U.S. Department of Justice
Immigration and Naturalization Service

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Office of the Executive Associate Commissioner

425 I Street NW
Washington, DC 20536

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MEMORANDUM FOR All Regional Directors
All District Directors
All Officers in Charge
All Service Center Directors
Asylum Directors
District Counsels
Training Facilities: Glynco, GA and Artesia, NM

FROM: Robert L. Bach
Executive Associate Commissioner
Office of Policy and Programs

SUBJECT: Accepting Applications for Adjustment of Status Under Section 245(i) of the Immigration and Nationality Act.

Purpose

The purpose of this memorandum is to provide additional guidance concerning the acceptance of applications for adjustment of status under section 245(i) of the Immigration and Nationality Act (Act). This memorandum clarifies the Service's January 9, 1998 memorandum with respect to the final paragraph, "The effect of the January 14, 1998 sunset date on eligibility to apply for adjustment of status under section 245(i) of the Act." This memorandum officially adopts the "alien-based" reading of section 245(i), provides the standard for review of pre-January 15, 1998 filings, and discusses the evidence required for family-based petitions filed before the sunset date. Future guidance will discuss the processing of employment-based petitions and labor certifications filed before January 15, 1998.

The Office of Field Operations concurs with this memorandum.

Background

Section 245 of the Act allows an alien to adjust his or her status to that of a lawful permanent resident (LPR) while in the United States if certain conditions are met. Among these are that the alien have been inspected and admitted or paroled and not engaged in unauthorized employment. Section 245(i) of the Act allows certain aliens to adjust status under section 245

notwithstanding the fact that some of these conditions are not met. From October 1, 1994 to January 14, 1998, any alien willing to pay the additional fee specified in section 245(i) who met the other requirements of section 245 could adjust status under that section.

Changes made to section 245(i) in the Departments of Commerce, State and Justice Appropriations Act for 1998, Pub. L. No 105-119, 111 Stat. 2440 (1997) limit the class of aliens who may avail themselves of the exception under section 245(i) to the general section 245 requirements. This memorandum provides instruction regarding the acceptance of applications for adjustment of status under section 245(i).

Who May Use Section 245(i)

In order to take advantage of section 245(i) after January 14, 1998, an alien must be the beneficiary of an immigrant visa petition filed with the Attorney General on or before January 14, 1998 or application for a labor certification filed with the Secretary of Labor on or before that date. Section 245(i) now reads as follows:

> (i)(1) Notwithstanding the provisions of subsections (a) and (c) of this section, an alien physically present in the United States--
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> (A) who --
>
> (i) entered the United States without inspection; or
>
> (ii) is within one of the classes enumerated in subsection (c) of this section; and
>
> (B) who is the beneficiary (including a spouse or child of the principal alien, if eligible to receive a visa under section 203(d)) of--
>
> (i) a petition for classification under section 204 that was filed with the Attorney General on or before January 14, 1998; or
>
> (ii) an application for a labor certification under section 212(a)(5)(A) that was filed pursuant to the regulations of the Secretary of Labor on or before such date;
>
> may apply to the Attorney General for the adjustment of his or her status to that of an alien lawfully admitted for permanent residence. The Attorney General may accept such application only if the alien remits with such application a sum equaling $1,000 as of the date of receipt of the application

The "alien-based" reading

The Service has adopted what has come to be known as the "alien-based" reading of section 245(i). Under this reading, it is the alien beneficiary of a visa petition or labor certification filed on or before January 14 who is "grandfathered" and thus able to adjust status under 245(i). In other words, the pre-January 15th filing allows the alien to use 245(i) as the vehicle for adjustment, but the basis for the adjustment may be obtained through a different filing, including a petition submitted and approved after January 14, 1998, or a diversity visa application.

Adjustment of status under section 245(i) of the Act was not available until October 1, 1994. Thus, in order to be grandfathered, the pre-January 15 petition or application for labor certification must have been pending on or filed after that date.

