

other additional documentation is inaccurate or insufficient, the adjudicating officer may require that the applicant submit the following additional documents prior to the adjudication of a fee waiver:

(1) The applicant's employment records, pay stubs, W-2 forms, letter(s) from employer(s), and proof of filing of a local, state, or federal income tax return. The same documents may also be required from the applicant's dependents in the United States.

(2) The applicant's rent receipts, bills for essential utilities (for example, gas, electricity, telephone, water), food, medical expenses, and receipts for other essential expenditures.

(3) Documentation to show all assets owned, possessed, or controlled by the applicant or by dependents of the applicant.

(4) Evidence of the applicant's living arrangements in the United States (living with relative, living in his or her own house or apartment, etc.), and evidence of whether his or her spouse, children, or other dependents are residing in his or her household in the United States.

(5) Evidence of the applicant's essential extraordinary expenditures or those of his or her dependents residing in the United States.

(g) The adjudicating officer must consider the totality of the information submitted in each case before requiring additional information or rendering a final decision.

(h) All documents submitted by the applicant or required by the adjudicating officer in support of a fee waiver request are subject to verification by the Service.

(i) In requiring additional information, the adjudicating officer should consider that some applicants may have little or no documentation to substantiate their claims. An adjudicating officer may accept other evidence, such as an affidavit from a member of the community of good moral character, but only if the applicant provides an affidavit stating that more direct documentary evidence is unavailable.

[57 FR 34507, Aug. 5, 1992. Redesignated at 62 FR 10367, 10382, Mar. 6, 1997]

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

Sec.

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AUTHORITY: 8 U.S.C. 1101, 1103, 1182, 1255; 8 CFR part 2.

§245.1 Eligibility.

(a) *General.* Any alien who is physically present in the United States, except for an alien who is ineligible to apply for adjustment of status under paragraph (b) or (c) of this section, may apply for adjustment of status to that of a lawful permanent resident of the United States if the applicant is eligible to receive an immigrant visa and an immigrant visa is immediately available at the time of filing of the application. A special immigrant described under section 101(a)(27)(J) of the Act shall be deemed, for the purpose of applying the adjustment to status provisions of section 245(a) of the Act, to have been paroled into the United States, regardless of the actual method of entry into the United States.

(b) *Restricted aliens.* The following categories of aliens are ineligible to apply for adjustment of status to that of a lawful permanent resident alien under section 245 of the Act, unless the

alien establishes eligibility under the provisions of section 245(i) of the Act and §245.10, is not included in the categories of aliens prohibited from applying for adjustment of status listed in §245.1(c), is eligible to receive an immigrant visa, and has an immigrant visa immediately available at the time of filing the application for adjustment of status:

(1) Any alien who entered the United States in transit without a visa;

(2) Any alien who, on arrival in the United States, was serving in any capacity on board a vessel or aircraft or was destined to join a vessel or aircraft in the United States to serve in any capacity thereon;

(3) Any alien who was not admitted or paroled following inspection by an immigration officer;

(4) Any alien who, on or after January 1, 1977, was employed in the United States without authorization prior to filing an application for adjustment of status. This restriction shall not apply to an alien who is:

(i) An immediate relative as defined in section 201(b) of the Act;

(ii) A special immigrant as defined in section 101(a)(27)(H) or (J) of the Act;

(iii) Eligible for the benefits of Public Law 101-238 (the Immigration Nursing Relief Act of 1989) and files an application for adjustment of status on or before October 17, 1991; or

(iv) Eligible for the benefits of Public Law 101-238 (the Immigration Nursing Relief Act of 1989), and has not entered into or continued in unauthorized employment on or after November 29, 1990.

(5) Any alien who on or after November 6, 1986 is not in lawful immigration status on the date of filing his or her application for adjustment of status, except an applicant who is an immediate relative as defined in section 201(b) or a special immigrant as defined in section 101(a)(27) (H), (I), or (J).

