IMMIGRATION AND NATIONALITY LAW

CERTIFICATION EXAMINATION

SAMPLE QUESTIONS AND ANSWERS

The sample examination questions that follow are not intended to be a formal guide from which to study for the examination. The sample examination questions provided are for illustrative purposes only and should not be relied on as an indication of topics that may be covered on the exam. Likewise, the model answers provided, while correct at the time the questions were written, may not reflect current law.

This examination will require a substantial amount of study and preparation. The degree and extent of preparation will depend on the individual examinee. An examinee may find it takes more or less time depending on that examinee's experience and knowledge in the various areas of immigration and nationality law.

LONG ESSAY

Scotty was born March 31, 1972, and like his parents before him, is a native and citizen of England. He has an illegitimate son, Layo, who was born May 13, 1990, in England. Layo's mother, Sally, was born in the United States while her United Kingdom national and citizen parents were visiting the United States. Sally's parents returned to England with Sally when she was nine months old. Sally never left England until shortly after Layo was born, when she moved to Miami, leaving Layo with Scotty. Because Sally missed Layo and wanted him to be with her she filed a petition for alien relative on Layo's behalf on January 20, 1997. Although the government received the petition, and issued a receipt to

Sally, the Service Center misplaced the papers. Unfortunately, Sally died April 29, 2000, and the petition was never adjudicated. Having not heard from his mother for some time, the plucky Layo travels legally with an uncle to Mexico then sneaks across the border into the United States on May 15, 2000. Layo makes his way to Miami where he was taken in by Sally's sister, Mary.

Being lonely, Scotty started surfing internet chat rooms and found Fiona, a United States citizen living in Miami, coincidentally, not far from Layo. Although Scotty has never met Fiona they have exchanged emails and pictures over the internet. Scotty has fallen deeply in love with Fiona. However, Fiona also has strong feelings for a United States citizen boy, Tom. Because Fiona doesn't want to hurt anyone she keeps Tom a secret from Scotty.

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As Scotty is sure he wants to marry Fiona, he grabs his passport and a few belongings and flies to the United States where he enters via the Visa Waiver program on July 4, 2007. The officer did not ask Scotty why he was coming to the United States, and he did not volunteer any reason. Even better for Scotty, as soon as he meets Fiona he knows he wants to marry her and live with her in America forever. On her part, Fiona can't believe how wonderful Scotty is. Although she is torn, she feels Scotty is the one and marries him on September 7, 2007, with the intent to live with him happily ever after. However, fickle Fiona instantly started to get cold feet and never had sexual relations with Scotty, either before or after the marriage. In fact, she leaves their jointly leased apartment and moved in with Tom after only a few months, leaving behind their joint bank accounts, credit cards, cars, and household furnishings, all purchasing in their joint names.

Not knowing about Tom, Scotty still loves Fiona and hopes to win her back. Fiona remains torn. Although she is living with Tom, she thinks she may have made a mistake and is leaning towards going back to Scotty, but just not yet. Even though Layo is still living with Mary, and Scotty hasn't really been in touch with him since he ran away to the United States, Scotty would like to reunite with his son and wants Fiona to file for Layo's Green Card too. As such, Fiona is willing to fill out the papers, go to the immigration interview, sign the affidavit of support, and do whatever else is needed to help Scotty and Layo become lawful permanent residents. Fiona figures it also doesn't hurt that Scotty has already landed a $75,000 per year job with a computer company and she is unemployed.

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NOTE TO EXAMINEES:

The employer never asked Scotty his immigration status nor did they have him complete an I-9. Although the employer pays him in cash he does report his income as required. As such, there is no issue about Scotty committing fraud to get the job or making a false claim to citizenship, to the employer, social security, IRS, etc., and you need **not** address those particular ramifications of his employment. You also do **not** need to discuss immigrant or non-immigrant visas, such as H-1B's, labor certification, etc., outside the family adjustment context.

Scotty and Fiona now come to you to help him and Layo. They are only interested in "getting legal" while in the United States so you need not discuss any issues involved with consular processing or travel abroad.

It is recognized that this is a very difficult case. Accordingly, points will not be added or subtracted based on a recommendation that the parties do or do not file the adjustment. Instead, points are to be rewarded for issue recognition and a discussion of the relevant law in the matter.

