INS Issues Interim Final Regulation on Section 245(i) Under LIFE Act Amendments

March 26, 2001

The Immigration and Naturalization Service has issued an interim final regulation governing the implementation of section 245(i) under the LIFE Act Amendments.

One key feature of the regulation is that INS will consider petitions to be filed as of the postmark date, instead of the receipt date, for these purposes.

The interim regulation, published at 66 FR 16383, appears below:

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[Federal Register: March 26, 2001 (Volume 66, Number 58)]
[Rules and Regulations]
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DEPARTMENT OF JUSTICE

Immigration and Naturalization Service

8 CFR Part 245

[INS No. 2078-00; AG Order No. 2411-2001]
RIN 1115-AF91

Adjustment of Status To That Person Admitted for Permanent Residence; Temporary Removal of Certain Restrictions of Eligibility

AGENCY: Immigration and Naturalization Service, Justice, and Executive Office for Immigration Review, Justice.

ACTION: Interim rule with request for comments.

SUMMARY: The Department of Justice (Department) is amending its regulations governing eligibility for adjustment of status under section 245(i) of the Immigration and Nationality Act (Act) to conform the regulations to existing policy and procedures and to remove language that has been superseded by subsequent legislation. Specifically, this interim rule conforms the regulations to include the changes made by the Departments of Commerce, State, Justice and the Judiciary Appropriations Act of 1998 and the Legal Immigration Family Equity Act Amendments of 2000. This rule adds the new sunset date of April 30, 2001, for the filing of qualifying petitions or applications that enable the applicant to apply to adjust status using section 245(i) of the Act, clarifies the effect of the new sunset date on eligibility, and discusses motions to reopen. This means that in order to preserve the ability to apply for adjustment of status under section 245(i), an alien must be the beneficiary of a visa petition for classification under section 204 of the Act that was filed with the Attorney General, or an application for labor certification properly filed with the Secretary of Labor, on or before April 30, 2001, and determined to have been approvable when filed. This rule also provides guidance on the standard for review of immigrant visa petitions and applications for labor certification filed on or before April 30, 2001.

DATES: Effective date. This rule is effective March 26, 2001.

Comment date. Comments must be submitted on or before May 25, 2001.

ADDRESSES: For matters relating to the Immigration and Naturalization Service (Service), please submit written comments to the Director, Policy Directives and Instructions Branch, Immigration and Naturalization Service, 425 I Street NW., Room 4034, Washington, DC 20536, or via fax to (202) 305-0143. To ensure proper handling, please reference INS number 2078-00 on your correspondence. Comments are available for public inspection at this location by calling (202) 514-3048 to arrange for an appointment. For matters relating to the Executive Office for Immigration Review (EOIR), please submit written comments to Charles Adkins-Blanch, General Counsel, EOIR, 5107 Leesburg Pike, Suite 2400, Falls Church, VA 22041, or via fax to (703) 305-0443. To ensure proper handling, please reference INS number 2078-00 on your correspondence.

FOR FURTHER INFORMATION CONTACT: For questions regarding the Service, contact Michael Valverde, Residence and Status Branch, Immigration and Naturalization Service, 425 I Street, NW., Room 3214, Washington, DC 20536, Telephone (202) 514-4754.

For questions regarding EOIR, contact Charles Adkins-Blanch, General Counsel, EOIR, 5107 Leesburg Pike, Suite 2400, Falls Church, VA 22041, Telephone (703) 305-0470.

SUPPLEMENTARY INFORMATION:

Background

What Is Section 245 of the Act?

Section 245 of the Act (8 U.S.C. 1255) allows the Attorney General, in his discretion, to adjust the status of an alien who has an immigrant visa immediately available to that of a lawful permanent resident (LPR) while the alien remains in the United States in lieu of applying for an immigrant visa at a U.S. consular office abroad, if certain conditions are met. An alien must have been inspected and admitted or paroled, be eligible for an immigrant visa and admissible for permanent residence and, with some exceptions, have maintained lawful nonimmigrant status. The alien must not have engaged in unauthorized employment.

What Is Section 245(i) of the Act?

Section 245(i) of the Act (8 U.S.C. 1255(i)) allows certain aliens with an immigrant visa immediately available to them to apply to adjust status upon payment of a $1,000 surcharge, even though the alien entered the United States without inspection or does not meet the maintenance of status and authorized employment requirements of section 245(c) of the Act (8 U.S.C. 1255(c)). Section 245(i) of the Act does not excuse any grounds of inadmissibility under section 212(a) of the Act (8 U.S.C. 1182(a)).

The Departments of Commerce, State, Justice and the Judiciary Appropriations Act of 1998, Public Law 105-119, section 111 (111 Stat. at 2458) (1997), significantly revised Section 245(i) and set a January 14, 1998, sunset date. After January 14, 1998, an alien could file an application for adjustment of status under Section 245(i) of the Act only if that alien was the beneficiary of either (1) an immigrant visa petition under Section 204 of the Act (8 U.S.C. 1154) that was filed with the Attorney General on or before January 14, 1998; or (2) an application for labor certification that was filed pursuant to the regulations of the Secretary of Labor by the alien's employer on or before that date. Such a visa petition or application for labor certification served to ``grandfather'' the alien beneficiary (that is, to preserve the alien's ability to file an application for adjustment of status under Section 245(i)) if the visa petition or application for labor certification was properly filed on or before the sunset date, under the appropriate regulations, and was approvable when filed.

What Changes Were Made by the Most Recent Amendments to Section 245(i)?