(6) Any alien who files an application for adjustment of status on or after November 6, 1986, who has failed (other than through no fault of his or her own or for technical reasons) to maintain continuously a lawful status since entry into the United States, except an applicant who is an immediate relative as defined in section 201(b) of the Act or a special immigrant as defined in

section 101(a)(27) (H), (I), or (J) of the Act;

(7) Any alien admitted as a visitor under the visa waiver provisions of §212.1(e) of this chapter;

(8) Any alien admitted as a Visa Waiver Pilot Program visitor under the provisions of section 217 of the Act and part 217 of this chapter other than an immediate relative as defined in section 201(b) of the Act;

(9) Any alien who seeks adjustment of status pursuant to an employment-based immigrant visa petition under section 203(b) of the Act and who is not maintaining a lawful nonimmigrant status at the time he or she files an application for adjustment of status; and

(10) Any alien who was ever employed in the United States without the authorization of the Service or who has otherwise at any time violated the terms of his or her admission to the United States as a nonimmigrant, except an alien who is an immediate relative as defined in section 201(b) of the Act or a special immigrant as defined in section 101(a)(27)(H), (I), (J), or (K) of the Act. For purposes of this paragraph, an alien who meets the requirements of §274a.12(c)(9) of this chapter shall not be deemed to have engaged in unauthorized employment during the pendency of his or her adjustment application.

(c) *Ineligible aliens.* The following categories of aliens are ineligible to apply for adjustment of status to that of a lawful permanent resident alien under section 245 of the Act:

(1) Any nonpreference alien who is seeking or engaging in gainful employment in the United States who is not the beneficiary of a valid individual or blanket labor certification issued by the Secretary of Labor or who is not exempt from certification requirements under §212.8(b) of this chapter;

(2) Except for an alien who is applying for residence under the provisions of section 133 of the Immigration Act of 1990, any alien who has or had the status of an exchange visitor under section 101(a)(15)(J) of the Act and who is subject to the foreign residence requirement of section 212(e) of the Act, unless the alien has complied with the foreign residence requirement or has

been granted a waiver of that requirement, under that section. An alien who has been granted a waiver under section 212(e)(iii) of the Act based on a request by a State Department of Health (or its equivalent) under Pub. L. 103-416 shall be ineligible to apply for adjustment of status under section 245 of the Act if the terms and conditions specified in section 214(k) of the Act and §212.7(c)(9) of this chapter have not been met;

(3) Any alien who has nonimmigrant status under paragraph (15)(A), (15)(E), or (15)(G) of section 101(a) of the Act, or has an occupational status which would, if the alien were seeking admission to the United States, entitle the alien to nonimmigrant status under those paragraphs, unless the alien first executes and submits the written waiver required by section 247(b) of the Act and part 247 of this chapter;

(4) Any alien who claims immediate relative status under section 201(b) or preference status under sections 203(a) or 203(b) of the Act, unless the applicant is the beneficiary of a valid unexpired visa petition filed in accordance with part 204 of this chapter;

(5) Any alien who is already an alien lawfully admitted to the United States for permanent residence on a conditional basis pursuant to section 216 or 216A of the Act, regardless of any other quota or non-quota immigrant visa classification for which the alien may otherwise be eligible;

(6) Any alien admitted to the United States as a nonimmigrant fiance as defined in section 101(a)(15)(K) of the Act, unless the alien is applying for adjustment of status based upon a marriage which was contracted within 90 days of entry with the United States citizen who filed a petition on behalf of the alien pursuant to §214.2(k) of this chapter;

(7) A nonimmigrant classified pursuant to section 101(a)(15)(S) of the Act, unless the nonimmigrant is applying for adjustment of status pursuant to the request of a law enforcement authority, the provisions of section 101(a)(15)(S) of the Act, and 8 CFR 245.11;

(8) Any arriving alien who is in removal proceedings pursuant to section 235(b)(1) or section 240 of the Act; and

(9) Any alien who seeks to adjust status based upon a marriage which occurred on or after November 10, 1986, and while the alien was in exclusion, deportation, or removal proceedings, or judicial proceedings relating thereto.

(i) *Commencement of proceedings.* The period during which the alien is in deportation, exclusion, or removal proceedings or judicial proceedings relating thereto, commences:

(A) With the issuance of the Form I-221, Order to Show Cause and Notice of Hearing prior to June 20, 1991;

(B) With the filing of a Form I-221, Order to Show Cause and Notice of Hearing, issued on or after June 20, 1991, with the Immigration Court;

(C) With the issuance of Form I-122, Notice to Applicant for Admission Detained for Hearing Before Immigration Judge, prior to April 1, 1997,

(D) With the filing of a Form I-862, Notice to Appear, with the Immigration Court, or

(E) With the issuance and service of Form I-860, Notice and Order of Expedited Removal.

