U.S. Department of Justice
Immigration and Naturalization Service

HQ 70/23.1-P
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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 /s/
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

This document provides supplemental guidance to the April 15 memorandum on adjustment of status under Section 245(i) of the Immigration and Nationality Act (the Act). In particular, this memorandum addresses the adjustment of persons who have filed **employment-based immigrant petitions (I-140s) and applications for tabor certifications**, for purposes of "grandfathering" under section 245(i) of the Act.

Note that the general policy outlined in the April 14 memorandum is applicable to the adjudication of both family and employment-based immigrant petitions. For this reason, we will not repeat the introductory, background, and general portions of the April 14 memorandum. This memorandum addresses issues unique to employment-based petitions and makes one set of clarifications to the April 15 memorandum. Officers are reminded that portions of the April 14 document relating to "alien-based" reading, "approvable when filed", and the effects of "grandfathering" remain in effect and are applicable to both family and employment-based immigrant petitions.

Offices and service centers should note that this memorandum lifts the processing hold on applications for adjustment of status based on an alien's representation that the employer filed a Department of Labor Application for Alien Employment Certification, Form ETA 750, Parts

A&B before January 15, 1998. See page 6 of the April 14, 1999 memorandum. Processing of these petitions may begin based upon the following instructions.

The Office of Field Operations concurs with this memorandum.

Filing issues regarding unadjudicated cases

A. Labor Certification Filed with DOL

Section 245(i) requires the application that will serve as the vehicle for grandfathering to have been filed on or before January 14, 1998. Adjudicators may encounter cases in which the original labor certification application has not yet been acted on by the Department of Labor (DOL), while the applicant seeks to adjust status on the basis of a later and different visa category such as the diversity lottery.

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. Mere proof that a labor certification application was mailed on or before January 14, 1998 is not sufficient for the grandfathering provisions of section 245(i).

For purposes of 245(i) adjustments, a properly filed DOL certification application means that the ETA 750 Parts A&B were properly completed by the sponsoring employer and the alien and filed with the Secretary of Labor on or before January 14, 1998.[1] The burden rests with the alien to submit sufficient proof. Examples of such evidence include documentary proof such as a receipt or a statement from the DOL that its records indicate that the application was submitted to the appropriate State Agency prior to January 15, 1998.

B. Employment-based Immigrant Visa Petitions filed with the Attorney General

In order to be approvable at the time of filing for purposes of grandfathering, an employment-based petition must meet all applicable requirements for obtaining immigrant classification in the category for which the petition was filed. Any district office adjudicator with questions on the applicable requirements for employment-based petitions may forward questions via e-mail to the following contact point for their respective service center:

Vermont: Beth Libbey
Texas: Joyce A. Brown
Nebraska: Sandy Palarski
California: Hector Corella

[1] "Properly filed" is the term used in reference to DOL certifications while "approvable at time of filing" is used with reference to INA petitions. Also note that the DOL has advised that they do not have the ability to state definitively if a certification is approvable or deniable during certification processing.

An alien who claims to be grandfathered because of 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. An example of this is when the INS-issued receipt notes that the petition was received before January 15, 1998. It is the applicant's burden to establish that he or she is eligible to be grandfathered, 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). If the pre-January 15, 1998 petition has been approved, it meets the "approvable when filed" standard and thus provides a basis for grandfathering. It is important to note, however, that denied, revoked, withdrawn, and pending cases may also meet the "approvable when filed" standard, as discussed in the April 14 memorandum.

When an adjudicator has a 245(i) adjustment filing that was based on a vehicle other than the qualifying petition that is pending with the service center, the adjudicator needs to check CLAIMS to see if the qualifying petition has been adjudicated. If it has been approved, it meets the requirement of approvable at the time of filing. If it is denied or not adjudicated, the adjudicator needs to contact his or her service center point of contact to request an expedited determination of approvability at the time of filing. This determination can be made by relying on the information contained in the application and the supporting documentation.

Grandfathering when petitions were denied

When an immigrant visa petition has been denied, and the alien claims that petition as the basis for grandfathering, adjudicators must look to the reasons for the denial to determine whether the alien continues to be a beneficiary of that petition for "grandfathering" purposes. The issue is whether or not the petition was "approvable when filed" with the Service.