LONG ESSAY MODEL ANSWER (FAMILY IMMIGRANT ESSAY)

Reviewers Note: As an initial matter it must be recognized that this is a very difficult case as Scotty and Fiona are not living together and the case may well be denied. Considering that Scotty came in on the Visa Waiver, and therefore does not have the right to go before an Immigration Judge, (except for an asylum claim, which isn't present here) his situation could be particularly perilous if his case is denied. Likewise, Layo came in EWI and does not have other relief. Accordingly, points will not be added or subtracted based on a recommendation that the parties do or do not file the adjustment. Instead, points are to be rewarded for issue recognition and a discussion of the relevant law in the matter.

Please note that this model answer is extremely detailed and thorough. The Committee did not shorten the answer, as the more extensive information may serve to assist the grader. However, the Committee does not expect the examinee to provide such extensive citation and discussion. The Committee will award full points to those answers which correctly address the legal issues and demonstrate an understanding of the applicable law.

Visa Waiver:

Does entering on the Visa Waiver bar Scotty from adjustment of status in the United States?

Except where INA § 245(i) applies, an alien must have been inspected and admitted or paroled to be able to adjust his or her status to that of a lawful permanent resident inside the United States. INA § 245(a). While having entered via the Visa Waiver program does preclude adjustment of status in most cases, it is not a bar in an immediate relative situation. 8 CFR § 245.1(b)(8). As Scotty was inspected and admitted using the Visa Waiver he is able to adjust his status here in the United States.

What potential effect would that on his case if it was denied?

By entering on the Visa Waiver an alien gives up the right to contest removability or even appear before an Immigration Judge, except to put forward a claim for asylum. INA § 217(b); 8 CFR § 217.4(b)(1). Accordingly, should Scotty's case be denied there is a substantial chance that ICE could take him into custody and deport him very quickly.

Immigrant Intent: *Does Scotty's immigrant intent at the time he entered the United States bar him or Layo from adjusting their status in the United States?*

In the absence of other adverse factors, an application for adjustment of status as an immediate relative should generally be granted in the exercise of discretion notwithstanding the fact that the applicant entered the United States as a nonimmigrant with a preconceived intention to remain Matter of Ibrahim*, 18 I&N Dec. 55 (BIA 1981);* Matter of Cavazos*, 17 I&N Dec. 215 (BIA 1980), Operating Instruction 245.3(b) [In the absence of other adverse factors, an application for adjustment of status as an immediate relative should generally be granted in the exercise of discretion notwithstanding the fact that the applicant entered the United States as a nonimmigrant with a preconceived intention to remain. (citing* Matter of Cavazos *and* Matter of Ibrahim*)] Further, it may not be the sole basis to deny an adjustment of status case in an immediate relative situation. Id. As such, the fact that Scotty intended to marry Fiona and stay permanently in the United States should not bar his adjustment of status. Further, as Scotty and Fiona did not get married until September 7, 2007, more than 60 days after he entered the United States, he is not presumed to have entered with immigrant intent. Where a person enters on a nonimmigrant visa and then, within 90 days of entry, acts in a manner inconsistent with the representations he made to the consular officer at the time of the visa application or to DHS at the time of admission, DOS "may presume" that the applicant's noncompliance (such as filing an adjustment of status) were willful misrepresentations of his or her intention in seeking a visa or entry. 9 FAM 302.9-4(B)(3)(g)(2)(a),* Kurzban's Immigration Law Sourcebook*, 16th Edition, 2018, pg. 157.*

Step-child age, Illegitimate Child: *Can Fiona file a petition for Layo as her step-son? Is this true even though he is the illegitimate son of Scotty?*

Fiona may file a petition for Layo as her "immediate relative" step-son. The main requirement is that the step-parent relationship was established while Layo was less than eighteen (18) years of age. INA § 101(b)(1)(B). Layo was 17 at the time Scotty and Fiona were married on September 7, 2007, as he was born on born May 13, 1990. Additionally, the definition of a "child" includes an illegitimate child provided the natural father has or had *a bona fide parent-child relationship with the person. INA § 101(b)(1)(D). As stated in the fact pattern, Layo lived with Scotty until he came to the United States. Accordingly, as he had a bona fide parent-child relationship with*

Scotty, Fiona could file for him as well. However, that would be another difficulty in the case and Scotty and Layo should reestablish their relationship as soon as possible.