(ii) *Termination of proceedings.* The period during which the alien is in exclusion, deportation, or removal proceedings, or judicial proceedings relating thereto, terminates:

(A) When the alien departs from the United States while an order of exclusion, deportation, or removal is outstanding or before the expiration of the voluntary departure time granted in connection with an alternate order of deportation or removal;

(B) When the alien is found not to be inadmissible or deportable from the United States;

(C) When the Form I-122, I-221, I-860, or I-862 is canceled;

(D) When proceedings are terminated by the immigration judge or the Board of Immigration Appeals; or

(E) When a petition for review or an action for habeas corpus is granted by a Federal court on judicial review.

(iii) *Exemptions.* This prohibition shall no longer apply if:

(A) The alien is found not to be inadmissible or deportable from the United States;

(B) Form I-122, I-221, I-860, or I-862, is canceled;

(C) Proceedings are terminated by the immigration judge or the Board of Immigration Appeals;

(D) A petition for review or an action for habeas corpus is granted by a Federal court on judicial review;

(E) The alien has resided outside the United States for 2 or more years following the marriage; or

(F) The alien establishes the marriage is bona fide by providing clear and convincing evidence that the marriage was entered into in good faith and in accordance with the laws of the place where the marriage took place, was not entered into for the purpose of procuring the alien's entry as an immigrant, and no fee or other consideration was given (other than to an attorney for assistance in preparation of a lawful petition) for the filing of a petition.

(iv) *Request for exemption.* No application or fee is required to request the exemption under section 245(e) of the Act. The request must be made in writing and submitted with the Form I-485, Application for Permanent Residence. The request must state the basis for requesting consideration for the exemption and must be supported by documentary evidence establishing eligibility for the exemption.

(v) *Evidence to establish eligibility for the bona fide marriage exemption.* Section 204(g) of the Act provides that certain visa petitions based upon marriages entered into during deportation, exclusion or related judicial proceedings may be approved only if the petitioner provides clear and convincing evidence that the marriage is bona fide. Evidence that a visa petition based upon the same marriage was approved under the bona fide marriage exemption to section 204(g) of the Act will be considered primary evidence of eligibility for the bona fide marriage exemption provided in this part. The applicant will not be required to submit additional evidence to qualify for the bona fide marriage exemption provided in this part, unless the district director determines that such additional evidence is needed. In cases where the district director notifies the applicant that additional evidence is required, the applicant must submit documentary evidence which clearly

and convincingly establishes that the marriage was entered into in good faith and not entered into for the purpose of procuring the alien's entry as an immigrant. Such evidence may include:

(A) Documentation showing joint ownership of property;

(B) Lease showing joint tenancy of a common residence;

(C) Documentation showing commingling of financial resources;

(D) Birth certificates of children born to the applicant and his or her spouse;

(E) Affidavits of third parties having knowledge of the bona fides of the marital relationship, or

(F) Other documentation establishing that the marriage was not entered into in order to evade the immigration laws of the United States.

(vi) *Decision.* An application for adjustment of status filed during the prohibited period shall be denied, unless the applicant establishes eligibility for an exemption from the general prohibition.

(vii) *Denials.* The denial of an application for adjustment of status because the marriage took place during the prohibited period shall be without prejudice to the consideration of a new application or a motion to reopen a previously denied application, if deportation or exclusion proceedings are terminated while the alien is in the United States. The denial shall also be without prejudice to the consideration of a new application or motion to reopen the adjustment of status application, if the applicant presents clear and convincing evidence establishing eligibility for the bona fide marriage exemption contained in this part.

(viii) *Appeals.* An application for adjustment of status to lawful permanent resident which is denied by the district director solely because the applicant failed to establish eligibility for the bona fide marriage exemption contained in this part may be appealed to the Associate Commissioner, Examinations, in accordance with 8 CFR part 103. The appeal to the Associate Commissioner, Examinations, shall be the single level of appellate review established by statute.

