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UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
BOARD OF IMMIGRATION APPEALS
FALLS CHURCH, VIRGINIA

In the Matter of:

Michael Raymund Aguirre LEGASPI	**A097-368-288**
Respondent.	**Removal Proceedings**

BRIEF OF AMICUS CURIAE, AMERICAN IMMIGRATION LAWYERS ASSOCIATION

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BRIEF OF AMICUS CURIAE

Section 245(i) fosters family unity and assists American employers by allowing otherwise ineligible immigrants to adjust status in the United States and avoid the harshness of the unlawful presence bars that would apply if those noncitizens had to apply for immigrant visas abroad. Section 245(i) of the Immigration and Nationality Act ("INA"). The statute and the implementing regulation, 8 C.F.R. § 1245.10(a)(1), unambiguously treat the named alien of a § 245(i) filing and that alien's dependents as grandfathered aliens, each equally entitled to the protections and rights afforded by Congress. For more than a dozen years, the U.S. Citizenship and Immigration Services ("USCIS") and its predecessor, the Immigration and Naturalization Service ("INS"), have applied the clear statutory and regulatory language to permit after-acquired spouses and children of all grandfathered aliens, named beneficiaries and included dependents alike, to adjust their status under § 245(i) if they were following to join or accompanying a grandfathered alien.

In *Matter of Legaspi*, 25 I&N Dec. 328 (BIA 2010), the Board in one fell swoop swept aside the long-settled expectations of immigrants, their families, and their employers, by confusing the plain statutory and regulatory language. In so doing, the Board did not address the DHS's longstanding reasonable interpretation and implementation of the statute. *Legaspi* represents a muddled and incorrect view of § 245(i) that will cause confusion for immigrants, their families, their employers, and USCIS adjudicators.

By applying traditional rules of statutory construction, AILA concludes that:

(1) The "principal alien" is the named beneficiary of a § 245(i) qualifying petition,

(2) The principal alien and his or her spouse and children in existence when the petition is filed are "grandfathered aliens,"

(3) All "grandfathered aliens" are treated equally and remain "grandfathered" until they adjust status, and

(4) After-acquired spouses and children, while not independently grandfathered, can adjust their status under § 245(i) if they are following to join or accompanying a grandfathered alien.

AILA takes no position on the merits of Mr. Legaspi's application for adjustment of status or the result of the application of the statutory framework outlined below to any party in this matter.

Statement of Interest

AILA is a national organization with more than 11,000 members throughout the United States, including lawyers and law school professionals who practice and teach in the field of immigration and nationality law. AILA seeks to advance the administration of law pertaining to immigration, nationality, and naturalization; to cultivate the jurisprudence of the immigration laws; and to facilitate the administration of justice and elevate the standard of integrity, honor, and courtesy of those appearing in a representative capacity in immigration and naturalization matters. AILA's members practice regularly before the Department of Homeland Security and before the Executive Office for Immigration Review (immigration courts and the Board of Immigration Appeals), as well as before the United States District Courts, Courts of Appeal, and the Supreme Court of the United States.

The statute and regulations clearly entitle Mr. Legaspi to adjust under 245(i) because he is following to join his wife, a grandfathered alien

The statute and regulations are clear and unambiguous. Section 245(i)(1)(B) and 8 C.F.R. § 1245.10(a)(1) classify Mr. Legaspi's wife, Ms. Blanco, as a grandfathered alien and permit Mr. Legaspi to follow to join as an after-acquired spouse. In reaching a contrary

conclusion, the Board inaccurately equated the terms "principal aliens" and "beneficiaries" and, in the process, swept away a decade's worth of interpretations and practice by an agency, the USCIS, charged with administering § 245. Grandfathered aliens include *both* the "principal alien" (the named beneficiary of a petition) and the spouse or child of the principal alien (if the relationship is in existence when the petition is filed).

The statute defines a grandfathered alien as one**:**

> (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—

INA § 245(i)(1)(B) (emphasis added).