The Legal Immigration Family Equity Act Amendments of 2000, Title XV of Public Law 106-554, section 1502 (114 Stat. at 2764) (enacted Dec. 21, 2000) (the LIFE Act Amendments) extended the Section 245(i) (8 U.S.C. 1255(i)) sunset date from January 14, 1998, to April 30, 2001. That Act also requires

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that, if the qualifying visa petition or labor certification application was filed after January 14, 1998, the alien must have been physically present in the United States on the date of enactment (December 21, 2000) to be eligible to apply for adjustment of status under Section 245(i).

What Does This Rule Do?

The previous regulations relating to Section 245(i) of the Act (8 U.S.C. 1255(i)), 8 CFR 245.10, were never amended to conform to the 1997 statutory changes to Section 245(i). The Department had developed a set of guidelines to implement Section 245(i) for aliens who were grandfathered (i.e., who were the beneficiaries of qualifying visa petitions or labor certification applications filed by the sunset date). In view of the changes made by the LIFE Act Amendments and the apparent intention of Congress to apply the amended law consistently with past interpretations, this rule is intended to conform Sec. 245.10 to the existing standards and to implement the new physical presence requirement. The rule also eliminates provisions from the existing regulation that have been obsolete since the 1997 amendments to Section 245(i).

How Does an Alien Become Grandfathered for Purposes of Section 245(i) of the Act?

To be grandfathered for purposes of Section 245(i) of the Act (8 U.S.C. 1255(i)), the alien must be the beneficiary of an immigrant visa petition or a labor certification application that (1) is filed on or before April 30, 2001, and (2) meets the requirements of the Act and these regulations. A visa petition or labor certification application that meets all of the applicable requirements so as to grandfather the alien beneficiary is referred to as a qualifying visa petition or a qualifying labor certification application. In addition, if the qualifying petition or qualifying application was filed after January 14, 1998, the alien beneficiary must also have been physically present in the United States on December 21, 2000, to be eligible to apply for adjustment under Section 245(i). The physical presence requirement is discussed later.

Since Section 245(i) was amended in 1997, the Department has adopted what has come to be known as an ``alien-based'' reading of Section 245(i). This means that the alien is grandfathered by the filing of a qualifying visa petition or qualifying labor certification application, for purposes of preserving the alien's eligibility to apply to adjust status under Section 245(i), but the alien is not limited to that particular petition or application as the only possible basis for adjustment of status. The qualifying petition or application that grandfathers the alien serves to preserve the alien's opportunity to file for adjustment of status under Section 245(i) at a later time, at which point the grandfathered alien becomes eligible for adjustment of status on any proper basis.

For example, if an alien is properly grandfathered as the beneficiary of a qualifying visa petition or qualifying application that was filed on or before April 30, 2001, the alien would also be eligible to adjust status under Section 245(i) if he or she later won a diversity visa.

Are the Dependent Family Members of a Grandfathered Alien Also Considered To Be Grandfathered?

Yes, a dependent spouse or child (if eligible under section 203(d) of the Act (8 U.S.C. 1153(d))) who is accompanying or following to join

a grandfathered alien is also considered to be grandfathered by the qualifying petition or qualifying application for labor certification, if the relationship exists before the principal alien adjusts his or her status.

What Documents Must Be Filed on or Before April 30, 2001?

The new sunset date of April 30, 2001, is the deadline for the filing of a qualifying visa petition or qualifying labor certification application in order to grandfather the alien beneficiary. To preserve the alien's ability to apply in the future for adjustment of status under Section 245(i) (8 U.S.C. 1255(i)), an alien must be the beneficiary of either (1) a qualifying Section 204 of the Act (8 U.S.C. 1154) immigrant visa petition that is properly filed with the Attorney General on or before April 30, 2001, and which is determined to have been approvable when filed; or (2) a qualifying application for labor certification that is properly filed on or before April 30, 2001, according to the regulations of the Secretary of Labor, and which is determined to have been approvable when filed.

An alien is not required to file his or her application for adjustment of status under Section 245(i) on or before April 30, 2001. If an alien is grandfathered (because he or she is the beneficiary of a qualifying visa petition or qualifying labor certification application filed on or before April 30, 2001), the alien will be able to submit the actual application for adjustment of status under Section 245(i) at any later time when an immigrant visa becomes available to the alien.

What Are the Requirements for a Qualifying Immigrant Visa Petition?

An alien becomes grandfathered for purposes of Section 245(i) of the Act (8 U.S.C. 1255(i)) if he or she is the beneficiary of an immigrant visa petition under Section 204 of the Act (8 U.S.C. 1154) on his or her behalf that is properly filed with the Service on or before April 30, 2001. This includes any of the following:

Form I-130, Petition for Alien Relative, filed on behalf of the alien beneficiary;

Form I-140, Immigrant Petition for Alien Worker, filed by an employer on behalf of the beneficiary;

Form I-360, Petition for Amerasian, Widow(er), or Special Immigrant, filed on behalf of the beneficiary or submitted as a self-petition under Section 204(a)(1)(A)(iii) or (a)(1)(A)(iv) filed by an eligible alien; and

Form I-526, Immigrant Petition by Alien Entrepreneur.

In any case, the visa petition must be determined to have been approvable when filed in order to grandfather the alien for purposes of Section 245(i), as discussed below.

A visa petition does not serve to grandfather the alien beneficiary if that alien has previously obtained lawful permanent resident status on the basis of that visa petition.

Other types of applications or petitions for immigration benefits--including but not limited to asylum applications, diversity visa

applications, and diversity visa lottery-winning letters--do not serve to grandfather an alien for purposes of Section 245(i), because they do not satisfy the statutory requirement that the alien must be the beneficiary of a qualifying immigrant visa petition for classification under Section 204 of the Act filed with the Attorney General or a qualifying labor certification application filed with the Secretary of Labor. Under current law, unless an alien is properly grandfathered as the beneficiary of a qualifying visa petition or qualifying application that was properly filed on or before April 30, 2001, the alien will not be able to take advantage of Section 245(i) even if he or she becomes eligible for an immigrant visa at some later date.