"Approvable When Filed"

Not all pre-January 15, 1998 immigrant visa petitions or labor certification applications will result in grandfathering. In order for a pre-January 15, 1998 filing to grandfather the alien, the filing must have been approvable at the time of filing. In order to be approvable at the time of filing for the purposes of grandfathering, a pre-January 15 filing must meet all applicable substantive requirements for that filing. **Pre-January 15 filings that are deficient because they were submitted without fee, or because they were fraudulent or without any basis in law or fact, should not be considered to have grandfathered the alien.**

Effects of grandfathering

Section 245(i) requires that the alien be the beneficiary of a timely filed immigrant visa petition or application for labor certification. Various factors in the adjudication process will determine whether an alien continues to be such a beneficiary. Some aliens who are the beneficiaries of immigrant visa petitions or applications for labor certifications filed on or before January 14, 1998, will obtain a visa number through the Department of State's diversity visa lottery program before their timely-filed immigrant visa or labor certification becomes current. Such aliens may adjust on the basis of their current diversity immigrant eligibility while using their other pre-January 15th visa petition or labor certification to establish eligibility for the benefits of section 245(i). It is important to remember that while a grandfathered visa petition or labor certification can support a diversity immigrant's adjustment under section 245(i), a previously filed diversity immigrant application *cannot* grandfather an alien for benefits under section 245(i). Since diversity immigrant applications are filed with the Department of State, they do not meet the section 245(i) definition of a petition "filed with the Attorney General" or a labor certification application "filed pursuant to the regulations of the Secretary of Labor."

There are many similar situations involving a variety of petitions. Applicants may change employers or petitioners, may remarry, or may become the beneficiaries of new petitions for any number of reasons. As long as the alien seeking to adjust status based on section 245(i) is recognized as the "beneficiary" of a qualifying pre-January 15th petition or labor certification application, the alien may adjust status under that section using a visa number obtained through a post-January 14 filing.

Filing issues regarding unadjudicated cases

Section 245(i) requires the grandfathering application to have been filed on or before January 14, 1998. Adjudicators may encounter cases in which the original visa petition or labor certification application that is claimed as the basis for grandfathering under section 245(i) has not yet been acted on by the Service or the Department of Labor, while the applicant seeks to adjust status on the basis of a later and different visa category (e.g., a diversity visa number).

For family-based petitions, officers should proceed to review the pre-January 15, 1998 Form I-130 to determine whether it provides a basis for grandfathering, in accordance with the instructions in this memorandum. For unadjudicated employment-based petitions and labor certification applications, detailed field instructions regarding their evaluation will be issued separately in an upcoming memorandum.

Denials, revocations and withdrawals of visa petitions

In cases where petitions have been denied, revoked or withdrawn, adjudicators attempting to determine whether the beneficiary of the pre-January 15 filing is grandfathered must look to that filing and determine whether it was "approvable when filed." If it meets this standard, then the beneficiary is grandfathered even if the filing was later denied, revoked or withdrawn.

Adjudicators thus must be careful to look at the reasons for the denial, withdrawal or revocation. In situations in which the adverse action takes place because of a change in circumstances (e.g., petitioner goes out of business, petitioning spouse dies, derivative child ages out), the filing is likely to have been approvable when filed. However, in cases where there is no change in circumstances, then the reasons for denial are likely to relate to eligibility at the time of filing and will likely preclude a finding that the petition was approvable when filed. Petitions that are denied or revoked due to fraud are not approvable when filed and therefore do not serve as a basis for grandfathering.

Family-based immigrant visa petitions filed with the Attorney General

In order to be approvable at the time of filing for the purposes of grandfathering, a family-based visa petition must meet all applicable substantive requirements for obtaining immigrant classification in the category for which the petition was filed. This includes, for

example, the existence of the qualifying relationship at the time the petition was filed. Cases that are deficient because they were submitted without fee, or because they were fraudulent or without any basis in law or fact, should be denied and should not be considered to have grandfathered the alien. This includes cases in which the claimed relationship does not exist or cannot serve as the basis for immigration (e.g., a relative petition for a cousin).

It is the applicant's burden to establish that he or she is eligible for the grandfathering benefit sought. While adjudicators should make reasonable efforts to verify an alien's claim that he or she is eligible to adjust status under section 245(i), the alien must ultimately provide proof that he or she is grandfathered. If a check of Service records and available files does not substantiate an alien's claim to be grandfathered and the alien cannot establish this fact to the adjudicator's satisfaction, then the applicant cannot be treated as a grandfathered alien.

When the pre-January 15, 1998 petition has already been approved, it meets the "approvable when filed" standard and thus provides a basis for grandfathering unless the approval was later revoked. It is important to note, however, that denied, revoked, and pending cases may also meet the "approvable when filed" standard, as discussed above.

When the I-130 that supports the grandfathering claim is unadjudicated, officers should review the petition to determine whether it was "approvable when filed." Cases that are deficient because the Service requires additional information, such as a birth or marriage certificate, and in which the petitioner would ordinarily be allowed to provide the additional information pursuant to 8 CFR 103.2(b)(8) are sufficient for grandfathering purposes once the additional information is submitted and the Service concludes that the petition was "approvable when filed."

