U.S. Department of Homeland Security
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U.S. Citizenship and Immigration Services

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Interoffice Memorandum

To: REGIONAL DIRECTORS
SERVICE CENTER DIRECTORS
DISTRICT DIRECTORS
NATIONAL BENEFIT CENTER DIRECTOR

From: William R. Yates /S/
Associate Director for Operations

Date: March 9, 2005

RE: Clarification of Certain Eligibility Requirements Pertaining to an Application to Adjust Status under Section 245(i) of the Immigration and Nationality Act

1. Purpose

This memorandum clarifies certain eligibility requirements pertaining to an application to adjust status (Form I-485, Application to Register Permanent Residence or Adjust Status) under section 245(i) of the Immigration and Nationality Act (the Act). In particular, this memorandum clarifies issues pertaining to a "derivative" of a grandfathered alien, when an application for labor certification serves to grandfather an alien, and multiple filings for adjustment of status under section 245(i).

2. Background

In general, section 245(i) of the Act allows an otherwise admissible alien who has an immediately available immigrant visa to apply for adjustment of status upon payment of a $1,000 surcharge, even though the alien entered the United States without inspection in violation of section 245(a) or is barred by section 245(c) of the Act. To be grandfathered under section 245(i) of the Act, an alien must be the beneficiary of a qualifying immigrant visa petition or application for labor certification that was filed on or before April 30, 2001 and meets applicable statutory and regulatory requirements.

United States Citizenship and Immigration Services (USCIS) has issued several policy memoranda explaining the implementation of section 245(i) of the Act, including "Accepting Applications for Adjustment of Status Under Section 245(i) of the Immigration and Nationality

Act" (April 14, 1999 and June 10, 1999) and "Rules for Adjustment of Status of Fiscal Year 1999 Diversity Cases Including Section 245(i) Penalty Sum Situations" (July 22, 1999).

3. Field Guidance

USCIS offices are directed to comply with the following guidance in the adjudication of applications for adjustment of status that are filed under section 245(i) of the Act.

A. USCIS Policy Pertaining to Section 245(i) of the Act

USCIS field offices will apply Section 245(i) of the Act as follows:

(1) Once an alien meets the requirements for grandfathering under 8 CFR 245.10, the alien continues to be grandfathered until the alien adjusts status.
(2) A grandfathered alien is not limited to seeking adjustment of status solely on the basis of the qualifying immigrant visa petition or application for labor certification that initially grandfathered the alien. The grandfathered alien may also seek to adjust status on any other proper basis for which the alien is eligible.
(3) Until a grandfathered alien adjusts status, there is no limit to the number of applications the grandfathered alien may file for adjustment of status under section 245(i) provided that the alien meets all of the requirements of 8 CFR 245.10, including payment of the $1,000 surcharge for every application filed.

To illustrate, an alien beneficiary of a Form I-130 (Petition for Alien Relative) that was filed on or before April 30, 2001 is considered to be a grandfathered alien and may apply to adjust status based on the I-130 petition. If the grandfathered alien is not yet eligible for adjustment of status based on the I-130 petition and later becomes the beneficiary of an approved Form I-140 (Immigrant Petition for Alien Worker), the alien would be eligible to apply for adjustment of status based on the I-140 petition. Similarly, the grandfathered alien would also be eligible for adjustment of status under section 245(i) if the alien later wins a diversity visa. If the alien has been denied adjustment of status, has withdrawn or abandoned the application for adjustment of status, or has otherwise not adjusted under section 245(i), the alien remains grandfathered. The alien may apply for adjustment of status again if the alien meets the requirements of 8 CFR 245.10.

B. General Requirements for Grandfathering

To be considered grandfathered, an alien must satisfy the following requirements pursuant to 8 CFR 245.10:

(1) The alien was the beneficiary of a qualifying immigrant petition or application for labor certification filed on or before April 30, 2001.

(2) The qualifying immigrant visa petition or the qualifying application for labor certification was "properly filed" and "approvable when filed."
(3) The principal alien was physically present in the United States on December 21, 2000, if the alien's qualifying immigrant visa petition or application for labor certification was filed between January 15, 1998 and April 30, 2001.