(d) *Definitions—(1) Lawful immigration status.* For purposes of section 245(c)(2)

of the Act, the term “lawful immigration status” will only describe the immigration status of an individual who is:

- (i) In lawful permanent resident status;
- (ii) An alien admitted to the United States in nonimmigrant status as defined in section 101(a)(15) of the Act, whose initial period of admission has not expired or whose nonimmigrant status has been extended in accordance with part 214 of this chapter;
- (iii) In refugee status under section 207 of the Act, such status not having been revoked;
- (iv) In asylee status under section 208 of the Act, such status not having been revoked;
- (v) In parole status which has not expired, been revoked or terminated; or
- (vi) Eligible for the benefits of Public Law 101-238 (the Immigration Nursing Relief Act of 1989) and files an application for adjustment of status on or before October 17, 1991.

(2) *No fault of the applicant or for technical reasons.* The parenthetical phrase *other than through no fault of his or her own or for technical reasons* shall be limited to:

- (i) Inaction of another individual or organization designated by regulation to act on behalf of an individual and over whose actions the individual has no control, if the inaction is acknowledged by that individual or organization (as, for example, where a designated school official certified under §214.2(f) of this chapter or an exchange program sponsor under §214.2(j) of this chapter did not provide required notification to the Service of continuation of status, or did not forward a request for continuation of status to the Service); or
- (ii) A technical violation resulting from inaction of the Service (as for example, where an applicant establishes that he or she properly filed a timely request to maintain status and the Service has not yet acted on that request). An individual whose refugee or asylum status has expired through passage of time, but whose status has not been revoked, will be considered to have gone out of status for a technical reason.

(iii) A technical violation caused by the physical inability of the applicant to request an extension of non-immigrant stay from the Service either in person or by mail (as, for example, an individual who is hospitalized with an illness at the time non-immigrant stay expires). The explanation of such a technical violation shall be accompanied by a letter explaining the circumstances from the hospital or attending physician.

(iv) A technical violation resulting from the Service’s application of the maximum five/six year period of stay for certain H-1 nurses only if the applicant was subsequently reinstated to H-1 status in accordance with the terms of Public Law 101-656 (Immigration Amendments of 1988).

(3) *Effect of departure.* The departure and subsequent reentry of an individual who was employed without authorization in the United States after January 1, 1977 does not erase the bar to adjustment of status in section 245(c)(2) of the Act. Similarly, the departure and subsequent reentry of an individual who has not maintained a lawful immigration status on any previous entry into the United States does not erase the bar to adjustment of status in section 245(c)(2) of the Act for any application filed on or after November 6, 1986.

(e) *Special categories—(1) Alien medical graduates.* Any alien who is a medical graduate qualified for special immigrant classification under section 101(a)(27)(H) of the Act and is the beneficiary of an approved petition as required under section 204(a)(1)(E)(i) of the Act is eligible for adjustment of status. An accompanying spouse and children also may apply for adjustment of status under this section. Temporary absences from the United States for 30 days or less, during which the applicant was practicing or studying medicine, do not interrupt the continuous presence requirement. Temporary absences authorized under the Service’s advance parole procedures will not be considered interruptive of continuous presence when the alien applies for adjustment of status.

(2) *Adjustment of certain nurses who were in H-1 nonimmigrant status on September 1, 1989 (Pub. L. 101-238)*—(i) *Eligibility.* An alien is eligible to apply for adjustment of status without regard to the numerical limitations of sections 201 and 202 of the Act if:

(A) The applicant was admitted to the United States in, or had been granted a change of status to, non-immigrant status under section 101(a)(15)(H)(i) of the Act on or before September 1, 1989, to perform services as a registered nurse (regardless of the date upon which the applicant's authorization to remain in the United States expired or will expire), and the applicant had not thereafter been granted a change to status to any other nonimmigrant classification prior to September 1, 1989,

(B) The applicant has been employed in the United States as a registered nurse for an aggregate of three years prior to the date of application for adjustment of status,

(C) The applicant's continued employment as a registered nurse meets the standards established for certification described in section 212(a)(5)(A)(i) of the Act,

(D) The applicant is the beneficiary of:

(1) A valid, unexpired visa petition filed prior to October 1, 1991, which has been approved to grant the applicant preference status under section 202(a) (3) or (6) of the Act (as in effect prior to October 1, 1991), and is deemed by operation of the automatic conversion provisions of section 4 of Public Law 102-110 (the Armed Forces Immigration Adjustment Act of 1991), to be effective to grant the applicant preference status under section 203(b) (2) or (3) of the Act (as in effect on and after October 1, 1991) because of his or her occupation as a registered nurse, provided the application for adjustment of status is approved no later than October 1, 1993, or

(2) A valid, unexpired visa petition filed on or after October 1, 1991, which has been approved to grant the applicant preference, status under section 203(b) (1), (2), or (3) of this Act (as in effect on and after October 1, 1991) because of his or her occupation as a registered nurse, and

(E) The applicant properly files an application for adjustment of status under the provisions of section 245 of the Act.

