An interlocutory appeal is an appeal of a ruling made by a factfinder in the course of a judicial or administrative tribunal, hearing, trial, or like proceeding, that is made before all claims are resolved as to all parties. Heretofore, interlocutory appeals, motions, or orders, have not been a normal part of USCIS adjudications or AAO proceeding. However, due to changes made to the underlying statutes, certain regulations or policies, and associated interpretations made by the courts, now seems to be the right time for a formal regulation that would allow for, and guide, interlocutory proceedings by AAO for the benefit of USCIS as a whole. Certain preliminary issues would be better resolved in isolation rather than being unnecessarily and pointlessly embedded in a much more complex adjudication. This is especially helpful if an adverse determination would exclude the issue and perhaps a party from the more complex adjudicative proceeding, or block any further proceeding altogether, thus saving time, energy, effort, costs, or any resources whatsoever.

While there is normally no review of the discretionary decision to approve or deny adjustment of status by USCIS, a few select issues are reviewable by AAO. In fact, a few categories of adjustment, by regulation, do have an administrative review available through AAO. The remaining majority of adjustment requests may be renewed, if and when, the individual applicant is placed in Removal Proceedings under the jurisdiction of the Executive Office of Immigration Review (EOIR) in the Department of Justice (DOJ) where an Immigration Judge (IJ) in Immigration Court (IC) can order adjustment of status as a form of relief from removal. An IJ’s decision ordering removal and denying relief is then appealable to the Board of Immigration Appeals (BIA).
Those specific types of cases which may have a right of appeal to AAO often involve an underlying issue which must be resolved in order to determine such right. When the Director is uncertain about an issue, an option to certify the case to AAO exists, however, the Director currently must make a decision to either approve or deny the benefit in order to certify the case to AAO.

For example, those USCIS adjudications involving concurrently filed immediate relative I-130 petitions and I-485 applications that rely upon the finding of a *bona fide* marriage are, by law, within the purview of AAO’s appellate review authority. Specifically, INA §245(e); 8 U.S.C. §1255(e), relating to the good faith exception to the prohibition against adjustments based upon marriages entered into during proceedings of any kind, allows for appellate review. More precisely, “*with respect to the alien spouse or alien son or [alien] daughter*”, the statute states, in pertinent part:

“In accordance with regulations, there shall be only one level of administrative appellate review for each alien under the previous sentence.” [Emphasis added.]

The Form I-130, *Petition for Alien Relative*, has been appealable only to the BIA since the BIA was established or shortly thereafter. There are, however, a few more specific issues relating to the I-130 where AAO may need to weigh in. The *Adam Walsh Child Protection and Safety Act of 2006*, Pub. L. No. 109-248, 120 Stat. 587 (the Adam Walsh Act (AWA)), of July 27, 2005, vests the Secretary of Homeland Security with “*unreviewable discretion*” as to certain findings related to certain I-130 and I-129F adjudications for spouses, children, and fiancés of citizens, or spouses and children of lawful permanent residents (LPRs). Since AAO is wielding delegated authority¹ of the Secretary, *it*, rather than the BIA, is the final administrative authority on specific issues that control the adjudication of select I-130 and I-129F petitions. The Board of Immigration Appeals has officially recognized and declared that it “lacks jurisdiction to review a “no risk” determination by the United States Citizenship and Immigration Services, including the appropriate standard of proof to be applied.” See *Matter of*

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¹ The authority to adjudicate appeals is delegated to the AAO by the Secretary of the Department of Homeland Security (DHS) pursuant to the authority vested through the Homeland Security Act of 2002, Pub. L. 107-296. See DHS Delegation Number 0150.1 (effective March 1, 2003); see also 8 C.F.R. § 2.1 (2003). The AAO exercises appellate jurisdiction over the matters described at 8 C.F.R. § 103.1(f)(3)(iii) (as in effect on February 28, 2003), with limited exceptions not at issue here.
Acejas-Quiroz, infra. As of this writing, the BIA has issued four precedent decisions\(^2\) that specifically address issues under the Adam Walsh Act.