The regulation provides, in relevant part:

> (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:

8 C.F.R. § 1245.10(a)(1) (emphasis added).

There is one group of "grandfathered aliens," all equally eligible to adjust under § 245(i). Grandfathered aliens, or "beneficiaries," consist of both the named beneficiary of the qualifying immigrant visa petition or labor certification application (the "principal alien") and includes dependents under INA § 203(d). "Principal aliens" are not the only "beneficiaries." Their spouses and minor children are also "beneficiaries." The statute and regulations do not distinguish between the principal alien and his or her spouse and children. They are equally grandfathered or, to put it another way, they have equal rights under grandfathering.

As the Board recognized, Ms. Blanco is a grandfathered alien. The Board deviated from the statute and regulation on page 328-329 of the decision. The Board defined "grandfathered aliens" as encompassing "beneficiaries (*and* their derivative beneficiaries)." *Legaspi*, 25 I&N Dec. at 328-29 (emphasis added). The statute uses the word "including." This is significant

because instead of distinguishing between the named alien and the dependents, which the Board did, the statute provides that the dependents are "beneficiaries" and, therefore, grandfathered aliens, just the same as the "principal alien." By equating "principal alien" and "grandfathered alien," the Board either eliminated an entire category of grandfathered aliens or created second-class status for the spouses and children of the principal alien. By using the word "including," Congress intended to provide grandfathering protection to both the named beneficiary (the principal alien) and his or her spouse and children in existence when the qualifying petition is filed.

It therefore follows that Ms. Blanco and her father are both grandfathered aliens. Ms. Blanco did not lose this status when she turned 21 or married, although she did lose her ability to adjust status through the qualifying petition. As the Board recognized on page 329 n.2, as a grandfathered alien, Ms. Blanco remains eligible to adjust under § 245(i) through another immigrant visa petition.

Mr. Legaspi himself is not a grandfathered alien and has never claimed to be. However, that does not end the analysis. As an after-acquired spouse, Mr. Legaspi is not independently grandfathered but remains eligible to adjust by accompanying or following to join his wife, who is independently grandfathered. The government's longstanding and heretofore unchallenged interpretation and policy has been to allow after-acquired spouses to follow to join grandfathered aliens. *See* 66 Fed. Reg. 16383, 16384 (March 26, 2001).

The Board's reliance on *Landin-Molina v. Holder*, 580 F.3d 913, 918 (9th Cir. 2009) is misplaced. In *Landin-Molina*, the grandfathered alien married *after* she adjusted her status. Thus, her husband, Mr. Landin-Molina, was ineligible to adjust under § 245(i) because he was not eligible to follow to join or accompany his wife under INA § 203(d). He was ineligible for

adjustment of status because his relationship to the visa petition beneficiary was not created until after she acquired permanent resident status. *Landin* acknowledges that an after-acquired spouse, who is not otherwise § 245(i) grandfathered, nonetheless remains eligible to adjust if he is following to join the grandfathered alien. *Landin*, 580 F.3d at 918.[1]

In this case, Mr. Legaspi's marriage to Ms. Blanco *before* she adjusted her status allows him to adjust under § 245(i) if he is following to join or accompanying her. Because Ms. Blanco is a grandfathered alien, Mr. Legaspi is eligible to adjust his status under § 245(i) as long as he is following to join or accompanying her.

The "principal alien" is the named beneficiary of the qualifying § 245(i) filing. The principal alien and his or her spouse and children when the petition or labor certification is filed are all "grandfathered aliens." The after-acquired spouses and children of these grandfathered aliens are not grandfathered, but are eligible to follow to join under § 245(i). Accordingly, Mr. Legaspi is eligible to adjust his status under § 245(i) because he is following to join Ms. Blanco.