C. Applications for Labor Certification Filed with the U.S. Department of Labor

"Approvable when filed" for a qualifying application for labor certification means that, as of the date of filing of the application for labor certification, the application was properly filed, meritorious in fact, and non-frivolous ("frivolous" meaning patently without substance). Absent evidence of fraud, when a qualifying application for labor certification (Form ETA-750) is properly filed and accepted by the United States Department of Labor in accordance with 20 CFR 656.21, USCIS will consider the requirements of 8 CFR 245.10 related to "properly filed" and "approvable when filed" to have been met for grandfathering purposes under section 245(i). Also, as already provided under 8 CFR 245.10(i), the denial, withdrawal, or revocation of a qualifying application for labor certification, that was properly filed on or before April 30, 2001 and was approvable when filed, will not preclude its grandfathered alien (including the grandfathered alien's dependent spouse or child) from seeking adjustment of status under section 245(i) of the Act on any proper basis, if so qualified.

D. Requirements for the Derivative Spouse or Child of a Grandfathered Alien

Section 245(i) defines the term "beneficiary" to include a spouse or child "eligible to receive a visa under section 203(d) of the Act." Depending on the circumstances, a spouse or child of a grandfathered alien may also be a grandfathered alien or may be eligible to adjust status as a dependent of the principal alien under section 245(i) of the Act.

(1) Spouse or Child Relationship Existed at Time of Filing of Grandfathering Immigrant Visa Petition or Application for Labor Certification submitted on or before April 30, 2001. If an alien demonstrates that a spouse or child relationship existed at the time a qualifying petition or application was properly filed on or before April 30, 2001, a principal alien's spouse or child is a grandfathered alien regardless of any subsequent changes in the relationship with the principal alien. This means that a spouse or child remains grandfathered even after losing the status of spouse or child, such as by divorce or the child becoming 21 years of age. Such spouse or child who is grandfathered may seek to adjust status under Section 245(i) on any proper basis, if so qualified.

Scenario 1 illustrates the conditions under which a grandfathered alien's spouse and child are also grandfathered.

An application for labor certification is filed on behalf of principal alien "A" in 2000. At that time, principal alien "A" is married to spouse "B" and they have child "C." Principal alien "A" and spouse "B" divorce in 2003. Today, spouse "B" and child "C" win the diversity lottery.

May spouse "B" and child "C" apply for adjustment of status under section 245(i) regardless of their relationship to and the status of principal alien "A"?

If all other grandfathering requirements are satisfied, spouse "B" and child "C" are grandfathered aliens. Principal alien "A" is a grandfathered alien, because the application for labor certification was filed on the principal alien's behalf on or before April 30, 2001. Spouse "B" and child "C" are also grandfathered, because a qualifying relationship existed at the time the application for labor certification was filed. Therefore, spouse "B" and child "C" may apply for adjustment under section 245(i) based on a winning lottery application or any other proper basis.

(2) Spouse or Child Relationship Established after April 30, 2001 and in Existence on the Date the Principal Alien Adjusts Status. If a spouse or child relationship is established after the filing of a grandfathering petition or application and is in existence at the time the principal alien adjusts status, the spouse or child is not a grandfathered alien and may not independently benefit from section 245(i). Rather, the spouse or child may only benefit from section 245(i) as a dependent of the principal alien. Accordingly, the qualifying relationship must continue to exist at the time the principal alien adjusts status in order for the spouse or child to obtain the derivative benefit.

Scenario 2 illustrates conditions under which a spouse and child can apply to adjust status under section 245(i) of the Act as dependents of the grandfathered alien.

An application for labor certification is filed on behalf of principal alien "A" in 2000. At that time, principal alien "A" is unmarried. Principal alien "A" marries spouse "B" in 2002. Principal alien "A" and spouse "B" have child "C." An I-140 is filed on behalf of principal alien "A" and is ultimately approved in 2004. Principal alien "A" applies for adjustment of status. May spouse "B" and child "C" apply for adjustment of status under section 245(i) in conjunction with principal alien "A"?

If all other grandfathering requirements are met, spouse "B" and child "C" may seek to adjust status only as dependents of principal alien "A." Principal alien "A" is grandfathered as described in Scenario 1. Because spouse "B" marries principal alien "A" after the April 30, 2001 sunset date, spouse "B" and child "C" are ***not*** grandfathered.

(3) Spouse or Child Relationship Established after April 30, 2001 but ***not*** in Existence on the Date the Principal Alien Adjusts Status. If a spouse or child relationship is established after the filing of a grandfathering petition or application but is ***not*** in existence at the time the principal alien adjusts status, the spouse or child is ***not*** grandfathered and may ***not*** file for adjustment of status under section 245(i) as a dependent of the principal alien pursuant to section 203(d) of the Act.

