in *Momeni v. Chertoff*,[39] considered its jurisdiction to hear a challenge to removal based on the alien's filing an adjustment of status application. The *Momeni* court decided that it did not have jurisdiction to consider challenges to a deportation order. But this is not the same as saying that the alien had no ability to adjust status. Had it limited itself to this jurisdictional formulation, then visa waiver entrants could adjust status, just not fight about being denied adjustment. It would be up to USCIS to decide and that decision would be final. However, the *Momeni* court said more: "We agree with the Tenth Circuit in *Schmitt v. Maurer*[40] that to allow an adjustment of status petition after the 90 days has expired would create an avoidable conflict between the adjustment of status statute and the no contest statute." The *Momeni* court thus

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[32] The program is found at INA §217.

[33] The countries currently in the program are Andorra, Australia, Austria, Belgium, Brunei, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Iceland, Ireland, Italy, Japan, Latvia, Liechtenstein, Lithuania, Luxembourg, Malta, Monaco, the Netherlands, New Zealand, Norway, Portugal, San Marino, Singapore, Slovakia, Slovenia, South Korea, Spain, Sweden, Switzerland, and the United Kingdom. 8 CFR §217.2(a).

[34] INA §248(a)(4).

[35] INA §245(c)(4).

[36] *Id.*; 8 CFR §1245.1(b)(8).

[37] INA §217(b)(2).

[38] *Id.*

[39] 521 F.3d 1094 (9th Cir. 2008).

[40] 451 F.3d 1092 (10th Cir. 2006).

went beyond a finding of a lack of jurisdiction to a finding that it lacks jurisdiction because an alien who files after ninety days *cannot adjust status*.

In *Bayo v. Napolitano*,[41] the Seventh Circuit Court of Appeals wrote, "Bayo filed his application for adjustment of status long after his 90 days were up. As a result, his adjustment-of-status application is barred by his valid VWP [Visa Waiver Program] waiver or by the fact that in the absence of a waiver he never would have entered the United States in the first place." This places the Seventh Circuit squarely in the camp that says visa waiver entrants cannot file adjustment applications after their authorized period of stay. The *Bayo* court states that all the circuits that addressed the issue have held the same, citing to cases in the fifth,[42] sixth,[43] and eighth circuits,[44] in addition to *Momeni* and *Schmitt*. It seems that the *Bayo* case may have overstated the holdings in the cases. Those courts certainly assert that visa waiver applicants cannot pursue the denials of adjustment of status with the immigration judge, the BIA, or the circuit courts of appeal, or anywhere else for that matter, but it is not clear that they also assert that USCIS cannot adjust the aliens' status if it wants to.

The question is whether the meaning of the *Bayo*, *Momeni*, and *Schmitt* decisions is that:

- A person cannot adjust status if he or she overstays the visa waiver program and then applies for adjustment of status, or
- A person cannot challenge the issuance of a removal order in an immigration court, BIA, or a federal court by seeking adjustment of status unless an adjustment of status application was filed before the 90 days, or
- A person cannot fight a removal order if he or she is ordered removed under the Visa Waiver Program if he filed his adjustment application after the 90 days, but he can adjust status as long as he is not removed while his adjustment of status application is pending.

As long as the *Bayo, Momeni* and *Schmitt* decisions deal with the court's jurisdiction, it is possible to say that the first potential holding above, that an alien cannot adjust if he or she overstays and then files for adjustment, is dicta—observations not necessary for the decision and thus not binding. The decision is that the immigration court and the federal courts cannot consider the denial and review the removal order and not that USCIS has no power to grant an adjustment application if it wants to.

What does the government say? So far, at the USCIS headquarters level, there has been no comment. However, the solicitor general has spoken on the issue in a brief opposing a writ of certiorari[45] in a case from the Third Circuit, *Bradley v. Attorney General of the United States.*[46] In *Bradley*, an alien was ordered removed under the visa waiver program despite having filed an adjustment of status application. The Third Circuit, in *Bradley*, limited its holding to whether an alien had the right to contest his removal if he filed his adjustment of status application after the expiration of the 90 days. It did not rule on whether a person had the right to pursue an adjustment of status if he filed before the expiration of the 90 days, as in *Momeni* and *Schmitt*. It also did not conclude that a person could not adjust with USCIS if he or she filed outside the 90-day period of stay, which *Momeni* and *Schmitt* seem to have, at least in dicta.