When Is an Immigrant Visa Petition ``Properly Filed on or Before April 30, 2001''?

To be considered properly filed, for purposes of grandfathering, the immigrant visa petition must be physically received by the Service prior

to the close of business on or before April 30, 2001, or if mailed, be postmarked on or before April 30, 2001.

The Service is applying the exception for grandfathering visa petitions contained in the regulations at 8 CFR Sec. 103.2(a)(7), which require that a petition must be physically received and stamped by the Service in order to be considered properly filed. For the purpose of grandfathering under section 245(i) of the Act (8 U.S.C. 1255(i)) only, the Service will accept as properly filed, visa petitions that are postmarked on or before April 30, 2001. In addition, given the April 30, 2001, sunset date, the Service notes that it will accept visa petitions that contain at least the minimum amount of information required by 8 CFR 103.2(a). Petitions that do not contain the names of the petitioner and the beneficiary, the proper fee, and the signature of the petitioner will not be accepted for filing.

When Is an Immigrant Visa Application ``Approvable When Filed'' for Grandfathering Purposes?

Not all immigrant visa petitions that are properly filed on or before April 30, 2001, will serve to grandfather the alien beneficiary for purposes of Section 245(i) of the Act (8 U.S.C. Sec. 1255(i)). In interpreting the language of Section 245(i) since it was amended in 1997, the Department has also required that the visa petition must have been ``approvable when filed'' to qualify the alien beneficiary for grandfathering.

``Approvable when filed'' means that, as of the date of filing the immigrant visa petition, the petition was properly filed, meritorious in fact, and non-frivolous (``frivolous'' meaning patently without substance). For example, a visa petition is not approvable when filed if it is fraudulent or if the named beneficiary did not have, at the time of filing, the appropriate family relationship or employment relationship that would support the issuance of an immigrant visa.

As noted, the Department recognizes that some immigrant visa petitions may be filed initially without all of the necessary

information for the Service to adjudicate the petition. In that case, the existing regulations at 8 CFR 103.2(b)(8) provide a process for the Service to request additional evidence and to allow the petitioner a period of 12 weeks to submit that additional evidence in support of the petition.

It is important to note, though, that all eligibility requirements must be satisfied before an immigrant visa petition can be approved. A visa petition will not qualify an alien for grandfathering unless the Service is able to determine, based on the available information (including additional evidence submitted by the petitioner after the filing of the petition) that the petition was approvable when filed.

If the Deparment has already approved the visa petition at the time the alien files an application for adjustment of status, it was approvable when filed, except as discussed below, and thus provides a basis for grandfathering. However, a visa petition may still serve as the basis for grandfathering even if it has not been adjudicated by the Service as of April 30, 2001. As discussed below, the adjudication of the visa petition on the merits is distinct from the question of whether the petition qualifies for grandfathering because it was approvable when filed.

What if an Immigrant Visa Petition Is Properly Filed on or Before April 30, 2001, but Is Later Denied, Withdrawn, or Revoked?

An immigrant visa petition on behalf of an alien beneficiary that is properly filed on or before April 30, 2001, but is subsequently denied or withdrawn, or the approval of which is revoked, may still serve to grandfather the alien, depending on the reasons for the disposition of the visa petition. The issue is whether the visa petition was approvable when filed.

Changed Circumstances Arising After the Time of Filing

As long as a qualifying visa petition was approvable when filed, the petition will still grandfather the alien even if the petition was denied or revoked due to circumstances arising after the filing of the petition as outlined at 8 CFR Sec. 205.1(a)(3)(i) or (ii). Such changed circumstances would include but are not limited to a child who has reached age 21 before the principal alien could adjust status, an employer going out of business, or a valid, bona fide marriage ending in divorce before the alien could adjust status.

These same principles apply where the petitioner withdraws an immigrant visa petition. For example, an employer that had filed an immigrant visa petition for an alien may suffer a business reversal 18 months after the date of filing and, as a result, withdraw the petition. In that case, the alien would still continue to be grandfathered for purposes of Section 245(i) of the Act, if the petition was approvable at the time of filing.

Under the ``alien-based'' reading, a grandfathered alien is not limited to filing for adjustment of status using the particular visa petition that provided the basis for grandfathering. Thus, a properly grandfathered alien with a petition that was denied or revoked due to circumstances arising after the filing of the petition may apply to adjust status using any other proper basis for adjustment. Although grandfathered by the denied or revoked petition, the alien may not use that petition as an adjustment basis, given that the petition was not approved.

Immigrant Visa Petitions Denied or Revoked Based on Ineligibility

When the Service has denied an immigrant visa petition (or has revoked a prior approval) based on ineligibility at the time of filing, the petition does not qualify to grandfather the alien beneficiary for purposes of section 245(i). Such ineligibility may be based on meritless or fraudulent petitions, such as those in which the claimed family or employment relationship at the time of the filing cannot serve as the basis for issuance of an immigrant visa.

When Is a Labor Certification Application ``Properly Filed on or Before April 30, 2001''?

To be considered properly filed, for purposes of grandfathering under Section 245(i) of the Act (8 U.S.C. 1255(i)), a labor certification application must be filed on or before April 30, 2001, according to the regulations established by the Department of Labor, 20 CFR 656.21. The sponsoring employer must properly complete and sign ETA Form 750, Parts A and B. The Labor Department considers an application for labor certification that is filed and accepted at a State Employment Security Agency (SESA) to be properly filed.

What Happens if an Employer Substitutes a New Beneficiary on a Labor Certification Application After April 30, 2001?

