

## **Adjustment of Status under Section 245(i) in Context of the Legal Immigration Family Equity (LIFE) Act Amendments (enacted 12/21/00)**

### **LIFE ACT AND ADJUSTMENT OF STATUS UNDER 245 (I)**

#### **Adjustment of Status**

The Immigration and Nationality Act (INA)<sup>1</sup> permits change of an alien's immigration status in the United States (US) from nonimmigrant or parolee (temporary) to immigrant (permanent) if the alien was properly admitted or paroled into the US. The term for a change from temporary to permanent status is adjustment of status. The term change of status refers to a change from one temporary classification to another.

For most aliens other than Canadian visitors or visitors with Border Crossing Cards, admission or parole is reflected on the Form I-94 Arrival-Departure Record issued by an INS inspector to every alien who enters the US. The INA lists<sup>2</sup> classes of aliens who are not eligible for adjustment of status, including those who entered the US illegally, have worked in the US without authorization (or with expired authorization), and/or have failed to continuously maintain lawful status since entry.

There are generally two alternative methods to obtain immigrant status for those who have been deemed eligible for permanent residence in the US -- via adjustment of status if the alien is already in the US and wants to remain in the US during the processing period or via consular processing if the alien will obtain the immigrant visa at a US consulate. Without Section 245(i), consular processing abroad is the only option for certain aliens who are ineligible for adjustment of status in the US.

#### **History of Section 245(i)**

In 1994, Congress enacted INA Section 245(i), permitting certain aliens who were otherwise ineligible for adjustment to pay a penalty fee for the convenience of adjusting status without leaving the US. Prior to enactment of the LIFE Act Amendments, the window for preserving adjustment eligibility under 245(i) closed on January 14, 1998<sup>3</sup>, after which only "grandfathered" aliens (beneficiaries<sup>4</sup> of labor certifications or immigrant visa petitions filed<sup>5</sup> on or before that date) were eligible to adjust status under Section 245(i).

Section 245(i) grandfathers aliens themselves as well as the applications or petitions filed for them. That is, the basis of a grandfathered alien's eventual adjustment is not restricted to the application or petition filed to preserve adjustment eligibility. The grandfathered alien's application for adjustment of status may be based on any adjustment provision available to the alien at the time of adjustment.<sup>6</sup>

#### **Relationship of 3- and 10-year bars to admissibility on Section 245(i)**

The [Illegal Immigration and Reform and Immigrant Responsibility Act \(IIRIRA\)](#) enacted in September 1996 provided that an alien who accumulates between 6 months and 1 year of unlawful presence in the US after April 1, 1997, becomes inadmissible for 3 years if (s)he subsequently leaves the US. Even if an alien who had become subject to a bar

were to obtain a visa at a consulate<sup>7</sup>, (s)he would not be admitted into the US upon arrival. Similarly, an alien who accumulates one year or longer of unlawful presence becomes inadmissible for 10 years.

IIRIRA's bars to admission were critical to the permanent residence process for the following reason. Following the January 1998 expiration of 245(i), it became increasingly difficult, if not impossible, for an alien to adjust status in the US if (s)he was unlawfully present (e.g. due to overstay past the Form I-94 expiration date or to breach of terms and conditions of status). Moreover, the same alien was also ineligible for consular processing if (s)he had accumulated sufficient unlawful presence for the 3 or 10 year bar to apply (i.e. for duration of the applicable bar).

If an applicant is subject to the 3- or 10-year bar, adjustment of status will not be approved unless (s)he obtains a waiver. Even if an alien overstays, however, a bar will not apply unless (s)he leaves the US and re-enters. An alien who succeeds in re-entering the US in spite of an applicable bar needs a waiver in order to adjust status. On the other hand, an alien who would be subject to a bar if (s)he were to travel outside the US will not be subject to the bar if (s)he never leaves the US. Note that the bars continue to apply if applicant travels while adjustment is pending, even if the alien obtains advance parole. A grant of permanent residence terminates applicability of a 3 or 10 year bar.

### **LIFE Act and 245(i)**

The Legal Immigration Family Equity (LIFE) Act Amendments, enacted on December 21, 2000, temporarily restored eligibility under Section 245(i) by replacing the previous cut-off date (January 14, 1998) with a new date (April 30, 2001). Accordingly, a beneficiary of a labor certification application or immigrant visa petition filed<sup>8</sup> on or before April 30, 2001, preserves eligibility to adjust status under INA §245(i). Payment of a \$1,000 surcharge will be required with the adjustment application, regardless of the timing or basis of the eventual adjustment. The \$1000 penalty fee is payable at the time of adjustment rather than at the time the grandfathering petition or application is filed.