Bona fide marriage:

An alien must have a bona fide intent to enter into a permanent marriage at the time he or she marries. Lutwak v. United States, 73 S.Ct. 481, 344 United States 605 (1953); Matter of McKee, 17 I&N Dec. 332 (BIA 1980); Matter of Boromond, 17 I&N Dec. 450 (BIA 1980). Everything that occurs after that is circumstantial evidence that is used to determine this central issue. (Conduct of the parties after marriage is relevant only to the extent that it bears upon their subjective state of mind at the time they were married) McKee, supra.

Lack of Sexual Relationship: *As Scotty and Fiona never consummated the marriage will that bar approval of the I-130 for either case?*

The failure to have sexual relations, while a factor to consider, is not an absolute bar in and of itself. Matter of M, 7 I&N Dec. 601 (BIA 1957).

Non-viable marriage: *Does the fact that they are living apart bar approval of the I-130 for either case?*

As long as the parties are not divorced or legally separated the non-viability of the marriage is also not an absolute bar to Scotty or Layo's adjustment of status. Matter of McKee, 17 I&N Dec. 332 (BIA 1980); Matter of Boromond, 17 I&N Dec. 450 (BIA 1980). As such, even though they are living apart and the marriage in non-viable, as long as Fiona and Scotty are willing to proceed with the case and maintain the status quo they may proceed with Scotty's adjustment of status. However, this will be considered to be a very negative factor and the proof of a bona fide marriage will have to be very strong. As stated in the fact pattern, the couple has a joint lease, credit cards, bills, etc. Even so, the parties would have to be warned that there is a substantial chance the case could be denied, and considering Scotty came on the visa waiver and Layo is an EWI, they would be at risk for deportation should the case be denied.

EWI: *Will Layo be able to adjust his status in the United States even though he entered without inspection (EWI)?*

An exception for the general rule that an alien must have been inspected and admitted or paroled to be eligible to adjust his or her status in the United States exists for those persons who are able to take advantage of the provisions of INA § 245(i). As an immigrant petition was filed on Layo's behalf before January 14, 1998 he need only show that the petition had been approvable when filed. INA § 245(i)(1)(B)(i); INA § 245(i)(1)(C); 8 C.F.R. § 245.10(a)(1)(i)(A). That means it was filed properly, it was meritorious in fact, it was not fraudulent, and at the time of filing, the beneficiary had the appropriate family relationship that would support the issuance of an immigrant visa. USCIS Questions and Answers, March 23, 2001, Q6. As Layo's mother, Sally, was a United States citizen the petition was approvable when filed. Further, the Government has accepted the "alien based" theory of 245(i) in that Layo may use INA § 245(i) in this case even though it was his mother who had originally filed for him. See Bach memo, Accepting Applications for Adjustment of Status Under Section 245(i) of the Immigration and Nationality Act, April 14, 1999.

Scotty's employment: *Has Scotty's employment caused him to be out of status?*

As Scotty did not have work authorization he did fall out of status. INA § 217(a)(1); INA § 101(a)(15)(B). (Visa waiver is a visitor who is not entering to work.)

However, that is not a bar to his adjustment of status as his petitioner, Fiona, is his "immediate relative" as she is his spouse and a United States citizen. INA § 245(c)(2); Aytes memo, June 27, 2006 re: Consolidation of Policy Regarding USCIS Form I-864, Affidavit of Support (AFM Update AD06-20). Note: an "immediate relative" is a United States citizen spouse, child 21 years of age or older, or parent of an unmarried child under 21 years of age. INA § 201(b)(2)(A)(i).

As Layo is also Fiona's "immediate relative" it is not a bar to Layo's adjustment for the same reasons it is not a bar to Scotty's adjustment.

I-864 – Affidavit of Support:

I-864 Issues: *An alien who is likely to become a public charge is inadmissible. INA § 212(a)(4). The petitioner (Fiona) is required to file an affidavit of support. 8 CFR § 213a.2(b)(1). The income must be sufficient at the time of filing, which is 125% of the poverty level for the particular family size. 8 CFR § 213a.2(a)(v)(A); Aytes memo, supra.*

Can they use Scotty's income for his case or do they need a co-sponsor?