Only the alien who was the beneficiary of an application for labor certification on or before April 30, 2001, will be considered to be grandfathered for purposes of Section 245(i) of the Act (8 U.S.C. 1255(i)).

When Is an Application for Labor Certification ``Approvable When Filed'' for Grandfathering Purposes?

Not all applications for labor certification that are properly filed on or before April 30, 2001, will serve to grandfather the alien beneficiary for purposes of Section 245(i) of the Act (8 U.S.C. 1255(i)). In interpreting the language of Section 245(i) since it was amended in 1997, the Department has also required that the application for

labor certification must have been ``approvable when filed'' to qualify the alien beneficiary for grandfathering.

``Approvable when filed'' 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).

What Happens if an Alien Is Already in Immigration Proceedings?

If an alien is already in immigration proceedings and believes that he or she may be eligible to apply to adjust status under Section 245(i) of the Act (8 U.S.C. 1255(i)), he or she should raise the matter with the Immigration Judge or the Board of Immigration Appeals according to the established procedures. Certain aliens in exclusion

proceedings and certain arriving aliens, however, cannot apply for Section 245(i) adjustment.

If an Alien Already Is the Subject of a Final Order of Removal, Deportation or Exclusion, What is the Procedure for Moving To Reopen Based on Section 245(i)?

The LIFE Act Amendments contain no special provisions for reopening cases under Section 245(i) of the Act (8 U.S.C. 1255(i)) where an alien already is the subject of a final order of removal, deportation or exclusion. Accordingly, motions to reopen based on Section 245(i) will be governed by the Department's current rules regarding motions to reopen, 8 CFR 3.23 (before the Immigration Judge) and 3.2 (before the Board of Immigration Appeals), which contain time and numerical limitations on the filing of such motions. See 8 CFR 3.23(b)(1) and 3.2(c)(2). The rules, however, do provide for limited exceptions to these time and numerical limitations, among which is a motion to reopen filed jointly by the alien and the Service counsel in the case. Therefore, an alien who is the subject of a final order who alleges eligibility for adjustment of status under Section 245(i) may contact the Service counsel to request the filing of a joint motion to reopen. The Service will exercise its discretion in reviewing these cases. However, there are provisions in the Immigration and Nationality Act which limit the Attorney General's ability to grant certain forms of discretionary relief, including adjustment of status, for a period of time, to particular categories of aliens with final orders, including but not limited to aliens whose orders were entered in absentia for failure to appear, and aliens who failed to voluntarily depart the United States within the time period specified.

How is an Alien's Nonimmigrant Status in the United States Affected if he or she is Grandfathered?

An alien's nonimmigrant status in the United States is not affected by the fact that he or she is grandfathered. The petition that serves to grandfather the alien neither extends an alien's nonimmigrant status nor authorizes employment in the United States. The immigrant visa petition or application for labor certification that serves to grandfather the alien does not serve to stay any order of removal, deportation, or exclusion.

What Effect Does a Grandfathering Petition Have on an Alien's Unlawful Presence in the United States if he or she Has Entered Without Inspection or Remained Beyond the Authorized Period of Admission?

The mere filing of a visa petition or application for a labor certification that has the effect of grandfathering the alien has no effect on an alien's unlawful presence in the United States and does not place the alien in a ``period of stay authorized by the Attorney General'' for purposes of section 212(a)(9)(B) of the Act (8 U.S.C. 1182(a)(9)(B)). Absent some other factor placing the alien in such a period of authorized stay, the alien continues to accrue periods of unlawful presence until he or she properly files an application for adjustment of status. A properly filed application for adjustment of status under Section 245(i) of the Act (8 U.S.C. 1255(i)) places the

alien in a ``period of stay authorized by the Attorney General'' for purposes of section 212(a)(9)(B) and (C) of the Act (8 U.S.C. 1182(a)(9)(B) and (C)).

Filing an application for adjustment of status stops the accrual of unlawful presence, but does not eliminate periods of unlawful presence accrued before such filing.

When Is an Alien Applying for Adjustment of Status Under Section 245(i) Required to Demonstrate Physical Presence in the United States?

If an alien is the beneficiary of a qualifying immigrant visa petition, or qualifying application for labor certification, that was filed after January 14, 1998, then the alien must have been physically present in the United States on December 21, 2000, to be eligible to use Section 245(i) of the Act (8 U.S.C. 1255(i)). The physical presence requirement does not apply if the qualifying petition or application was filed on or before January 14, 1998, regardless of when the Section 245(i) application for adjustment of status itself is filed.

Proof of a grandfathered alien's physical presence is not required to be presented when a visa petition or labor certification application is filed; such proof must be presented when the alien files the Section 245(i) application for adjustment of status itself.

How Can an Applicant Demonstrate That he or she Was Physically Present in the United States on December 21, 2000?

Applicants for adjustment under Section 245(i) of the Act (8 U.S.C. 1255(i)) who are covered by the physical presence requirement must submit, at the time they file the Section 245(i) application for adjustment of status, evidence that they were physically present in the United States on December 21, 2000.

The Act is silent as to the methods by which an applicant may demonstrate his or her physical presence in the United States on that date. This rule provides guidance as to what evidence an applicant may submit to prove physical presence in the United States on December 21, 2000. This guidance largely corresponds to the existing regulations at 8 CFR 245.15(i) for aliens who must demonstrate physical presence on a specific date for purposes of the Haitian Refugee Immigrant Fairness Act of 1998 (HRIFA). The rule will incorporate, in part, the forms of documentation accepted in HRIFA regarding physical presence (8 CFR 245.15(i) and (j)(2)) and adopt them as examples of possible proof of physical presence for section 245(i). The Department is also soliciting comments on what type of evidence can be best utilized to demonstrate physical presence on December 21, 2000.