Matter of Legaspi **threatens to render grandfathering under § 245(i) temporary**

The Board's opinion in *Legaspi* threatens to shut off the possibility of a grandfathered derivative beneficiary being able to confer follow to join benefits to an after-acquired spouse. More alarmingly, the Board seems to also suggest that a derivative beneficiary may lose § 245(i) grandfathering if he or she subsequently marries, by speculating that had Ms. Blanco married at the time of her grandfather's petition in 1987, she would not have met the definition of "child" for purposes of INA § 203(d). The Board correctly restates the law in footnote 2 on page 329,

[1] The Ninth Circuit cited with approval 1999 guidance from the INS, which stated that spouses and children of grandfathered aliens are grandfathered and remain so even if the relationship to the principal alien ends and also that after-acquired spouses and children of grandfathered aliens can adjust under 245(i). *Landin*, 580 F.3d at 919-20.

but a contrary suggestion on page 330 is likely to cause confusion and uncertainty for immigrants and the USCIS as it administers the statute.

While a derivative beneficiary of a qualifying filing, such as Ms. Blanco, must have been single to qualify as a "child" when the petition was filed, the derivative beneficiary does not lose his or her grandfathered status just because he or she no longer has a qualifying relationship to the named beneficiary because, for example, he or she ages out or marries. It is clear that § 245(i) provides a permanent grandfathering benefit to an individual "who is the beneficiary (including a spouse or child of a principal alien, if eligible to receive a visa under section 203(d))" of a petition under INA § 204 or an application for labor certification under INA § 212(a) (5)(A) that was filed on or before April 30, 2001. The regulations also properly define a "grandfathered alien" as "an alien who is the beneficiary (including a spouse or child of the alien beneficiary if eligible to receive a visa under § 203(d) of the Act)" of such a petition or labor certification. 8 C.F.R. § 245.10(a)(1)(i). This eternal grandfathering benefit continues even after the alien ceases to be a spouse or is too old to be a child. By the same logic, this benefit ought to continue even after such a child marries.

AILA respectfully requests the Board to clarify its position. Under the Board's current position in *Legaspi*, aliens other than derivative beneficiaries are also potentially adversely affected. Anyone who obtained protection under § 245(i) by virtue of being single, even as a direct or principal beneficiary, such as an unmarried son or daughter of a permanent resident pursuant to INA § 203(a)(2)(B), may not be able to confer a benefit under § 245(i) to another spouse. There is no limitation in the language of § 245(i) that authorizes a temporal application of grandfathering. Even as the Board acknowledges that Ms. Blanco is eligible to adjust status under § 245(i) on page 329 n.2, on the following page the Board suggests that she may no longer

be independently grandfathered because she married the respondent. The Board's position on page 329 n.2 is the correct one, and because she continues to remain grandfathered, her after-acquired spouse should also be able to follow to join her through § 245(i).

By misstating the law and ignoring longstanding guidance, the Board's decision in *Legaspi* threatens to undermine well-settled interpretations and practices and cause confusion among noncitizens, their families, their employers, and USCIS adjudicators.

The Board should follow longstanding agency policy and interpretation of § 245(i)

The Board cited with approval the Yates memo at page 329 n.2 of the decision. Memorandum from William R. Yates, Assoc. Dir for Operations, to USCIS Officials (Mar. 9, 2005) ("Yates memo"), attached as Tab A. Elsewhere in the memo, the USCIS described a scenario strikingly similar to this case. Yates memo at page 4. In Scenario 2, the grandfathered alien married and had a child after the filing of the qualifying labor certification but before the grant of adjustment of status. The DHS concluded that while the spouse and child are not themselves "grandfathered," they could still apply for adjustment of status under § 245(i) as dependents of the grandfathered alien:

> An application for labor certification is filed on behalf of principal alien "A" in 2000. At that time, principal alien "A" is unmarried. Principal alien "A" marries spouse "B" in 2002. Principal alien "A" and spouse "B" have child "C." An I-130 is filed on behalf of principal alien "A" and is ultimately approved in 2004. Principal alien "A" applies for adjustment of status. May spouse "B" and child "C" apply for adjustment of status under section 245(i) in conjunction with principal alien "A"?
>
> If all other grandfathering requirements are met, spouse "B" and child "C" may seek to adjust status only as dependents of the principal alien "A." Principal alien "A" is grandfathered as described in Scenario 1. Because spouse "B" marries principal alien "A" after April 30, 2001 sunset date, spouse "B" and child "C" are ***not*** grandfathered.