The intending immigrant's income may be counted if he or she is the sponsor's spouse even if they do not live together. INA § 213A; 8 CFR § 213a.2(c)(2)(i)(C)(5); Aytes memo, supra. As Scotty is filing for adjustment under INA § 245 he must file for employment authorization if he wants to work. 8 CFR § 274a.12(c)(9). Although there is an argument that an alien is authorized to work as soon as the adjustment of status and request for employment authorization is filed, USCIS's current position is that the intending immigrant's income may only be counted if the income is earned from authorized employment. Aytes memo, supra. (Stating it is the "clear public policy, as stated in INA §§ 245(c)(2) and 274A … against unauthorized employment"). As Fiona isn't working, and Scotty is not yet authorized to work, they will initially need a co-sponsor. The co- sponsor must meet the same requirements as the petitioner, other than filing an immigrant petition on behalf of the intending immigrant, i.e. being a United States citizen or lawful permanent resident, have sufficient income based on his or her household size plus Scotty and Layo, and has filed his or her required tax returns. 8 CFR § 213a.2(c)(2)(iii)(C). Once Scotty gets his Employment Authorization Document they will be able to use his income to satisfy the public charge/I-864 financial affidavit requirements and then drop the co-

sponsor. As Scotty is the beneficiary he will not be required to file an I-864a in his case. Aytes memo, supra.

Can they use Scotty's income in Layo's case or do they need a co-sponsor?

As discussed above, Fiona will need a co-sponsor for Layo's case. The main difference being that Scotty would have to file an I-864a if they intend to use his income for Layo's case as Scotty is not the beneficiary here. Aytes memo, supra.

If Scotty or Layo needs support can they compel Fiona to support either or both of them up to 125% of the poverty level and for how long? (Bonus Issue. No Points should be deducted for failure to discuss this issue.)

While the decisions are still at the Federal District Court and State Appellate level, there have been holdings that a sponsor or co-sponsor could be compelled to support a sponsored alien up to 125% of the poverty level until the sponsor dies, the sponsored immigrant dies, the sponsored immigrant becomes a United States citizen, the sponsored immigrant permanently departs from the United States or the sponsored immigrant is credited with a total of 40 qualifying quarters of work. INA § 213A(a)(2),(3); 8 CFR § 212a.2(e). Cheshire v Cheshire, No. 3:05-cv-00453-TJC-MCR, WL 1208010, (M.D.FL May 4, 2006); Davis v. Davis, No. WD-04-020, WL 2924344, (6th Dist.OH December 17, 2004). As such, Fiona, and any joint or co-sponsor, must be aware of this possibility. To avoid any conflict of interest issues Fiona and any joint or co-sponsors should be advised to have independent counsel regarding this issue.

Is Layo a United States citizen? (Reviewers Please Note: This is a bonus section and no points are to be deducted if not discussed.)

For a child born out of wedlock to a United States citizen mother after December 23,

1952, the mother had to have been physically present in the United States or one of its outlying possessions for a continuous period of one year prior to the child's birth. INA § 309(c). As Sally only lived in the United States for 9 months Layo did not acquire United States citizenship pursuant to INA § 309(c).

To obtain automatic citizenship under INA § 320 at least one parent needs to be a United States citizen by birth or naturalization and the child must be residing in the United States in the legal and physical custody of the citizen parent pursuant to a lawful admission for permanent residence. As Sally is deceased and Layo is not a lawful permanent resident he is not a United States citizen under INA § 320.

To obtain automatic citizenship under INA § 322; 1) at least one parent (or, at the time of his or her death, was) is a citizen of the United States by birth or naturalization; 2) the United States parent has or had been physically present in the United States or its outlying possessions for a period or periods totalling not less than five years, at least two of which were after attaining the age of fourteen years; or has (or, at the time of his or her death, had) a citizen parent who has been physically present in the United States or its outlying possessions for a period or periods totalling not less than five years, at least two of which were after attaining the age of fourteen years; 3) the child is under the age of eighteen years; 4) the child is residing outside the United States in the legal and physical custody of the applicant (or, if the citizen parent is deceased, an individual who does not object to the application; and 5) the child is temporarily present in the United States pursuant to a lawful admission, and is maintaining such lawful status. As Layo is not in the United States pursuant to a lawful admission he is not a United States citizen under INA § 322.

