HQ 70/23.I-P

JAN 26 2001

MEMORANDUM FOR ALL REGIONAL DIRECTORS
ALL SERVICE CENTER DIRECTORS
ALL DISTRICT DIRECTORS
ALL OFFICERS IN CHARGE

FROM: Michael D. Cronin
Acting Executive Associate Commissioner
Office of Programs

SUBJECT: Adjustment of status under section 245(i), as amended by the Legal Immigration Family Equity Act Amendments of 2000.

Purpose

The purpose of this memorandum is to provide guidance concerning adjustment of status under section 245(i) of the Immigration and Nationality Act (Act) as amended by the Legal Immigration Family Equity Act (LIFE) Amendments of 2000. The LIFE Amendments of 2000 are found in Title XV of HR 5666, Public Law 106-554, and enacted on December 21, 2000. This memorandum discusses how section 245(i) of the Act has been modified and how those modifications affect eligibility and adjudications. The Immigration Services Division (ISD) concurs with this memorandum.

History

Section 245 of the Act allows an alien to apply for adjustment of status to that of a lawful permanent resident (LPR) while in the United States if certain conditions arc met. The 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 shams. The alien must also not have engaged in unauthorized employment Section 245(i) of the Act allows an alien to apply to adjust status under section 245 notwithstanding the fact that he or she entered without inspection, overstayed, or worked without authorization.

From October 1, 1994 to January 14, 1998, any alien who filed for adjustment of stares under section 245(i) had to pay the additional sum specified in that section. Changes made to section 245(i) in the Departments of Commerce, State and Justice Appropriations Act for 1998, Pub. L. No. 105-119, limit_ the class of aliens who are eligible to file an application for adjustment of status under section 245(i). The Service issued two memoranda, dated April 14, 1999, and June 10, 1999, providing guidance on the acceptance of applications for adjustment of status under section 245(i), and discussing who is grandfathered under section 245(i). Except as modified by this memorandum, those memoranda remain valid.

Changes to section 245(i) by the LIFE Amendments of 2000

The LIFE Amendments of 2000 amended section 245(i) of the Act in two ways.

1. New sunset date for aliens with current priority dates: The LIFE Amendments of 2000 changed the sunset date of the section from January 14, 1998, to April 30, 2001. Beginning immediately, any alien who is included in the categories of restricted aliens under 8 CFR 245.1 (b) may apply tot adjustment of status under section 245 of the Act if the alien:
    1. is physically present in the United States;
    2. is the beneficiary or a visa petition or application for labor certification properly filed on or before April 30, 2001, and determined to be approvable at time of filing;
    3. is eligible for an immigrant classification under section 203 of the Act, and has an immigrant visa number immediately available at the time of filing an application for adjustment of status;
    4. is not inadmissible to the United States under section 212 of the Act, or, if appropriate, all grounds of inadmissibility have been waived;
    5. properly files Form I-485, Application to Register Permanent Residence or Adjust Status, with the fees required for that application;
    6. properly files Supplement A to Form I-485;
    7. pays an additional sum of $1000 unless payment of the sum is not required under subsection 245(i)(1)(B)(ii) of the Act; and

2. Physical presence requirement for beneficiaries of visa petitions or applications for labor certification filed after January 14, 1998 and on or before April 30, 2001: The LIFE Amendments of 2000 add a new requirement, that all aliens who seek to adjust on the basis of a visa petition or application for labor certification filed after January 14, 1998, must have been physically present in the United States on December 21, 2000. Thus, to be eligible to adjust under section 245(i) after the April 30, 2001 sunset date, an alien must meet one of the following four conditions:

    1. The alien is the beneficiary of a visa petition pursuant to section 204 of the Act properly filed on or before January 14, 1998, which was approvable on the date of filing, regardless of whether it was subsequently denied or withdrawn, or its approval was revoked except in cases where there is evidence of fraud;
    2. The alien is the beneficiary of a visa petition pursuant to section 204 of the Act properly filed after January 14, 1998, and on or before April 30, 2001, which was approvable on the date of filing regardless of whether it was subsequently denied or withdrawn, or its approval was revoked except in cases where there is evidence of fraud, and the alien was physically present on December 21, 2000;
    3. The alien is the beneficiary of an application for labor certifica6on which was properly filed on or before January 14, 1998; or ,
    4. Thc alien is the beneficiary of an application for labor certification that was properly filed after January 14, 1998, and on or before April 30, 2001, and the alien was physically present on December 21, 2000.