Tab A at page 4 (emphasis in original).

Consistent with the statutory language, the USCIS has since 1999 treated spouses and children of grandfathered aliens as being grandfathered. *See* Memorandum of Robert L. Bach, Executive Assoc. Commissioner, to INS officials (June 10, 1999) ("Bach memo"), attached at Tab B. Significantly, on page 4 of the Bach memo, the INS states that the

> spouse or child of a grandfathered alien … 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 …
>
> 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.

Bach memo at 4.[2] This guidance was also included in a list of issued resolved by AILA and the INS General Counsel. *See* Items 8-9 of the INS General Counsel List of Resolved Issues (December 10, 1999), attached at tab C.

The language from the Bach memo seems to anticipate the *Legaspi* fact pattern. Ms. Blanco was the child of a grandfathered alien and was thus grandfathered herself. As a grandfathered alien, she remains grandfathered even if she adjusted her status through a different petition. She also remains grandfathered even after she lost the status of child. According to the INS's guidance, her after-acquired spouse, Mr. Legaspi, could adjust his status under 245(i) because he married Ms. Blanco before she adjusted status.

While AILA acknowledges that the Board is not bound by the interpretation of the USCIS as to the statutes that it administers, *see Matter of M/V Sam Meru,* 20 I&N Dec. 592, 595 (BIA 1992), the Yates memo correctly interprets the statute, which has resulted in a settled

[2] The *Landin* Court cited this memo with approval. *Landin*, 580 F.3d at 919-20.

practice among USCIS adjudicators and immigrants seeking the protection of § 245(i) for over a decade.

Matter of Legaspi has the potential of abruptly disrupting this longstanding practice. Nevertheless, the Board continues to have discretion to adopt the USCIS's interpretation. *See Matter of Ho*, 15 I&N Dec. 692 (BIA 1976). In this case, the USCIS's interpretation is in line with the plain statutory language and is consistent with the congressional intent to foster family unity and unite American employers with qualified employees. The Board did not give a reason for departing from established USCIS policy and AILA believes that none exists. AILA urge the Board to follow the above referenced memorandum as it is well-settled policy that has never been challenged prior to the Board's decision in *Legaspi*.

CONCLUSION

AILA urges the Board to reconsider its precedent decision in *Legaspi*. Consistent with the plain statutory language and long-standing agency practice, grandfathered aliens include the named beneficiary, or principal alien, of § 245(i) filings and the named beneficiary's spouse or children in existence when the petition is filed. They are equally entitled to the benefits of § 245(i), even after the relationship between the named beneficiary and included dependents ends. The after-acquired spouses and children of all grandfathered aliens are not independently grandfathered, but can still adjust status under § 245(i) if they are following to join or accompanying the grandfathered alien.

Respectfully submitted,

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Certificate of Service

I hereby certify that on October 20, 2010, I served by regular mail a copy of the Motion for Leave to Appear as Amicus Curiae and the Brief of Amicus Curiae, American Immigration Lawyers Association, on Richard M. Loew, Aquino & Loew, APLC, 625 Fair Oaks Ave., Suite 101, South Pasadena, CA 91030, and ICE Chief Counsel, 606 S. Olive St., 8th Floor, Los Angeles, CA 90014.

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Russell Abrutyn

Tab A

U.S. Department of Homeland Security
20 Massachusetts Avenue, N.W.
Washington, D.C. 20536

U.S. Citizenship and Immigration Services

HQOPRD 70/23.1

Interoffice Memorandum

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

From: William R. Yates
Associate Director for Operations

Date: MAR 9 2005

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

1. Purpose

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

2. Background

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

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

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

3. Field Guidance

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

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

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

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

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

B. General Requirements for Grandfathering

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

4. Use

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

5. Contact Information

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

Tab B

INS on Accepting Applications for AOS under Section 245(i) of the Immigration and Nationality Act

Cite as "AILA InfoNet Doc. No. 99061940 (posted Jun. 19, 1999)"

Dated 10 June, 1999

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

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 labor 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.