Conclusion:

As stated above, this is a very difficult case to get approved as Scotty and Fiona never consummated the marriage, and even more importantly (as USCIS will probably never

ask about their sexual relations) not only are Scotty and Fiona not living together, but Fiona is living with Tom. Furthermore, as Scotty was an intending immigrant at the time he entered the United States, that would be one more possible reason to deny his case. On the other hand, if USCIS believes it was a bona fide marriage, and Scotty is denied solely for being an intending immigrant, that would not be a reason to deny Layo's case. As Layo was grandfathered for 245(i) by his mother's petition in 1997, he was 17 years old when Fiona became his step-mother, and his father had a real parent-child relationship with him at one time, his case is approvable. Because it could be a problem that Scotty doesn't currently have a relationship with Layo, they should reunite as soon as possible.

Finally, Fiona and any co-sponsor need to be advised to get independent counsel to advise them of the I-864 support issues as set forth above. Naturally, everyone should be advised to be completely truthful on the forms and at the interview about their living arrangements.

MULTIPLE CHOICE QUESTIONS

1. Gerald, a British Citizen, married Rose, a United States Citizen and became a Conditional Permanent Resident on July 1, 2001, when he was 20 years old. He has since had the condition removed and is a permanent resident. He is now 27 years of age and wants to naturalize as a United States citizen. His only issue is that he has not registered for selective service because he did not know of the requirement. **Which of the following is CORRECT**?

a. He should not apply for naturalization because he risks being put into removal proceedings for failing to register.

b. He should register now and apply after he gets registered.

c. He could wait until he is 30 and then apply for naturalization.

d. He could apply now, but for approval he will have to obtain evidence that his failure to register was not knowing and willful or that he was not required to register.

Answer: *d.*
Memo, Yates, Deputy Executive Assoc. Comm., Field Operations, 6-18-99 (AILA Document 99010740).

2. On July 5, 2002, Mrs. Padron's husband filed an application for asylum, in which Mrs. Padron was a derivative family member. Mr. And Mrs. Padron's last date of entry was January 18, 2002. The application was therefore timely filed in compliance with the one-year requirement. An interview on Mr. Padron's application for asylum was scheduled for February 23, 2005. On that date, Mrs. Padron attended the interview alone because her husband had left the United States because of a serious medical emergency. On the same date, Mrs. Padron submitted her own application for asylum independent of her husband's application. Instead of receiving a new interview date relating to her new application for asylum, Mrs. Padron instead received a "referral notice" dated March 9, 2005. The notice indicates that Mrs. Padron has not "demonstrated with clear and convincing evidence" that her application was filed within one year of her last arrival. **Which of the following statements is <u>CORRECT</u>?**

a. There are no exceptions to the one-year asylum filing deadline.

b. A change in conditions in the applicant's country of nationality is the only exception to the one-year asylum filing deadline.

c. An asylum application may be considered if filed beyond the one-year deadline if the applicant can demonstrate the existence of "extraordinary circumstances" relating to the delay in filing the application within the one-year period.

d. Mrs. Padron's husband's illness cannot be considered an "extraordinary circumstance" excusing the delay.

Answer: c.

3. Rosa is in removal proceedings as an "arriving alien," and she is seeking to adjust her status to lawful permanent resident through marriage. **Which of the following is <u>TRUE</u>?**

a. Rosa may adjust her status in court if she is applying under Section 2 of the Cuban Adjustment Act.

b. Rosa may adjust her status in court regardless of what type of application for adjustment she is filing, as the new regulations removed the bar on arriving aliens from adjusting.

c. The court does not have jurisdiction over any adjustment application made by an arriving alien. Therefore, proceedings would have to be terminated in order for Rosa to apply with CIS, regardless of what type of marriage adjustment she seeks to file.

d. Neither the court nor CIS has jurisdiction over an application for adjustment of status made by an arriving alien.