Evidence of physical presence on December 21, 2000

Aliens adjusting status under section 245(i) based on a visa petition or application for labor certification filed after January 14, 1998, and on or before April 30, 2001, must prove physical presence in the United States on December 21, 2000. Note: The physical presence requirement only applies to principal applicants for adjustment of status under section 245(i) of the Act. Dependent spouses and children do nut need to demonstrate physical presence on December 21, 2000.

An alien may demonstrate physical presence by submitting a photocopy of a Federal, State, or local Government-issued document that demonstrates the alien's physical presence in the United States on December 21, 2000. If the alien is not in possession of such document, but believes that a copy of the document 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 Government agency, the type of document and the date on which it was issued.

If the alien does not submit a Government-issued document that demonstrates his or her physical presence on December 21, 2000, Service officers should 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.

In some instances, a single document may suffice to establish the applicant's physical presence on December 21, 2000. In most cases, however, we anticipate that the alien will need to submit several documents. In such cases, the Service should accept documentation establishing the applicant's physical presence in the United States prior to, as well as after December 21, 2000. For example, bank records that show that an applicant made a mortgage payment on December 1, 2000, and again on January 1,2001, would be acceptable. The dates documenting the alien's physical presence prior to and after December 21, 2000 should be reasonably near to that date. The Service may not accept a personal affidavit of physical presence on December 21, 2000, without an interview or additional secondary information that validates the affidavit.

It is 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.

Applications before the new sunset date

Since the deadline for submitting visa petitions or applications for labor certifications for the purpose of grandfathering under section 245(i) of the Act has been re-opened until April 30, 2001, the Service is adopting a similar approach to accepting applications and petitions up to the sunset date, as outlined in the January 9, 1998 memorandum, Subject: Special procedures for the sunset of amended section 245(i) of the Immigration and Nationality Act, from the Office of Field Operations.

Visa petitions, which meet the threshold filing requirements of 8 CFR 103.2(a)(1) and (2), the required fee and the applicant's signature, may not be rejected prior to May 1, 2001. In order to allow the maximum opportunity for timely receipt of visa petitions, the Service will make special arrangements for submission of visa petitions to Service Offices as the April 30, 2001, sunset date approaches.

Point of Contact

Service personnel with questions relating to section 245(i) adjustments should go through appropriate supervisory channels and contact Michael Valverde via cc: mail with questions. Attachments (2)

U.S. Department of Justice
Immigration and Naturalization Service

HQ 70/23.1-P
HQ 70/8-P

Office of the Executive Associate Commissioner

425 I Street NW
Washington, DC 20536

JUN 10 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 /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.

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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.

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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.

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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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U.S. Department of Justice
Immigration and Naturalization Service

HQ 70/23.1-P
HQ 70/8-P

Office of the Executive Associate Commissioner

425 I Street NW
Washington, DC 20536

APR 1 4 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

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

The Office of Field Operations concurs with this memorandum.

Background

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

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

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

Who May Use Section 245(i)

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

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

The "alien-based" reading

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

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

"Approvable When Filed"

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

Effects of grandfathering

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

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

Filing issues regarding unadjudicated cases

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

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

Denials, revocations and withdrawals of visa petitions

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

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

Family-based immigrant visa petitions filed with the Attorney General

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

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

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

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

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

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

Employment-based immigrant visa petitions filed with the Attorney General

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

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

Applications for labor certification filed with the Secretary of Labor

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

Used petitions

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

Correct allocation of visa numbers

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

Amenability to removal proceedings

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

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

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

Acceptance of Applications

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

Point of Contact

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