In some cases, a single document may suffice to establish the applicant's physical presence on December 21, 2000. In most cases, however, the alien may need to submit several documents, because most applicants may not possess documentation that contains the exact date of December 21, 2000. In such instances, the applicant should submit sufficient documentation establishing the applicant's physical presence in the United States prior to and after December 21, 2000.

An alien may make the demonstration of physical presence by submitting a photocopy of a Federal, state, or local government-issued document(s) that demonstrates the alien's physical presence in the United States on December 21, 2000 (or before and after that date). If

the alien is not in

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possession of such a document or documents, but believes that a copy is already contained in the Service file relating to him or her, he or she may submit a statement as to the name and location of the issuing Federal, state, or local government agency, the type of document and the date on which it was issued. Examples of such Service issued documents include, but are not limited to, Form I-94, Arrival-Departure Record, Form I-862, Notice to Appear, Form I-122, Notice to Applicant for Admission Detained for Hearing before Immigration Judge, or Form I-221, Order to Show Cause. Examples of such Federal, state, or local government issued documents include, but are not limited to, a state driver's license or identification card, a county or municipal hospital record, a public college or public school transcript, income tax records, a Federal, State, or local governmental record which was created on or prior to December 21, 2000, shows that the applicant was present in the United States at the time, or a transcript from a private or religious school that is registered with, or approved or licensed by, appropriate State or local authorities.

If there are no government-issued documents that demonstrate an alien's physical presence on December 21, 2000, the Service will accept and evaluate non-government issued documents. Such documentation must bear the name of the applicant, have been dated at the time it was issued, and bear the seal or signature of the issuing authority (if the documentation is normally signed or sealed), be issued on letterhead stationery, or be otherwise authenticated. A personal affidavit attesting to physical presence on December 21, 2000, will not be accepted without additional evidence to validate the affidavit. Examples of such non-government issued documents include, but are not limited to, school records, rental receipts, utility bills, cancelled personal checks, employment records, or credit card statements.

In all cases, any doubts as to the existence, authenticity, veracity, or accuracy of the documentation shall be resolved by the official government record, with records of the Service and the Executive Office for Immigration Review (EOIR) having precedence over the records of other agencies. Furthermore, determinations as to the weight to be given any particular document or item of evidence shall be solely within the discretion of the adjudicating authority (i.e., the Service or EOIR). It shall be the responsibility of the applicant to obtain and submit copies of the records of any other government agency that the applicant desires to be considered in support of his or her application.

Do the Dependent Family Members of a Grandfathered Alien Need to Meet the December 21, 2000, Physical Presence Requirement?

No, the dependent spouse or children of a grandfathered alien are not required to meet the physical presence requirement. Only the principal beneficiary of an immigrant visa petition or application for labor certification filed after January 14, 1998, and on or before April 30, 2001, needs to demonstrate his or her physical presence in the United States on December 21, 2000.

What Outdated Information Is Being Removed From the Regulations?

The Department amends 8 CFR 245.10 to remove language made obsolete by Public Law 105-119 and Public Law 106-554, specifically: language that refers to fee amounts for applications filed before December 29, 1996; and language that ends the application period for adjustment applications on October 23, 1997. The new language conforms the regulations to the existing law and established procedures.

Congressional Review Act

Although this rule falls under the category of major rule as that term is defined in 5 U.S.C. 804(2)(A), the Department finds that under 5 U.S.C. 808(2) good cause exists for immediate implementation of this regulation upon publication in the Federal Register. The reason and necessity for immediate implementation are as follows: Under the statutory (LIFE Act) changes that went into effect on December 21, 2000, individuals who want preserve their ability to adjust their immigration status under section 245(i) of the Act must do so by April 30, 2001. Accordingly, because there is a very short window of opportunity for these individuals to apply, the Department finds that delaying the effective date of this rule is impracticable, unnecessary, and contrary to the public interest.

Good Cause Exception

The Department's implementation of this rule as an interim rule with provisions for post-promulgation comment, and with an immediate effective date, is based on the ``good cause'' exceptions found at 5 U.S.C. 553(b)(3)(B) and (d)(3). The implementation of this rule without prior notice and comment, and without a delayed effective date, is necessary to implement recently enacted statutory changes that took effect upon enactment on December 21, 2000. There is a very short window of opportunity (ending on April 30, 2001) provided by the new law for the filing of immigrant visa petitions and applications for labor certification, in order to preserve the ability of eligible aliens to adjust their status under Section 245(i) of the Act (8 U.S.C. 1255(i)).

This rule implements a portion of the LIFE Act Amendments by setting forth the procedural instructions on the proper filing of immigrant visa petitions, applications for labor certification, and applications for adjustment of status under Section 245(i). Certain individuals, if they miss the opportunity to use Section 245(i) to adjust their status while in the United States, may be subject to the 3 or 10 year bars to admission under Section 212(a)(9) (8 U.S.C. 1182(a)(9)) if they leave the United States to apply for an immigrant visa at a U.S. consular office abroad. It would be impractical and contrary to the public interest to publish a proposed rule or to delay the effective date of these procedural instructions, because the public comment period and a delayed effective date would consume most of the very limited time statutorily available for qualified applicants to take advantage of the new law. The Department will fully consider all comments about this interim rule that are submitted during the comment period.

Regulatory Flexibility Act

The Attorney General, in accordance with the Regulatory Flexibility Act (5 U.S.C. 605(b)), has reviewed this regulation and, by approving it, certifies that this rule will not have a significant economic impact on a substantial number of small entities. This rule affects individuals by temporarily removing certain restrictions on eligibility for adjustment of status in accordance with Public Law 110-119. This rule is intended to eliminate inconvenience to a number of individuals currently in the United States who otherwise would be required to incur significant monetary expenses by traveling abroad to apply for an immigrant visa at a United States consulate or embassy. This interim rule will have no effect on small entities as that term is defined in 5 U.S.C. 601(6).