This memorandum has the concurrence of the Service's Office of Field Operations. 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 Service,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

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.

AILA InfoNet Doc. No. 10102663. (Posted 10/26/10)

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.

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 I-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.

AILA InfoNet Doc. No. 10102663. (Posted 10/26/10)

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 Pearl Chang, Chief, Residence and Status Branch, Office of Adjudications, at 202-514-4754, through appropriate channels.

_____

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.

Tab C

INS General Counsel List of Resolved Issues

Cite as "AILA InfoNet Doc. No. 99122271 (posted Dec. 22, 1999)"

December 10,1999

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4000 Bell Atlantic Tower
1717 Arch Street
Philadelphia, PA 19103-2793

Daryl Buffenstein, Esq.
Paul, Hastings, Janofsky & Walker
600 Peachtree St., NE
Suite 2400
Atlanta, GA 30308

Dear Ron and Daryl:

Thank you for your visit today, and for your prompt review of the items we sent to you earlier this week. Based on your comments of December 8 and on our conversation today, I believe that the attached list correctly sets out our common understanding on twenty-one points that you have raised in past liaison meetings. If there is any need for further revision or discussion, please let me know. Where these points set out interpretations of implementing decisions of the INS, those interpretations or decisions of course remain subject to change in the future. Nevertheless, they represent our best understanding of the current law and practice. Please feel free to circulate these materials among your members.

I am grateful for the efforts you and your colleagues have invested in our liaison meetings. I believe that the AILA-INS General Counsel Liaison meetings have been fruitful, and I look forward to continued progress.

Sincerely,

Bo Cooper
General Counsel

Items from the AILA-General Counsel Liaison Meetings

1. An alien whose I-94 indicates "D/S" does not accrue unlawful presence time commencing when the INS initiates removal proceedings; rather, it commences from the date of an immigration judge's order that the alien is removable. This assumes that the INS has not denied the extension of stay or change of status
2. An alien who leaves the United States voluntarily and not under an order of removal after being placed in proceedings is not subject to the three-year bar if the alien's unlawful presence was less than one year. Also, if an alien leaves the United States in such a situation, returns with a legal visa (such as an H-1B) and then travels without any further period of unlawful presence, the alien is not subject to the three-year bar upon return.
3. Aliens who are paroled into the United States are considered "authorized by the Attorney General" to be

in the U.S. and do not accrue unlawful presence time so long as they do not violate the terms of their parole.