In the solicitor general's brief, he wrote, "... the court of appeals correctly decided that an alien admitted into the United States under the VWP [Visa Waiver Program] may not contest his removal based on an adjustment application filed after the 90-day period of lawful admission under the VWP. The solicitor general specifically addresses seeking adjustment in immigration court and in the federal court. He is quite clear, writing, "Because a VWP alien who is an immediate relative may seek adjustment of status outside removal proceedings—in a manner specified 'under DHS [Department of Homeland Security] regulations,' 8 USC

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[41] 593 F.3d 495 (7th Cir. 2010) (*en banc*).

[42] *McCarthy v. Mukasey*, 555 F.3d 459 (5th Cir. 2009).

[43] *Lacey v. Gonzales*, 499 F.3d 514, 519 (6th Cir.2007).

[44] *Zine v. Mukasey*, 517 F.3d 535 (8th Cir.2008).

[45] www.justice.gov/osg/briefs/2010/0responses/2010-0397.resp.pdf.

[46] 603 F.3d 235 (3d Cir. 2010).

§1255(a), there is no conflict between the two statutes." He means that INA §217(b)(2), which allows for no contest of an order of removal, and INA §245(c)(4), which allows visa waiver entrants to adjust through an immediate relative, are not in conflict because the "no contest" clause refers to fighting the removal order in immigration court or in the federal courts, not by seeking adjustment of status with USCIS. If USCIS is willing to entertain the adjustment of status application and to prevail upon its sister agency, ICE, not to remove the alien while it is pending, the alien can adjust status. The solicitor general writes, "Indeed, petitioner himself [Mr. Bradley] has been able to file applications for adjustment. USCIS has considered those applications notwithstanding petitioner's lengthy violation of the terms of his admission to the United States."

Distilling all this, the law seems relatively clear that a visa waiver program entrant who files for adjustment of status before his 90-day period of admission expires can pursue his adjustment of status with USCIS and then with the immigration court, the BIA, and even the courts of appeal if the courts of appeal have jurisdiction over the issues in the case.

Outside the seventh, ninth, and tenth circuits, it seems, for now, that an alien can apply for adjustment of status at any time before he is ordered removed for violating his visa waiver status and USCIS can adjudicate and approve the adjustment if it wants to. There is no recourse to the immigration court, the BIA, or the federal courts to contest the denial of an adjustment of status and the removal order. It should be noted that this conclusion is based not on clear holdings by those circuits, but because of ambiguity as to their holdings in their visa waiver jurisprudence. In other words, visa waiver adjustment applicants are skating on very thin ice wherever in the country they file. In the seventh, ninth, and tenth circuits, on the other hand, the ice has melted. In these circuits, the courts are quite unequivocal that visa waiver entrants cannot adjust status if they apply for adjustment after the expiration of their periods of stay. How USCIS will implement these decisions is a separate, unclear matter.

The solicitor general, who presumably conferred with USCIS before he filed his brief, expressed the position that a visa waiver entrant can apply for adjustment of status at any time before he or she is removed and USCIS can adjust his or her status at its discretion, even if ICE has ordered the alien's removal. The fact that there may be a removal order issued by ICE is immaterial.[47] Until USCIS clarifies its position, harmonizing its view as expressed by the solicitor general with the holdings in *Bayo*, *Schmidt*, and *Momeni*, we are bound to see disparate treatment of visa waiver adjustment applicants between districts. However, nowhere will a visa waiver adjustment applicant who filed his or her adjustment application after the expiration of his or her period of authorized stay be able to seek review of the denial administratively or judicially. Denied aliens can certainly file motions to reopen on Form I-290B, but because of the ambiguity in the statute of the law and the fact that ICE can simply deport the alien and moot the adjustment of status application, doing this is of limited value.

## CONCLUSION

Practitioners facing cases where opposition comes their way, depending on the type of case, have various options to try, try, try, try, and try to overcome the obstacles and succeed at last. Sometimes the odds are insurmountable and sometimes there is just nowhere to go for relief. But, if your case has merit and there is somewhere to take the denial, as Mr. Cliff sang, "the hotter the battle, it's the sweeter the victory."

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[47] *See, Matter of Yauri*, 25 I&N Dec. 103 (BIA 2009), where the BIA held that USCIS can adjust an alien's status even if there is a pending, executed removal order against the alien.