Unfunded Mandates Reform Act of 1995

This rule will not result in the expenditure by State, local and tribal governments, in the aggregate, or by the private sector, of $100 million or more in 1 year, and it will not significantly or uniquely affect small governments.

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Therefore, no actions were deemed necessary under the provisions of the Unfunded Mandates Reform Act of 1995.

Small Business Regulatory Enforcement Fairness Act of 1996

This rule is a major rule as defined by the Small Business Regulatory Enforcement Act of 1996. This rule will result in an effect on the economy of approximately:

$178,300,000 for 2001,
$99,200,000 for 2002, and
$91,900,000 for 2003.

This increase in cost is directly associated with the expected increase in the number of applications for adjustment of status submitted under section 245(i) of the Act (8 U.S.C. 1255(i)) with the required $1,000 penalty fee and other associated applications. Section 1502 of the LIFE Amendments, Public Law 106-554, reinstates section 245(i) until April 30, 2001. The reinstatement of section 245(i) provides some previously ineligible individuals with the opportunity to file the proper forms to preserve their ability to use section 245(i). The Service projects that in fiscal year 2001, a total 946,000 applications will be submitted because of the reinstatement of section 245(i) of the Act as follows:

500,000 Forms I-130;
50,000 Forms I-140;
148,500 Forms I-765;
82,500 Forms I-131; and
165,000 Forms I-485.

In addition, the Department of Labor projects that at least 40,000 Forms ETA 750 will be submitted. The Service projects that in fiscal year 2002, a total of 324,000 total applications will be submitted as follows:

121,500 Forms I-765;
67,500 Forms I-131; and
135,000 Forms I-485.

The Service projects that in fiscal year 2003, a total of 300,000 applications will be submitted as follows:

112,500 Forms I-765;
62,500 Forms I-131; and
125,000 Forms I-485.

Executive Order 12866

This rule is considered by the Department of Justice to be an ``economically significant regulatory action'' under Executive Order 12866, Regulatory Planning and Review. Accordingly, this rule has been submitted to the Office of Management and Budget for review.

Executive Order 13132

This rule will not have substantial direct effects on the States, on the relationship between the National Government and the States, or on the distribution of power and responsibilities among the various levels of government. Therefore, in accordance with Section 6 of Executive Order 13132, it is determined that this rule does not have sufficient federalism implications to warrant the preparation of a federalism summary impact statement.

Executive Order 12988

This interim rule meets the applicable standards set forth in Sections 3(a) and 3(b)(2) of Executive Order 12988.

Paperwork Reduction Act

This interim rule does not impose any new reporting or recordkeeping requirements. The information collection requirements pertaining to this rule were previously approved for use by the Office of Management and Budget (OMB). The OMB control numbers for these collections are contained in 8 CFR 299.5, Display of Control Numbers.

List of Subjects in 8 CFR Part 245

Aliens, Immigration, Reporting and recordkeeping requirements.

Accordingly, chapter I of title 8 of the Code of Federal Regulations is amended as follows:

PART 245--ADJUSTMENT OF STATUS TO THAT OF PERSON ADMITTED FOR PERMANENT RESIDENCE

1. The authority citation for part 245 continues to read as follows:

Authority: 8 U.S.C. 1101, 1103, 1182, 1255; sec. 202, Pub. L. 105-100, 111 Stat. 2160, 2193; Sec. 902, Pub. L. 105-277, 112 Stat. 2681; 8 CFR part 2.

2. Section 245.10 is amended by:

a. Revising the section heading;

b. Removing paragraph (c);

c. Redesignating paragraphs (a) and (b) as paragraphs (b) and (c) respectively;

d. Adding a new paragraph (a);

e. Revising newly redesignated paragraph (b) introductory text;

f. Revising newly redesignated paragraphs (b)(4), (b)(5), and (b)(7);

g. Revising newly redesignated paragraph (c) introductory text;

h. Revising the phrase ``receipt of approval'' to read ``receipt or approval'' in the first sentence of newly redesignated paragraph (c)(3);

i. Revising paragraph (d);

j. Revising paragraph (e);

k. Revising paragraph (f); and

l. Adding new paragraphs (h), (i), (j), (k), (l), (m), and (n).

The additions and revisions to read as follows:

Sec. 245.10 Adjustment of status upon payment of additional sum under section 245(i).

(a) Definitions. As used in this section the term:

(1)(i) Grandfathered alien means an alien who is the beneficiary (including a spouse or child of the alien beneficiary if eligible to receive a visa under section 203(d) of the Act) of:

(A) A petition for classification under section 204 of the Act which was properly filed with the Attorney General on or before April 30, 2001, and which was approvable when filed; or

(B) An application for labor certification under section 212(a)(5)(A) of the Act that was properly filed pursuant to the regulations of the Secretary of Labor on or before April 30, 2001, and which was approvable when filed.

(ii) If the qualifying visa petition or application for labor certification was filed after January 14, 1998, the alien must have been physically present in the United States on December 21, 2000. This requirement does not apply with respect to a spouse or child accompanying or following to join a principal alien who is a grandfathered alien as described in this section.

(2) Properly filed means:

(i) With respect to a qualifying immigrant visa petition, that the application was physically received by the Service on or before April 30, 2001, or if mailed, was postmarked on or before April 30, 2001, and accepted for filing as provided in Sec. 103.2(a)(1) and (a)(2) of this chapter; and

(ii) With respect to a qualifying application for labor certification, that the application was properly filed and accepted pursuant to the regulations of the Secretary of Labor, 20 CFR 656.21.