Scenario 3 illustrates conditions under which a spouse ***cannot*** apply for adjustment of status under section 245(i) of the Act.

A fourth-preference I-130 is filed on behalf of principal alien "A" in 1999. At that time, principal alien "A" is unmarried. Principal alien "A" marries spouse "B" in 2002. An I-140 petition is filed on behalf of principal alien "A" and is ultimately approved in 2003. Principal alien "A" applies for adjustment of status. Principal alien "A" and spouse "B" divorce in 2004 while the I-485 is still pending. Spouse "B" wins the diversity visa lottery. May spouse "B" apply to adjust status under section 245(i) based on the winning diversity visa lottery application regardless of whether or how principal alien "A" adjusts status? May spouse "B" apply for adjustment of status under section 245(i) as a dependent of principal alien "A"?

Spouse "B" cannot apply for adjustment under section 245(i) based on the winning diversity lottery application. If all other grandfathering requirements are satisfied, principal alien "A" is grandfathered as described above. Because spouse "B" marries principal alien "A" after the April 30, 2001 sunset date, spouse "B" is not grandfathered and may not independently benefit from section 245(i) of the Act. In addition, spouse "B" may not apply for adjustment of status under section 245(i) as a dependent of principal alien "A," because principal alien "A" and spouse "B" divorced before principal alien "A" adjusted status.

(4) Spouse or Child Relationship Established after the Principal Alien Adjusts Status. An alien who becomes the child or spouse of a grandfathered alien after the grandfathered alien acquires lawful permanent resident (LPR) status cannot adjust status under section 245(i) of the Act unless the alien has an independent basis for grandfathering.

Scenario 4 illustrates conditions under which a spouse and child of a grandfathered alien who acquires LPR status ***cannot*** apply for adjustment of status under section 245(i) of the Act.

An application for labor certification is filed on behalf of principal alien "A" in 1999. At that time, principal alien "A" is unmarried. An I-140 is filed on behalf of principal alien "A" and is ultimately approved in 2001. Principal alien "A" applies for adjustment of status and is granted LPR status in 2003. Principal alien "A" marries spouse "B" in 2004. Principal alien "A" and spouse "B" have child "C." May spouse "B" and child "C" apply for adjustment of status under section 245(i) as dependents of principal alien "A"?

Spouse "B" and child "C" may not apply for adjustment of status under section 245(i) as dependents of principal alien "A." Spouse "B" and child "C" are not grandfathered aliens on the basis of principal alien "A's" application for labor certification, as the spouse and child relationships did not exist on the date of the filing of the application. Moreover, because the spouse and child relationships were established after the principal alien adjusted status to an LPR, spouse "B" and child "C" are not eligible as "accompanying" or "following-to-join" spouse and child under section 203(d) of the Act.

E. Multiple Filings for Adjustment of Status under Section 245 of the Act

Section 245 of the Act does not stipulate when or how often an alien may file an application for adjustment of status. As such, there is no restriction on the number of times an alien may properly seek to adjust status, except as noted in (2) below.

(1) Timing of the Filing of an Application to Adjust Status. A grandfathered alien is not required to submit Form I-485 by a particular date. The mere filing of a qualifying immigrant visa petition or application for labor certification, however, does not confer status upon an alien nor place an alien in a period of stay authorized by the Secretary of Homeland Security for purposes of section 212(a)(9) of the Act. The filing of Form I-485 will prevent an alien from accruing unlawful presence under section 212(a)(9)(B) and (C) of the Act.

(2) Eligibility to File an Application to Adjust Status. A grandfathered alien is eligible to file an application to adjust status under section 245(i) as long as the alien meets the requirements of 8 CFR 245.10 and has ***not*** adjusted status under section 245(i). USCIS no longer considers an alien "grandfathered" once the alien is granted adjustment of status under section 245(i), because the alien has acquired the only intended benefit of grandfathering: LPR status.

4. Use

This memorandum is intended solely for the training and guidance of USCIS personnel in performing their duties relative to the adjudication of applications for adjustment of status. It is not intended to, does not, and may not be relied upon to create any right or benefit, substantive or procedural, enforceable at law of by any individual or other party in removal proceedings, in litigation with the United States, or in any other form or manner.

5. Contact Information

Questions regarding this memorandum and USCIS policy regarding section 245(i) of the Act may be directed to Mark Phillips, USCIS Office of Program and Regulations Development, through appropriate supervisory channels.