Under the AWA, certain **criminal issues** will disqualify a petitioner from petitioning for spouses, fiancés, and children. Very often those children tend to be stepchildren dependent on a parent who is in turn dependent on a potential abuser and thus, is especially vulnerable. Certain violent and/or heinous sexually-based crimes were determined to serve as barriers to petitioning for certain classes of beneficiaries who might be particularly vulnerable and thereby, at risk for abuse, attack, or exploitation. Congress was somewhat vague in describing which crimes serve to disqualify a petitioner, these cases are decided in the “unreviewable discretion” of USCIS on behalf of the Secretary. When there is a dispute, it is to be decided by AAO, also, in the name of the Secretary. A determination that the petitioner would pose “no risk” to the beneficiaries is a decision that Congress vested solely in the Secretary. The Secretary delegated it to USCIS and AAO is a part of USCIS. The reality of this statutory scheme is easy enough to figure out but from a practical standpoint, the biggest problem is tackling the confusing procedural issues based on outdated and unclear regulations. Some progress has been made but this job is far from over. The “no-risk” determination is an example of a question that the Director might like to certify to AAO on its own. The petitioner might also like to have that issue reviewed on its own as well. A petitioner might be filing multiple I-130s for a spouse and children. The same issue might control the outcome of multiple I-130 petitions for alien relatives. An interlocutory appeal on the “no risk” determination would help processing such a family group of petitions.

Turning our attention from family-based to employment-based cases and it is of particular note that AAO recently announced a new interpretation as to the issue of “standing” for a narrowly drawn class of I-140 beneficiaries. It was recognized in **Matter of V- Inc., ID# 568252 (AAO April 28, 2017)**, that AC-21 § 106(c), which provides the benefit of “portability” to long delayed applicants for adjustment of status, implicitly mandates that those eligible **I-140-beneficiaries-turned-I-485-applicants** are among the **real parties of interest** in specified I-140 appeals, motions, and certifications. Since AAO

\(^2\) The full citations, holdings, and links are appended hereto.
has jurisdiction over I-140 disputes and there are very specific underlying issues that must be settled before the beneficiary qualifies as one of the real parties of interest, it might be worth the effort for USCIS to include provisions relating to interlocutory appeals directly addressing these “underlying issues” when AAO promulgates its highly anticipated and extremely overdue new procedural rules. Prerequisite findings that must be satisfied in order for a certain party to be recognized in related proceedings have heretofore been subsumed within the larger proceeding making them protracted and often unwieldy. The introduction of clearly defined interlocutory proceedings would simplify matters. Instead of complex dog-fights where issues are introduced as collateral attacks on earlier findings, these issues would no longer be in controversy because they would have already been settled in discrete, issue-specific interlocutory proceedings. The forthcoming, more-complex proceedings would only be open to those qualified parties who have been duly recognized after meeting specified prerequisites. In terms of economic efficiency, USCIS should benefit by streamlining AAO Proceedings into more predictable modules. By segregating complex prerequisite issues from the more predictable portions of appellate review, processing efficiencies would likely result. USCIS could charge the same I-290B fee when it is instigated by the petitioner but should put interlocutory appeals on a fast track, a separate processing queue. The fast turnaround would benefit the adjudicators as much as, or more than the petitioners. As a former USCIS adjudicator, I can attest that when a case was returned to me for continued processing, the quicker I got it back, the better. There are numerous breaks in case processing. A particular case might need additional evidence and an RFE must be sent; perhaps a second or follow-up interview is needed, maybe an applicant requests rescheduling of an interview; and sometimes cases are returned after supervisory review, a background check completion, an appeal; or when relief is granted by an IJ or BIA, or a waiver is granted by AAO on appeal. Regardless of the reason for an interruption in the adjudication, the quicker it came back, the better the chance of me recalling it and being able to reach a final decision expeditiously. As always, this is merely one man’s opinion.
The following excerpts from the regulations and statutes, as well as the holdings of pertinent Precedents are provided for the convenience of the readers.

8 CFR §245.25 Adjustment of status of aliens with approved employment-based immigrant visa petitions; validity of petition and offer of employment.

(a) Validity of petition for continued eligibility for adjustment of status. An alien who has a pending application to adjust status to that of a lawful permanent resident based on an approved employment-based immigrant visa petition filed under section 204(a)(1)(F) of the Act on the applicant’s behalf must have a valid offer of employment based on a valid petition at the time the application to adjust status is filed and at the time the alien’s application to adjust status is adjudicated, and the applicant must intend to accept such offer of employment. Prior to a final administrative decision on an application to adjust status, USCIS may require that the applicant demonstrate, or the applicant may affirmatively demonstrate to USCIS, on Form I-485 Supplement J, with any supporting material and credible documentary evidence, in accordance with the form instructions that:

(1) The employment offer by the petitioning employer is continuing; or

(2) Under section 204(j) of the Act, the applicant has a new offer of employment from the petitioning employer or a different U.S. employer, or a new offer based on self-employment, in the same or a similar occupational classification as the employment offered under the qualifying petition, provided that:

(i) The alien's application to adjust status based on a qualifying petition has been pending for 180 days or more; and

(ii) The qualifying immigrant visa petition:

(A) Has already been approved; or

(B) Is pending when the beneficiary notifies USCIS of a new job offer 180 days or more after the date the alien's adjustment of status application was filed, and the petition is subsequently approved:

(1) Adjudication of the pending petition shall be without regard to the requirement in 8 CFR 204.5(g)(2) to continuously establish the ability to pay the proffered wage after filing and until the beneficiary obtains lawful permanent residence; and
(2) The pending petition will be approved if it was eligible for approval at the time of filing and until the alien's adjustment of status application has been pending for 180 days, unless approval of the qualifying immigrant visa petition at the time of adjudication is inconsistent with a requirement of the Act or another applicable statute; and

(iii) The approval of the qualifying petition has not been revoked.