(3) Approvable when filed means that, as of the date of the filing of the qualifying immigrant visa petition under section 204 of the Act or qualifying application for labor certification, the qualifying petition or application was properly filed, meritorious in fact, and non-frivolous (``frivolous'' being defined herein as patently without

substance). This determination will be made based on the circumstances that existed at the time the qualifying petition or application was filed. A visa petition that was properly filed on or before April 30, 2001, and was approvable when filed, but was later withdrawn, denied, or revoked due to circumstances that have arisen after the time of filing, will preserve the alien beneficiary's grandfathered status if the alien is otherwise eligible to file an application

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for adjustment of status under section 245(i) of the Act.

(4) Circumstances that have arisen after the time of filing means circumstances similar to those outlined in Sec. 205.1(a)(3)(i) or (a)(3)(ii) of this chapter.

(b) Eligibility. An alien who is included in the categories of restricted aliens under Sec. 245.1(b) and meets the definition of a ``grandfathered alien'' may apply for adjustment of status under section 245 of the Act if the alien meets the requirements of paragraphs (b)(1) through (b)(7) of this section:

* * * * *

(4) Properly files Form I-485, Application to Register Permanent Residence or Adjust Status on or after October 1, 1994, with the required fee for that application;

(5) Properly files Supplement A to Form I-485 on or after October 1, 1994;

* * * * *

(7) Will adjust status under section 245 of the Act to that of lawful permanent resident of the United States on or after October 1, 1994.

(c) Payment of additional sum. An adjustment applicant filing under the provisions of section 245(i) of the Act must pay the standard adjustment application filing fee as specified in Sec. 103.7(b)(1) of this chapter. Each application submitted under the provisions of section 245(i) of the Act must be submitted with an additional sum of $1,000. An applicant must submit the additional sum of $1,000 only once per application for adjustment of status submitted under the provisions of section 245(i) of the Act. However, an applicant filing under the provisions of section 245(i) of the Act is not required to pay the additional sum if, at the time the application for adjustment of status is filed, the alien is:

* * * * *

(d) Pending adjustment application with the Service or Executive Office for Immigration Review filed without Supplement A to Form I-485 and additional sum. An alien who filed an adjustment of status application with the Service in accordance with Sec. 103.2 of this chapter will be allowed the opportunity to amend such an application to request consideration under the provisions of section 245(i) of the Act, if it appears that the alien is not otherwise ineligible for adjustment of status. The Service shall notify the applicant in writing of the Service's intent to deny the adjustment of status application, and any other requests for benefits that derive from the adjustment application, unless Supplement A to Form I-485 and any required additional sum is filed within 30 days of the date of the notice. If the application for adjustment of status is pending before the Executive Office for Immigration Review (EOIR), EOIR will allow the

respondent an opportunity to amend an adjustment of status application filed in accordance with Sec. 103.2 of this chapter (to include Supplement A to Form I-485 and proof of remittance to the INS of the required additional sum) in order to request consideration under the provisions of section 245(i) of the Act.

(e) Applications for Adjustment of Status filed before October 1, 1994. The provisions of section 245(i) of the Act shall not apply to an application for adjustment of status that was filed before October 1, 1994. The provisions of section 245(i) of the Act also shall not apply to a motion to reopen or reconsider an application for adjustment of status if the application for adjustment of status was filed before October 1, 1994. An applicant whose pre-October 1, 1994, application for adjustment of status has been denied may file a new application for adjustment of status pursuant to section 245(i) of the Act on or after October 1, 1994, provided that such new application is accompanied by: the required fee; Supplement A to Form I-485; the additional sum required by section 245(i) of the Act; and all other required initial and additional evidence.

(f) Effect of section 245(i) on completed adjustment applications before the Service. (1) Any motion to reopen or reconsider before the Service alleging availability of section 245(i) of the Act must be filed in accordance with Sec. 103.5 of this chapter. If said motion to reopen with the Service is granted, the alien must remit to the Service Supplement A to Form I-485 and the additional sum required by section 245(i) of the Act. If the alien had previously remitted Supplement A to Form I-485 and the additional sum with the application which is the subject of the motion to reopen, then no additional sum need be remitted upon such reopening.

(2) An alien whose adjustment application was adjudicated and denied by the Service because of ineligibility under section 245(a) or (c) of the Act and now alleges eligibility due to the availability of section 245(i) of the Act may file a new application for adjustment of status pursuant to section 245(i) of the Act, provided that such new application is accompanied by the required fee for the application, Supplement A to Form I-485, additional sum required by section 245(i) of the Act and all other required and additional evidence.

* * * * *

(h) Asylum or diversity immigrant visa applications. An asylum application, diversity visa lottery application, or diversity visa lottery-winning letter does not serve to grandfather the alien for purposes of section 245(i) of the Act. However, an otherwise grandfathered alien may use winning a diversity visa as a basis for adjustment.

(i) Denial, withdrawal, or revocation of the approval of a visa petition or application for labor certification. The denial, withdrawal, or revocation of the approval of a qualifying immigrant visa petition, or application for labor certification, that was properly filed on or before April 30, 2001, and that was approvable when filed, will not preclude its grandfathered alien (including the grandfathered alien's family members) from seeking adjustment of status under section 245(i) of the Act on the basis of another approved visa petition, a diversity visa, or any other ground for adjustment of status under the Act, as appropriate.