The LIFE Act added a significant requirement to Section 245(i). If the qualifying petition or labor certification was filed after the previous cut-off date (January 14, 1998), the alien must have been physically present<sup>9</sup> in the US on the date of enactment (December 21, 2000) in order to qualify for Section 245(i) benefits under LIFE.<sup>10</sup> It is uncertain at this time what evidence will be required or accepted to satisfy the physical presence requirement.

### **Qualifying filings**

Labor certifications or visa petitions filed in order to preserve an alien's adjustment eligibility under 245(i) must be both properly filed and approvable (meritorious in fact and non-frivolous) when filed. To meet this test, at a minimum, the filing must be timely and meet all applicable substantive requirements. Deficiencies such as lack of fee or original signature disqualify the submissions.

Petitions that have been denied or withdrawn, or for which approval has been revoked by INS, may still serve to grandfather the alien beneficiary, depending on the reasons for the final action. The determinative issue is whether a visa petition is approvable when filed. To remain eligible, the changed circumstances must relate to factors beyond the alien's control rather than to the merits of the petition at the time of filing.

In the event that an employer applicant for a labor certification or petitioner for employment-based permanent residence dies, goes out of business, or otherwise chooses to withdraw or becomes ineligible to maintain the application or petition, or the family member who filed the petition dies or is divorced from the beneficiary, the alien beneficiary does not necessarily lose grandfathered<sup>11</sup> status.

### **What and how to file<sup>12</sup>**

If approvable under the circumstances, any of the following may be filed on or before April 30, 2001, to preserve the beneficiary's adjustment eligibility:

#### *Family-based permanent residence:*

[Form I-130](#) may be filed by a qualifying family member of the alien who is a citizen or lawful permanent resident of the US. This form may be ordered toll-free at 800-870-3676 or downloaded from INS' Website.

#### *Employment-based permanent residence:*

[Form I-140](#) may be filed by a US employer who has offered the alien beneficiary permanent employment in the US. Most petitions for permanent residence based on a job offer require labor certification in order to be approvable (this refers to the actual certification by US Department of Labor - USDOL -- rather than to mere filing of Form ETA-750). Certain less common filings also qualify.<sup>13</sup> The forms may be ordered toll-free at 800-870-3676 or downloaded from INS' Website.

#### *Labor Certification:*

To obtain labor certification, an employer and alien employee together submit a completed application Form ETA-750 (typically available from state departments of employment services or from the [USDOL Website](#) together with documentary evidence to the state DOL<sup>14</sup>. For more information about labor certification, see below.

### **Confusion of LIFE provisions with "Amnesty"**

Many persons mistakenly believe that 245(i) constitutes amnesty, i.e. forgiveness of unlawful presence or breaches of status. On the contrary, unlawful presence continues to accrue until application for adjustment of status is filed (which stops accrual of unlawful presence). Section 245(i) does not protect an alien from deportation. That is, an alien who continues to work without authorization may remain eligible to adjust status if and when permanent residence is approved and an immigrant visa is available, but may be removed from the US if discovered in the meantime. Furthermore, a US employer who files Form ETA-750 or Form I-140, naming an unauthorized alien as beneficiary, will be subject to sanctions if discovered to be knowingly employing that alien prior to

eligibility for adjustment (when alien can obtain an EAD). Once application for adjustment is made, the alien becomes eligible for work authorization. It may take months or years, however, from the time that the qualifying 245(i) application for labor certification or petition is filed, for the alien to become eligible to file for adjustment.

### **Impact on dependents of grandfathered aliens**

A dependent spouse or child who is accompanying or following to join a grandfathered alien is also considered grandfathered by the qualifying petition or labor certification if the relationship existed or comes to exist before the principal alien eventually adjusts status. Only the principal beneficiary of a visa petition or application for labor certification filed after January 14 1998, and on or before April 30, 2001, needs to demonstrate physical presence in the US on December 21, 2000.

