

Adjustment Status for K-2 VISA Holders: Deciphering the 'Aging Out' Problem

The Immigration and Nationality Act, or INA, indicates that the child of a fiancée who accompanies or follows to join his parent may enter the United States with a K-2 visa. The child is defined as an unmarried person under the age of 21. Prior to the 1986 Immigration Marriage Fraud Amendments to the act, or IMFA, a fiancée visa holder automatically obtained legal permanent residence upon his or her marriage to a U.S. citizen. After the IMFA was promulgated, the K-1 fiancées were given the opportunity to apply for their green cards rather than obtaining that status automatically prior to 1986.

The issue that was not explicitly addressed by the IMFA was the issue as to whether K-2 visa holders (the children under 21 of K-1 fiancées) were able to apply for adjustment of status. To alleviate this problem, the attorney general assisted in the enactment of federal regulations providing a basis for K-2 visa holders to adjust their status to lawful permanent residents. The former INS established that the adjustment of status of a K-2 visa holder derives from the parent's newly acquired status as the spouse of a U.S. citizen. The issue that arose before the Immigration Service was determining whether the K-2 visa holder must have been under 21 at the time his or her adjustment of status application was decided or simply under 21 at the time the adjustment of status application was filed.

The answer to this question is extremely critical. If the Immigration Service determines that the K-2 visa holder must be under 21 at the time his or her adjustment of status application is decided, then many K-2 visa holders could conceivably "age out." This means that many K-2 visa holders will miss their window of opportunity to become lawful permanent residents because they will likely be over the age of 21 by the time their adjustment of status applications are fully adjudicated, especially given the backlog of such applications before the USCIS. On the other hand, if the Immigration Service determines that the K-2 visa holder must merely be under 21 at the time his or her adjustment of status application is filed, then there will no longer be an "age out" problem. That is, so long as the adjustment of status application on behalf of the K-2 visa holder was timely filed when he or she was under the age of 21, then he or she can become a lawful permanent resident even if the adjustment of status application is fully adjudicated when the applicant is over the age of 21.

Fortunately, there is a district court case in Northern California, *Verokin v. Still* (2007), that held that the K-2 visa holder must merely have been 21 at the time his adjustment of status application was filed in order to be eligible to apply for adjustment of status. In 2008 and 2009, there have been other district courts across the United States that have followed suit, thereby correcting the problems created by the local Immigration Processing Centers that erroneously denied the adjustment of status applications of K-2 visa holders because those applicants were over 21 at the time their applications were decided. Now, it is abundantly clear: So long as the K-2 visa holder was under 21 at the time his adjustment of status application was filed with the USCIS (and assuming all other eligibility requirements under the INA are met), then the K-2 visa holder should be granted the opportunity to become a lawful permanent resident. This is wonderful news for many parents who previously believed that their K-2 children were in a terrible predicament.

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