(j) Substitution of a beneficiary on an application for a labor certification. Only the alien who was the beneficiary of the

application for the labor certification on or before April 30, 2001, will be considered to have been grandfathered for purposes of filing an application for adjustment of status under section 245(i) of the Act. An alien who was previously the beneficiary of the application for the labor certification but was subsequently replaced by another alien on or before April 30, 2001, will not be considered to be a grandfathered alien. An alien who was substituted for the previous beneficiary of the application for the labor certification after April 30, 2001, will not be considered to be a grandfathered alien.

(k) Changes in employment. An applicant for adjustment under section 245(i) of the Act who is adjusting status through an employment-based category is not required to work for the petitioner who filed the petition that grandfathered the alien, unless he or she is seeking adjustment based on employment for that same petitioner.

(l) Effects of grandfathering on an alien's nonimmigrant status . An alien's nonimmigrant status is not affected by the fact that he or she is a grandfathered alien. Lawful immigration status for a nonimmigrant is defined in Sec. 245.1(d)(1)(ii).

(m) Effect of grandfathering on unlawful presence under section

212(a)(9)(B) and (c) of the Act. If the alien is not in a period of stay authorized by the Attorney General, the fact that he or she is a grandfathered alien does not prevent the alien from accruing unlawful presence under section 212(a)(9)(B) and (C) of the Act.

(n) Evidentiary requirement to demonstrate physical presence on December 21, 2000. (1) Unless the qualifying immigrant visa petition or application for labor certification was filed on or before January 14, 1998, a principal grandfathered alien must establish that he or she was physically present in the United States on December 21, 2000, to be eligible to apply to adjust status under section 245(i) of the Act. If no one document establishes the alien's physical presence on December 21, 2000, he or she may submit several documents establishing his or her physical presence in the United States prior to, and after December 21, 2000.

(2) To demonstrate physical presence on December 21, 2000, the alien may submit Service documentation. Examples of acceptable Service documentation include, but are not limited to:

(i) A photocopy of the Form I-94, Arrival-Departure Record, issued upon the alien's arrival in the United States;

(ii) A photocopy of the Form I-862, Notice to Appear;

(iii) A photocopy of the Form I-122, Notice to Applicant for Admission Detained for Hearing before Immigration Judge, issued by the Service on or prior to December 21, 2000, placing the applicant in exclusion proceedings under section 236 of the Act (as in effect prior to April 1, 1997);

(iv) A photocopy of the Form I-221, Order to Show Cause, issued by the Service on or prior to December 21, 2000, placing the applicant in deportation proceedings under section 242 or 242A of the Act (as in effect prior to April 1, 1997);

(v) A photocopy of any application or petition for a benefit under the Act filed by or on behalf of the applicant on or prior to December 21, 2000, which establishes his or her presence in the United States, or a fee receipt issued by the Service for such application or

petition.

(3) To demonstrate physical presence on December 21, 2000, the alien may submit other government documentation. Other government documentation issued by a Federal, state, or local authority must bear the signature, seal, or other authenticating instrument of such authority (if the document normally bears such instrument), be dated at the time of issuance, and bear a date of issuance not later than December 21, 2000. For this purpose, the term Federal, state, or local authority includes any governmental, educational, or administrative function operated by Federal, state, county, or municipal officials. Examples of such other documentation include, but are not limited to:

(i) A state driver's license;

(ii) A state identification card;

(iii) A county or municipal hospital record;

(iv) A public college or public school transcript;

(v) Income tax records;

(vi) A certified copy of a Federal, state, or local governmental record which was created on or prior to December 21, 2000, shows that the applicant was present in the United States at the time, and establishes that the applicant sought on his or her own behalf, or some other party sought on the applicant's behalf, a benefit from the Federal, state, or local governmental agency keeping such record;

(vii) A certified copy of a Federal, state, or local governmental record which was created on or prior to December 21, 2000, that shows that the applicant was present in the United States at the time, and establishes that the applicant submitted an income tax return, property tax payment, or similar submission or payment to the Federal, state, or local governmental agency keeping such record;

(viii) A transcript from a private or religious school that is registered with, or approved or licensed by, appropriate State or local authorities, accredited by the State or regional accrediting body, or by the appropriate private school association, or maintains enrollment records in accordance with State or local requirements or standards.

(4) To demonstrate physical presence on December 21, 2000, the alien may submit non-government documentation. Examples of documentation establishing physical presence on December 21, 2000, may include, but are not limited to:

(i) School records;

(ii) Rental receipts;

(iii) Utility bill receipts;

(iv) Any other dated receipts;

(v) Personal checks written by the applicant bearing a bank cancellation stamp;

(vi) Employment records, including pay stubs;

(vii) Credit card statements showing the dates of purchase, payment, or other transaction;

(viii) Certified copies of records maintained by organizations chartered by the Federal or State government, such as public utilities, accredited private and religious schools, and banks;

(ix) If the applicant established that a family unit was in existence and cohabiting in the United States, documents evidencing the presence of another member of the same family unit; and

(x) For applicants who have ongoing correspondence or other interaction with the Service, a list of the types and dates of such correspondence or other contact that the applicant knows to be

contained or reflected in Service records.

(5)(i) The adjudicator will evaluate all evidence on a case-by-case basis and will not accept a personal affidavit attesting to physical presence on December 21, 2000, without requiring an interview or additional evidence to validate the affidavit.

(ii) In all cases, any doubts as to the existence, authenticity, veracity, or accuracy of the documentation shall be resolved by the official government record, with records of the Service and the Executive Office for Immigration Review (EOIR) having precedence over the records of other agencies. Furthermore, determinations as to the weight to be given any particular document or item of evidence shall be solely within the discretion of the adjudicating authority (i.e., the Service or EOIR). It shall be the responsibility of the applicant to obtain and submit copies of the records of any other government agency that the applicant desires to be considered in support of his or her application.

Dated: March 20, 2001.

John Ashcroft,

Attorney General.

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