## **THE PERMANENT RESIDENCE PROCESS IN A NUTSHELL**

### **Family-based:**

- A US citizen or permanent resident relative files INS [Form I-130](#), naming a qualifying relative (such as a spouse, parent, child or sibling) as beneficiary and providing the required proof of the relationship. The form contains specific instructions for filing.
- An I-130 may be filed at an applicable [Service Center](#). In some circumstances, an I-130 may be filed in conjunction with an [I-485](#) in a [district office having jurisdiction over the petitioner's place of residence](#).<sup>15</sup>
- Family-based beneficiaries are typically issued employment authorization documents by the INS offices where their adjustment applications are pending.<sup>16</sup> The processing period may vary according to caseload and from one INS office to another. The family-based beneficiary is not authorized to work in the US until the employment authorization document is received.
- When the I-485 application for adjustment is adjudicated, which could take up to a few years but varies case by case, the applicant may be called into the INS field office for an interview. A decision will be subsequently communicated to him or her.
- If adjustment of status is approved, an appointment is made to have an "I-551 stamp" placed in the alien's passport. The I-551 stamp is meant to establish proof of the alien's permanent residence and unrestricted employment eligibility until the actual Permanent Resident Card (Form I-551) is processed (approximately one year).
- Aliens approved for permanent residence on the basis of marriage are granted conditional residence for two years, after which an interview takes place for determination of whether the marriage is bona fide. If a positive determination is made, the conditions on permanent residence are removed and the alien obtains unrestricted permanent residence and a Permanent Resident Card valid for ten years.

### **Employment-based:**

- [Form I-140](#) is filed at the [INS Service Center](#) with geographic jurisdiction over the place of employment. All employment-based forms (including [Forms I-360](#) and [I-526](#)) contain complete instructions.
- In some cases, employment-based permanent residence *does not require* labor certification.<sup>17</sup> However, the majority of cases require that the Form I-140 be filed with a labor certification approved by the US Department of Labor. In such cases, the Form I-140 is not complete and/or approvable unless the labor certification is filed with it. The Form ETA-750 must be certified by USDOL. A copy of the application to USDOL is insufficient. Labor certifications may take two years or longer to process, particularly in backlogged areas such as New York, Illinois, and California.
- Once the I-140 is approved, the alien beneficiary becomes eligible to file for adjustment of status provided that an immigrant visa is available. If it is not, application for adjustment cannot be filed.
- Once the immigrant petition is approved and an immigrant visa is available, [Form I-485](#) application for adjustment may be filed, along with [Form I-765](#) application for employment authorization (for one year at a time for the duration of the adjustment process) and [Form I-131](#) application for advance parole to permit travel abroad during the adjustment process.
- Form I-765 applications for employment-based applicants are filed at [INS Service Centers](#) and take 90 days or longer to process. The alien may not work in the US until the employment authorization document is received.

#### **Processing of I-130 and I-140 petitions:**

- A [Form I-130](#) or [I-140](#), filed at an [INS Service Center](#), typically takes up to six months to process, on a case by case basis, depending upon backlogs at the Service Center where it is filed as well as the completeness of the petition and supporting documentation.
- Where deficiencies are found by Service Center adjudicators, requests for evidence (RFEs) are issued and typically result in processing delay.

#### **LABOR CERTIFICATION (for employment-based permanent residence)**

Labor certification is a statement from the US Department of Labor (USDOL) that a particular position at a particular company is "open" because no US workers who satisfy the minimum requirements for the job are available. An alien seeking to immigrate to the US on the basis of employment must obtain an offer of permanent full-time employment from an employer in the US. Such alien cannot be admitted as a permanent resident unless, among other things, the employer obtains a labor certification from USDOL that qualified US workers are not available for the employment offered to the alien, and that the wages and working conditions offered will not adversely affect those of similarly employed US workers.

The labor certification process requires the employer to recruit US workers at prevailing wages and working conditions through the State Employment Service, by advertising, posting notice of the job opportunity, and other appropriate means. A USDOL regional certifying officer makes a decision to grant or deny the labor certification based on the results of the employer's recruitment efforts and compliance with USDOL regulations. Most employers of unskilled workers, skilled workers, and professional workers need to obtain labor certification before petitioning INS for permanent residence for those workers based on employment. Exceptions exist for aliens in shortage occupations

(registered nurses, physical therapists, sheep herders and those demonstrating "exceptional ability" in business, science, or arts), aliens demonstrating to INS that they possess extraordinary ability, aliens who are multinational executives or managers, aliens whose work is deemed in the "national interest," and aliens who are outstanding university level teachers and researchers in tenure-track jobs. Petitions naming beneficiaries who hold such positions, which are considered unique and do not displace American workers, do not require labor certification.