(3) In all cases, the applicant and his or her intended employer must demonstrate the intention for the applicant to be employed under the continuing or new employment offer (including self-employment) described in paragraphs (a)(1) and (2) of this section, as applicable, within a reasonable period upon the applicant's grant of lawful permanent resident status.

(b) Definition of same or similar occupational classification. The term “same occupational classification” means an occupation that resembles in every relevant respect the occupation for which the underlying employment-based immigrant visa petition was approved. The term “similar occupational classification” means an occupation that shares essential qualities or has a marked resemblance or likeness with the occupation for which the underlying employment-based immigrant visa petition was approved.

[81 FR 82398, Nov. 18, 2016, at 82490]

Matter of Calcano De Millan, 26 I&N Dec. 904 (BIA 2017), held:

For purposes of the Adam Walsh Child Protection and Safety Act of 2006, Pub. L. No. 109-248, 120 Stat. 587, and section 204(a)(1)(A)(viii)(I) of the Immigration and Nationality Act, 8 U.S.C. § 1154(a)(1)(A)(viii)(I) (2012), a United States citizen or lawful permanent resident petitioner has been “convicted” of an offense where either a formal judgment of guilt has been entered by a court or, if adjudication of guilt has been withheld, where (1) a plea, finding, or admission of facts established the petitioner’s guilt and (2) a judge ordered some form of punishment, penalty, or restraint on his or her liberty.

https://www.justice.gov/eoir/page/file/925381/download

Matter of Jackson and Erandio, 26 I&N Dec. 314 (BIA 2014), held:

Section 402(a)(2) of the Adam Walsh Child Protection and Safety Act of 2006, Pub. L. No. 109-248, 120 Stat. 587, 622, which bars the approval of a family-based visa petition filed by a petitioner who has been convicted of a “specified offense against a minor” and has not shown that he poses “no risk” to the beneficiary, does not have an impermissible retroactive effect when applied to convictions that occurred before its enactment.

Matter of Introcaso, 26 I&N Dec. 304 (BIA 2014), held:

(1) In a visa petition case involving the Adam Walsh Child Protection and Safety Act of 2006, Pub. L. No. 109-248, 120 Stat. 587, the petitioner bears the burden of proving that he has not been convicted of a “specified offense against a minor.”

(2) In assessing whether a petitioner has been convicted of a “specified offense against a minor,” adjudicators may apply the “circumstance-specific” approach, which permits an inquiry into the facts and conduct underlying the conviction to determine if it is for a disqualifying offense.


Matter of Aceijas-Quiroz, 26 I&N Dec. 294 (BIA 2014), held:

In adjudicating cases involving the Adam Walsh Child Protection and Safety Act of 2006, Pub. L. No. 109-248, 120 Stat. 587, the Board of Immigration Appeals lacks jurisdiction to review a “no risk” determination by the United States Citizenship and Immigration Services, including the appropriate standard of proof to be applied.


28 U.S. Code § 1292 - Interlocutory decisions

§1292. Interlocutory decisions

(a) Except as provided in subsections (c) and (d) of this section, the courts of appeals shall have jurisdiction of appeals from:

(1) Interlocutory orders of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, or of the judges thereof, granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions, except where a direct review may be had in the Supreme Court;

(2) Interlocutory orders appointing receivers, or refusing orders to wind up receiverships or to take steps to accomplish the purposes thereof, such as directing sales or other disposals of property;

(3) Interlocutory decrees of such district courts or the judges thereof determining the rights and liabilities of the parties to admiralty cases in which appeals from final decrees are allowed.

(b) When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals which would have jurisdiction of an appeal of such action may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order; Provided, however, That application for an appeal hereunder shall not stay proceedings in the district court unless the district judge or the Court of Appeals or a judge thereof shall so order.
(c) The United States Court of Appeals for the Federal Circuit shall have exclusive jurisdiction-

(1) of an appeal from an interlocutory order or decree described in subsection (a) or (b) of this section in any case over which the court would have jurisdiction of an appeal under section 1295 of this title; and

(2) of an appeal from a judgment in a civil action for patent infringement which would otherwise be appealable to the United States Court of Appeals for the Federal Circuit and is final except for an accounting.