A. Denials based on change in circumstances

When an immigrant visa petition has been denied due to circumstances arising after the petition or application was filed, the Service will continue to regard the alien as the "beneficiary" for the purposes of grandfathering under section 245(i). Changed circumstances generally relate to factors beyond the alien's control not related to the merits of the petition at the time of filing. In addition to the examples discussed below involving children, examples of changed circumstances include the alien beneficiary's employer going out of business or the death of a petitioning spouse.

B. Denials based on the merits

Another type of denial relates to the merits of the petition itself at the time of filing. This type of denial is not based on the changed circumstances described above. This includes meritless or fraudulent petitions or applications, or cases in which the claimed relationship or employment simply cannot serve as the basis for issuance of a visa. When the denial relates to the merits in this manner, the alien cannot continue to be deemed a beneficiary upon denial of the petition or application, and the alien cannot be considered grandfathered as the result of the filing of such a petition.

C. Withdrawn petitions

When an immigrant visa petition is withdrawn, the former beneficiary of the withdrawn filing is still grandfathered for the purpose of section 245(i). For example, a business files an 1-140 on behalf of an alien. After 18 months, the business experiences a reversal and no longer needs the services of the alien. The alien is still grandfathered since he or she was the subject of an approvable petition at the time of filing. Officers must be aware, however, of situations where the alien withdraws a petition knowing that the petition will be denied. In such cases, officers should apply the standards noted in the prior section on denials based on merits.

Clarification Points from the April 14 Memorandum

Officers should note this clarification of the second paragraph of the section entitled "The alien-based reading" found on page 3. The beneficiaries (including derivatives and following to join) of any petition or labor certification that was filed, pending or approved before January 15, 1998, may be grandfathered if the beneficiary has not yet obtained LPR status as a result of the above noted pre-January 15 filing and the filing has not been denied. The exception is for those filings that meet the "approvable when filed" standard notwithstanding the denial. Each grandfathered beneficiary, including those qualifying to ride as derivative beneficiaries, is then entitled to one section 245(i) filing, and may adjust only once under section 245(i) based on the pre-January 15 petition. (See page 6, April 14 memorandum, section entitled "Used petitions.")

Grandfathered children and spouses

Section 245(i) defines the term "beneficiary" to include a spouse or child "eligible to receive a visa under section 203(d) of the Act." This applies to spouses or children "accompanying or following to join" the principal alien.

An alien who is accompanying or following to join an alien who is a grandfathered alien is thus also the "beneficiary" of the grandfathered petition or labor certification application and is also grandfathered.

Since an alien's ability to characterize himself or herself as “accompanying or following to join" the principal alien depends on the existence of a qualifying relationship at the time of the principal's adjustment, adjudicators must determine whether the relationship existed prior to the time the alien adjusted status. Officers should remember that the burden of proof to establish the qualifying relationship rests with the applicant.

The spouse or child of a grandfathered alien as of January 14 is also grandfathered for 245(i) purposes. This means that the spouse or child is grandfathered irrespective of whether the spouse or child adjusts with the principal. The pre-January 15 spouse or child also are grandfathered even after losing the status of spouse or child, such as by divorce or by becoming 21 years of age.

Many aliens with pending, grandfathered petitions or labor certification applications will marry or have children after the qualifying petition or application was filed but before adjustment of status. These "after-acquired" children and spouses are allowed to adjust under 245(i) as long as they acquire the status of a spouse or child before the principal alien ultimately adjusts status.

An alien who becomes the child or spouse of a grandfathered alien after the alien adjusts status or immigrates cannot adjust status under section 245(i) unless he or she has an independent basis for grandfathering.

"Aged-out" children

Often, a principal alien who has filed a visa petition or labor certification application will have a "child" who reaches the age of 21, and thus no longer meet the statutory definition of child, before the petition or application is approved or the principal alien adjusts status. However, such an "aged-out" beneficiary will remain a beneficiary for the purpose of determining whether he or she may use section 245(i) to adjust status.

Point of Contact

Questions concerning this memorandum or policy issues related to section 245(i) should be referred to the Residence and Status Branch, Office of Adjudications, through appropriate channels.

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