To obtain labor certification, an employer and alien employee together submit application Form ETA-750 (This form is available from state departments of employment services or downloadable from [USDOL's Website](#).) together with documentary evidence to the state DOL. The state DOL confirms that the wage offered for the position is the "prevailing wage" and reports whether the salary must be increased to satisfy prevailing wage requirements. The state DOL then approves an advertising strategy and sends the application to the local DOL. At the local DOL office, the job is listed as "open" in the state computerized job bank and the employer is instructed to place an ad in a specified journal or newspaper. The ad will ask applicants for the position to apply directly to the local DOL. The local DOL screens applicants and refers seemingly qualified applicants to the employer. The employer must promptly interview all seemingly qualified applicants. The employer must also consider and interview if necessary any other applicants who, through the job bank listing or pure chance, apply for the position. The employer then files a recruitment report with the local DOL explaining why the ad placement was appropriate, the names of persons who applied for the job (if any), and why such applicants were not qualified.

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1. [Section 245\(a\)](#)
  2. §245(a) and (c)
  3. The sunset date of Section 245(i), as originally enacted, was October 1, 1997; various legislative acts extended Section 245(i) temporarily until November 26, 1997. Thereafter, President Clinton signed into law a provision that changed the nature of 245(i), so as to grandfather those aliens in the US for whom an immigrant visa or application for labor certification was filed on or before January 14, 1998.
  4. The beneficiary is the alien named in the application or petition
  5. All qualifying submissions were required to be both properly filed and approvable at the time of filing.
  6. *Example:* A qualifying Form ETA-750 filed on or before January 14, 1998 preserved the beneficiary's eligibility to adjust status after that date. However, the filed ETA-750 did/does not commit that alien to adjustment on the basis of an employment-based petition. If, after January 14, 1998, the alien was named as beneficiary in a family-based petition or won an immigrant visa in the diversity lottery, (s)he was/is permitted to adjust status on the new basis (note that the an immigrant visa won in the diversity lottery will not grandfather an alien, but may be used as a basis of adjustment by an alien who is already grandfathered under Section 245(i).
  7. A visa is a travel document that permits the alien to whom is was issued to travel to the US and apply for admission under the classification indicated on the visa. It has no purpose inside the US.
  8. See footnote 3.

9. One document may not suffice to prove physical presence on December 21, 2000. An alien may need to provide a number of documents for this purpose. INS anticipates that it will accept governmental and/or non-governmental documentation.
10. **Note:** Some 245(i) applicants grandfathered before January 14, 1998, have still not filed for adjustment, yet remain eligible until their permanent residence petitions are approved and immigrant visas are available. These aliens are not required to satisfy LIFE's December 21, 2000, physical presence requirement.
11. Provided that the qualifying submissions were approvable when filed, timely, and meritorious in fact.
12. In each case below, an adjustment application must eventually be filed. When it is time to file for adjustment, [Form I-485 supplement A](#) should be filed with [Form I-485](#) and \$1000 fee. If Form I-485 was filed without supplement, applicants should attach a copy of the filing receipt when filing the supplement and fee.
13. [Form I-360](#) for Amerasian, Widow(er), or Special Immigrant (including religious workers), filed on behalf of a beneficiary or as a self-petition under Sections 204(a)(1)(A)(iii) or (a)(1)(A)(iv) if filed by an eligible alien, as well as a [Form I-526](#), Immigrant Petition by Alien Entrepreneur, also meet this requirement.
14. It is the filing of Form ETA-750, rather than approval or certification by USDOL that preserves adjustment eligibility under Section 245(i). It is important to realize, however, that filing is the first step in a potentially very lengthy process, during which alien beneficiaries taking advantage of 245(i) benefits remain in unlawful status. Obtaining a labor certification takes from several months to two years, depending on the location of the job (New York, California and Illinois are particularly backlogged).
15. For example, petitions for alien spouses of US citizens are typically filed with [Form I-485](#) (adjustment of status), [Form I-765](#) (employment authorization), [Form I-864](#) (affidavit of support) and [Form I-131](#) (advance parole).
16. Local offices issue the Form I-688B version of the Employment Authorization Document and Service Centers issue Form I-766.
17. For more information, request Office of Business Liaison Employer Bulletin 99-14.