Answer: *a.*

8 CFR § 245.2(a)(1), 245.2(a)(5)(ii), 1240.11(a)(1), 1245.2(a)(1), 1245.2(a)(5)(ii). For arriving aliens, the court only has jurisdiction over Cuban adjustment applications, or an application for adjustment made by someone who is an arriving alien because they traveled pursuant to advanced parole based on an adjustment that was filed with CIS, and they are renewing that same adjustment application before the court. All other adjustment applications, including marriage adjustments, must be adjudicated by CIS.

4. Carl filed an I-130 petition for his adult unmarried son Jerry in 1997 under the family-based 2B preference category. The petition was approved in June 1998, but the preference category was not current. In May 2001, Jerry married his current wife Anne. Both Jerry and Anne live in Switzerland. In August 2002, Carl obtained United States citizenship. Jerry and Anne are now ready to move to the United States as permanent residents, so Carl contacts you to see how to proceed at this point. **Which of the following statements is <u>CORRECT</u>?**

a. Jerry and Anne cannot consular process since the visa petition is no longer valid.

b. Both Jerry and Anne can consular process at this time since the priority date is current.

c. Jerry can consular process, but then he will have to file a separate petition for Anne since he married her after the petition was filed.

d. Carl can file a new petition for Jerry and keep the old priority date of 1997, which will permit both Jerry and Anne to consular process as soon as the new petition is approved.

Answer: a.

(8 C.F.R. §205.1(a)). As soon as Jerry married, prior to his father becoming a United States citizen, he was no longer the unmarried son of a lawful permanent resident alien and the petition was automatically revoked. Carl would need to file a new I-130 petition, but he does not get to keep the old priority date.

5. Julie is a single mother and a citizen of the United Kingdom. Her application for permanent residence in the employment based third preference category was approved on January 2, 2002. She applied for a re-entry permit and from March 12, 2002, she lived in England to care for her sick mother until she re-entered the USA on August 1, 2004, with the re-entry permit. She wants to apply for naturalization as soon as possible and seeks your advice. **Which of the following is <u>CORRECT</u>?**

a. She must wait until after August 2, 2008, to submit her application because it will be 4 years and 1 day after her return.

b. She can submit her application after May 4, 2008 (90 days before August 2, 2008).

c. She can submit her application now (March 14, 2008) because even though she was out of the United States for more than 1 year during the past 5 years, she preserved her continuous residence because she had the re-entry permit.

d. She can apply now but only if she can rebut the presumption that her continuous residence was broken. The presumption can be rebutted by showing that she retained full access to her home in the United States, that she did not obtain employment while in the United Kingdom and that she was the only one available to care for her mother.

Answer: a.

(8 C.F.R. §316.5(c)(1)(ii)) The 90 day early application rule does not help. The re-entry permit does not preserve continuous residence. The absence in excess of 1 year breaks the continuous residence.

6. The following H-1B applicants are **NOT** exempt from the 65,000 numerical limitation:

a. Persons who have earned a Master's or higher degree from a United States institution of higher education.

b. Persons who have earned a foreign degree equivalent to a Master's or higher degree.

c. Persons applying for their first extension of their H-1B status with the same employer.

d. Spouses and children of H-1Bs.

Answer: b.

The 65,000 numerical limitation foes not apply to persons holding a United States Master's or higher degree (H-1B Visa Reform Act of 2004 Public Law No. 108-447 and persons applying for an extension of their H-1B status INA §214(g)(7). "b" is not correct because the alien must have earned a United States Master's or higher degree; a foreign degree is not qualifying. Extensions or H-1B status are exempt. Spouses and children of H-1B nonimmigrants are exempt. Memo, Aytes, Assoc. Dir., Domestic Operations, USCIS, HQPRD 70/6.2.8, 70/6.2.12, AD 06-29 (Dec. 5, 2006) AILA Doc. No. 06122063.

7. Pamela filed a family-based petition (i.e., Form I-130) with U.S. Citizenship and Immigration Servces (USCIS) on behalf of her adopted daughter, Catherine. USCIS ultimately denied Pamela's family-based petition. **Which of the following statements is <u>CORRECT</u>?**

a. Pamela and/or Catherine may appeal the denial of the family-based petition to the Administrative Appeals Office (AAO).

b. The family-based petition cannot be appealed.

c. Catherine may file an appeal of her family-based petition with the Board of Immigration Appeals (BIA).

d. Pamela may file an appeal of her family-based petition with the Board of Immigration Appeals (BIA).