4. If a conditional resident timely files a condition removal application and the INS denies the application, the alien is not considered unlawfully present while awaiting removal proceedings and during removal proceedings in which the alien will renew the conditional residence removal application. If the condition removal application is not timely filed, the alien is considered unlawfully present unless the INS agrees that it was not timely filed for good cause.
5. For purposes of counting the 120 day three-year bar tolling for a timely-filed extension of change of status application, the first day in considered to be the day after the expiration of Form I-94 and not the date of filing the extension or change of status application. The INS is considering AILA's position that aliens with timely filed pending applications for change or extension of status should be treated as being "authorized by the Attorney General" during the time the application is pending with the INS after 120 days.
6. If an alien has been granted voluntary departure at the conclusion of proceedings but files a timely appeal, a voluntary departure bond must be timely posted.
7. An individual who is granted 212(c) relief prior to the passage of AEDPA for an aggravated felony cannot be placed in removal proceedings for the same offense. This does not apply, however, if the alien is subsequently convicted of another crime.
8. The spouse or child of a grandfathered alien as of January 14 is also grandfathered for section 245(i) purposes. This means that the spouse or child retains his or her grandfathered status irrespective or whether or not the spouse adjusts with the principal. The pre-January 15 spouse or child also retains grandfathered status even after losing the status of spouse or child, such as by divorce or by becoming 21 years of age.
9. Spouses or children accompanying or following to join a grandfathered alien are eligible to adjust under section 245(i). Therefore, even if the individual was not a spouse or child as of January 14, he or she can adjust under section 245(i) if he or she is a spouse or child at the time of the principal's adjustment.
10. Despite an unpublished, non-precedent opinion of the Board of Immigration Appeals that an alien is grandfathered for purposes of section 245(i) by virtue of applying for the DV lottery prior to January 15, 1998, the INS position is that such aliens are not grandfathered.
11. INS has agreed that adjustment of status under NACARA is mandatory, and not discretionary. However, if a waiver is needed, adjudication of the waiver is discretionary.
12. An alien does not accrue unlawful presence time when an immigration judge's order denying voluntary departure is reversed on appeal. The period from the denial of voluntary departure to the grant of voluntary departure on appeal will be considered authorized by the Attorney General. It should be noted that unless otherwise in a period of stay authorized by Attorney General, the alien is accruing time unlawfully present while he or she is appealing the IJ ruling denying voluntary departure. Only after the alien prevails on appeal will the INS go back and determine that there was not net accrual of time unlawfully present during the time the ruling was on appeal.
13. For purpose of the three and ten-year bars, where the INS Asylum Unit has referred an asylum case, the asylum application is considered pending while the alien is in proceedings, while an appeal is pending with the Board, and while review is pending in federal court. Pre-asylum reform applications that are denied by the INS are also considered pending for the purpose of section 212(a)(9)(B)(iii)(II) during the period between denial by the asylum office and renewal in front of the immigration court. Once it is renewed, the case is covered by the broader provision governing asylum applications.
14. INS has agreed to administratively close all OSCs and issue NTAs where a non-aggravated felon respondent would have benefited in applying for 212(c) and where such respondent was not eligible under AEDPA, in anticipation of a regulation which will allow the cases to be repapered.
15. INS has reinterpreted section 303(b)(2) of IIRAIRA and section 236(c) of the INA to require detention only when the alien was released from prison after the expiration of the TPCR. Any alien who was granted bond from INS custody before the expiration of the TPCR would not be subject to section 236(c). Such an alien has probably been released by now.
16. Unlawful presence does not accrue while a conditional suspension grantee or a conditional cancellation of

removal grantee is in conditional grantee status.

17. For purposes of section 245(k), an alien may adjust under section 245(a) as long as the alien, as of the date of filing, has not violated status, has not engaged in unlawful employment, and has not had any violations of the terms and conditions of nonimmigrant admission, for a period in excess of 180 days in the aggregate subsequent to the alien's last admission under which she is presently in the United States.
18. The Commissioner issued a memorandum on April 19, 1999, wherein she discussed what status Cubans paroled from detention will have which will enable them to file for adjustment under the Cuban Adjustment Act. This memorandum was printed in 76 Interpreter Releases 684 (1999).
19. The ACWIA statute and INS regulations are silent on whether an employer can accept reimbursement or compensation of the $500 H-1B job training fee from a source other than the alien. INS is unable to speak to whether third party reimbursement violate any Department of Labor rules. The INS is preparing final regulations on the ACWIA fee after consideration of public comments.
20. With respect to 245(i) grandfathering, the INS continues to agree that the alien is grandfathered rather than any particular petition or application being grandfathered. The INS' present position is that the pre-January 15 petition or application must have been "approvable" at the time of filing or the labor certificate application must have been properly filed in order to result in grandfathering of the alien. It is not relevant to grandfathering if a change of fact or law subsequent to the filing renders the petition or application subsequently non-approvable.
21. The issue of whether an alien is subject to the two-year home residence requirement is an issue of law to be determined by the Immigration and Naturalization Service.

AILA InfoNet Doc. No. 10102663. (Posted 10/26/10)