(d)

(1) When the chief judge of the Court of International Trade issues an order under the provisions of section 256(b) of this title, or when any judge of the Court of International Trade, in issuing any other interlocutory order, includes in the order a statement that a controlling question of law is involved with respect to which there is a substantial ground for difference of opinion and that an immediate appeal from that order may materially advance the ultimate termination of the litigation, the United States Court of Appeals for the Federal Circuit may, in its discretion, permit an appeal to be taken from such order, if application is made to that Court within ten days after the entry of such order.

(2) When the chief judge of the United States Court of Federal Claims issues an order under section 798(b) of this title, or when any judge of the United States Court of Federal Claims, in issuing an interlocutory order, includes in the order a statement that a controlling question of law is involved with respect to which there is a substantial ground for difference of opinion and that an immediate appeal from that order may materially advance the ultimate termination of the litigation, the United States Court of Appeals for the Federal Circuit may, in its discretion, permit an appeal to be taken from such order, if application is made to that Court within ten days after the entry of such order.

(3) Neither the application for nor the granting of an appeal under this subsection shall stay proceedings in the Court of International Trade or in the Court of Federal Claims, as the case may be, unless a stay is ordered by a judge of the Court of International Trade or of the Court of Federal Claims or by the United States Court of Appeals for the Federal Circuit or a judge of that court.

(4)

(A) The United States Court of Appeals for the Federal Circuit shall have exclusive jurisdiction of an appeal from an interlocutory order of a district court of the United States, the District Court of Guam, the District Court of the Virgin Islands, or the District Court for the Northern Mariana Islands, granting or denying, in whole or in part, a motion to transfer an action to the United States Court of Federal Claims under section 1631 of this title.

(B) When a motion to transfer an action to the Court of Federal Claims is filed in a district court, no further proceedings shall be taken in the district court until 60 days after the court has ruled upon the motion. If an appeal is taken from the district court’s grant or denial of the motion, proceedings shall be further stayed until the appeal has been decided by the Court of Appeals for the Federal Circuit. The stay of proceedings in the district court shall not bar the granting of preliminary or injunctive relief, where appropriate and where expedition is reasonably necessary. However, during the period in which proceedings are stayed as provided in this subparagraph, no transfer to the Court of Federal Claims pursuant to the motion shall be carried out.
(e) The Supreme Court may prescribe rules, in accordance with section 2072 of this title, to provide for an appeal of an interlocutory decision to the courts of appeals that is not otherwise provided for under subsection (a), (b), (c), or (d).


**The United States Code Online used, was current through Public Law 115-30 (4/28/2017)**

The currency date for each section of the United States Code is displayed above the text of the section. If the section has been affected by any laws enacted after that date, those laws will appear in a list of "Pending Updates". If there are no pending updates listed, the section is current as shown.

When present, the list of pending updates provides the public law numbers of each law affecting the section in some way—either the text of the section, a statutory note set out under the section, or a table of contents preceding the section. Following the list of pending updates is a “View Details” link that provides more specific information about how each law has affected the section.

The Classification Tables can also be used to find the latest laws affecting the Code. The Classification Tables indicate which sections of the Code have been affected by recently enacted laws.

The text of public laws listed as Pending Updates or appearing in the Classification Tables can be found in a number of sources, such as the Government Publishing Office’s [FDSys](https://fdsys.gov) (Federal Digital System) or the Library of Congress’s [CONGRESS.GOV](https://www.congress.gov) database.

For an explanation of the differences between the version of the United States Code as posted for searching and browsing by default on this website and the versions of the Code based on the database used for the official print version, see the [About the United States Code and This Website](https://uscode.house.gov/about) page. The currency dates of prior versions of the United States Code in print since 1994 can be found by using the “Search in version” feature on the [Advanced Search](https://uscode.house.gov/advanced_search) page.

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**The e-CFR data used herein was current as of May 23, 2017.**

It is a currently updated version of the Code of Federal Regulations (CFR). It is not an official legal edition of the CFR.

**TITLE 8—Aliens and Nationality**

- **CHAPTER I—DEPARTMENT OF HOMELAND SECURITY**
  - [SUBCHAPTER A—GENERAL PROVISIONS](https://www.ecfr.gov/cgi-bin/text-idx?c=ecfr&rgn=div6&view=true&node=10:1.1.1.1.4&idno=10)
  - [SUBCHAPTER B—IMMIGRATION REGULATIONS](https://www.ecfr.gov/cgi-bin/text-idx?c=ecfr&rgn=div6&view=true&node=10:1.1.1.1.5&idno=10)
  - [SUBCHAPTER C—NATIONALITY REGULATIONS](https://www.ecfr.gov/cgi-bin/text-idx?c=ecfr&rgn=div6&view=true&node=10:1.1.1.1.6&idno=10)

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