Answer: d

8. Susie is the beneficiary of an I-130 petition filed by her Lawful Permanent Resident mother on January 12, 1998. At the time, Susie was living in Colombia. Susie entered the United States eight months ago without inspection and is now 19 years old. An immigrant visa is available in the family-based 2nd preference category. **What is the <u>BEST</u> answer based on the preceding fact pattern?**

a. Susie cannot adjust status because she entered illegally. She will need to consular process, but does not need to apply for a waiver.

b. Susie is grandfathered under §245(i) and is eligible to adjust status.

c. Susie is not grandfathered under §245(i) because she cannot establish the required physical presence in the United States.

d. Susie is ineligible to adjust status and will need to apply for a waiver at the consulate because of her unlawful presence in the United States for more than 180 days.

Answer: b.
(§245(i)). This section permits a person to adjust status if they were the beneficiary of an I-130 visa petition filed on or before April 30, 2001. Likewise, if the petition was filed on or before January 14, 1998, there is no physical presence requirement (§245(i)(1)(C)).

9. Barbie enters into fraudulent marriage with a United States citizen in order to obtain permanent resident status. At the marriage interview, her husband admits that she paid him for the marriage and that they never lived together. As a consequence, the petition is denied and Barbie is deported from the United States. **Which of the following is <u>CORRECT</u> based on current law?**

a. Barbie can never acquire permanent resident status in the United States as a result of her fraudulent marriage.

b. An I-130 petition filed by a new husband, in a valid marriage, can be approved and she can obtain an immigrant visa to the United States based on that marriage.

c. An I-130 petition may not be approved based on a marriage to a U.S. citizen, but she can have an I-140 petition approved on her behalf based on an approved labor certification and then obtain an immigrant visa to the United States.

d. Barbie can be admitted to the United States for permanent residence as an accompanying alien if a future husband qualifies for an immigrant visa and a 212(i) waiver is approved on her behalf.

Answer: d.

(INA § 204(c)). This section provides that "no <u>petition</u> shall be approved" if there was a previous fraudulent marriage. However, this does not preclude Barbie from being admitted as an "accompanying" alien since no petition would be required on her behalf in such a case. However, she would still need a waiver under INA § 212(i) for the previous fraud.

10. Kara Oke is currently in the United States from Japan in B-1 status and just finished her Master's Degree in Bioengineering from the University of Japan which was a five-year program. She recently formed a new software company with a United States partner to offer the services of systems software support to United States medical device manufacturers and exporters, who export medical devices to Japan. She and her partner invested $150,000 of capital, $125,000 was a gift to Kara from her parents and the rest came from her United States partner. Kara Oke owns the majority of the shares of the company and would like to start working as soon as possible in the business. Kara Oke intends to be mostly the manager of the company and will hire specialized consultants. Kara Oke's partner has already obtained the commitment of several large United States medical device manufacturers to use their services, and these contracts reflect over $100,000 in net profits for the first year of operations. Kara Oke and her partner come to seek your advice about the best course of action for Kara Oke to work in the business. Kara Oke must go back to Japan to visit her parents before she starts her new position as a manager of her company. Her position will require frequent travel between Japan and the United States. Assume there is a treaty between the United States and Japan for E-1 and E-2 visa issuance. **You advise that the best solution to get her working for the United States company as soon as possible is to:**

a. Apply for an H-1B visa.

b. Apply for an E-2 visa with the United States Embassy in Japan.

c. Come back to the United States with her B-1 and apply for a change of status to the E-2 status.

d. Apply for the E-1 visa with the United States Embassy in Japan.

Answer: b.

Kara Oke meets all the prerequisites for a successful E-2 visa application 9 FAM 41.51. Because she needs to travel frequently she needs to get the visa on her first trip out of the United States "c." is not the best solution because if she applies for a change of status she could not travel in and out of the United States unless she applied for the visa at the United States Embassy in Japan; there would also be an issue of intent upon entry. "d." and "e." are not correct because although the business involving the software support of export companies, Kara Oke's company does not in itself create a trade between the United States and Japan. 9 FAM 41.51. Please note that the H-1B visa is not a solution either because there is no visa available at this time and USCIS might challenge that the managerial position is not a specialty occupation.