In some cases, it may be difficult for the alien to present or for the Service to secure relevant records to determine whether an alien is grandfathered or to reconstruct whether a petition would have been "approvable when filed." In these cases, officers should contact the Headquarters Office of Adjudications, as described at the end of this memorandum, for further guidance.

Employment-based immigrant visa petitions filed with the Attorney General

An alien who claims to be grandfathered based on an employment-based pre-January 15, 1998 filing with the Service must show evidence of that filing when submitting the subsequent application for adjustment of status – for example, the INS-issued receipt dated before January 15, 1998. Again, it is the applicant's burden to establish that he or she is eligible for the grandfathering benefit sought, but adjudicators should make reasonable efforts to verify an alien's claim that he or she is eligible to adjust status under section 245(i). When the pre-January 15, 1998 petition has already been approved, it meets the "approvable when filed" standard and thus provides a basis for grandfathering unless the approval was later revoked. It is important to note, however, that denied, revoked, and pending cases may also meet the "approvable when filed" standard, as discussed above.

Internal discussions are continuing about the appropriate handling of employment-based petitions filed directly with the Service when they provide the claimed basis for grandfathering. Special consideration is required since the pre-January 15 petition could be pending for adjudication at a Service Center while a subsequent petition for the grandfathered alien is pending at a district office. In addition, the question of whether a denied, revoked, or withdrawn petition may have been "approvable when filed" but was affected by changed circumstances is more complex. Further guidance will be provided in a future memorandum.

Applications for labor certification filed with the Secretary of Labor

When the claimed basis for grandfathering is an application for labor certification filed with the Secretary of Labor, the beneficiary of that application must demonstrate that the application meets all relevant regulatory requirements established by the Secretary of Labor for filing the application. Until further notice, the Service will accept and hold applications for adjustment of status for consideration as grandfathered under section 245(i) based on the alien's representation that the employer filed an Application for Alien Employment Certification, ETA 750, Parts A & B, on his or her behalf before January 15, 1998. Discussions are ongoing with the Department of Labor concerning the appropriate proof of pre-January 15 filing and satisfaction of the "approvable when filed" standard with respect to these cases. Further guidance will follow based on those discussions.

Used petitions

Once a visa petition or labor certification has been used as the basis for admission as an immigrant or for adjustment of status, the underlying visa petition or labor certification cannot be used again. Thus, even though such a petition or labor certification application was filed on or before the January 14 cut-off date, it cannot be used as the basis for section 245(i) grandfathering. Adjudicators should be careful to distinguish between used and unused visa petitions and labor certifications.

Correct allocation of visa numbers

In cases in which a grandfathered alien is adjusting status on the basis of a visa petition or application for labor certification other than the one serving as the basis for grandfathering, the adjudicator should take care to request a visa number from the Department of State in the category under which the alien is actually adjusting his or her status and not in the original grandfathered visa category. This is especially important when the visa providing the basis for adjustment was obtained through the Diversity Lottery program.

Amenability to removal proceedings

The Service has determined as a matter of policy that aliens with pending, affirmative applications for adjustment of status before the Service under both sections 245(a) and 245(i) of the Act are in a period of stay authorized by the Attorney General for the sole purpose of calculating periods of unlawful presence as defined in section 212(a)(9)(B) of the Act. This period of authorized stay shall include the period during which a denied application is renewed during the course of a removal proceeding.

The mere filing of a grandfathering petition or application for a labor certification does not place the alien in a period of stay authorized by the Attorney General. Absent some other factor placing the alien in such a period of authorized stay, the alien continues to accrue periods of unlawful presence.

Once the Service encounters an alien who is the beneficiary of a grandfathering immigrant visa petition or application for labor certification, the fact that the alien is such a beneficiary is not a bar to the commencement of removal proceedings. The fact that the alien is the beneficiary of a grandfathering petition which may ultimately allow him or her to seek adjustment of status is, however, an important factor to be considered in determining whether Service resources are best utilized by commencing removal proceedings against that particular alien.

Acceptance of Applications

Because the Service has adopted the alien-based reading, Service offices should accept applications for adjustment of status under section 245(i) of the Act if the alien can show that he or she is the beneficiary of a pre-January 15, 1998 filing as described above. The Service is in the process of developing more detailed instructions for the adjudication of these applications and will issue this guidance in the near future.

Point of Contact

Questions concerning this memorandum or policy issues related to section 245(i) should be referred to Pearl Chang, Chief, Residence and Status Branch, Office of Adjudications, at 202-514-4754, through appropriate channels.