(ii) *Application period.* To benefit from the provisions of Public Law 101-238, an alien must properly file an application for adjustments of status under section 245 of the Act on or before March 20, 1995.

(iii) *Application.* An applicant for the benefits of Public Law 101-238 must file an application for adjustment of status on Form I-485, accompanied by the fee and supporting documents described in §245.2 of this part. Beneficiaries of Public Law 101-238 must also submit:

(A) Evidence that the applicant is the beneficiary of:

(1) A valid, unexpired visa petition filed prior to October 1, 1991, which has been approved to grant the applicant preference status under section 203(a) (3) or (6) of the Act (as in effect prior to October 1, 1991) and is deemed by operation of the automatic conversion provisions of section 4 of Public Law 101-110 to be effective to grant the applicant preference status under section 203(b) (2) or (3) of the Act (as in effect on and after October 1, 1991) because of his or her occupation as a registered nurse, provided the application for adjustment of status is approved no later than October 1, 1993, or

(2) A valid, unexpired visa petition filed on or after October 1, 1991, which has been approved to grant the applicant preference status under section 203(b) (1), (2), or (3) of the Act (as in effect on and after October 1, 1991) because of his or her occupation as a registered nurse, and

(B) A request, made on Form ETA 750 submitted in duplicate, for a determination by the district director that the alien is qualified for and will engage in the occupation of registered nurse, as currently listed on Schedule A (20 CFR part 656),

(C) Evidence showing that the applicant has been employed in the United States as a registered nurse for an aggregate of three years prior to the date the application for adjustment of status is filed, in the form of:

(1) Letters from employers stating the beginning and ending dates of employment as a registered nurse, or

(2) Other evidence of employment as a registered nurse, such as pay receipts supported by affidavits of co-workers, which is accompanied by evidence that the nurse has made reasonable efforts to obtain employment letter(s), but has been unable to do so because the current or former employer refuses to issue the letter or has gone out of business.

(D) Evidence that the applicant was licensed, either temporarily or permanently, as a registered nurse during all periods of qualifying employment, and

(E) Evidence which establishes that the applicant was in the United States in H-1 nonimmigrant status for the purpose of performing services as a registered nurse on September 1, 1989.

(iv) *Effect of section 245(c)(2)*. An applicant for the benefits of the adjustment of status provisions of Public Law 101-238 must establish eligibility for adjustment of status under all provisions of section 245 unless those provisions have specifically been waived.

(A) *Application for adjustment of status filed on or before October 17, 1991*. An applicant who qualifies for the benefits of Public Law 101-238, who properly files an application for adjustment of status on or before October 17, 1991, may be granted adjustment of status even though the alien has engaged or is engaging in unauthorized employment. For purposes of adjustment of status, the applicant will be considered to have continuously maintained a lawful nonimmigrant status throughout his or her stay in the United States as a nonimmigrant and to be in lawful nonimmigrant status at the time the application is filed.

(B) *Application for adjustment of status filed after October 17, 1991*. An alien who files an application for adjustment of status after October 17, 1991, will not automatically be considered as having maintained lawful nonimmigrant status. An alien who files for adjustment after this date will be subject to the statutory bar of section 245(c)(2) of the Act and will be ineligible to apply for adjustment of status if he or she has failed to continuously maintain lawful nonimmigrant status (other than through no fault of his or her own or for technical reasons); if he or she was not in lawful nonimmigrant status at

the time the application was filed; or if he or she was employed without authorization on or after November 29, 1990. Unauthorized employment which has been waived as a basis for ineligibility for adjustment of status may not be used as the basis of a determination that the applicant is ineligible for adjustment of status due to failure to continuously maintain lawful nonimmigrant status.

(C) *Motions to reopen*. Public Law 101-649 (the Immigration Act of 1990), which became law on November 29, 1990, retroactively amended Public Law 101-238 (the Immigration Nursing Relief Act of 1989). An alien whose application for adjustment of status under the provisions of Public Law 101-238 was denied by the district director before November 29, 1990, because of unauthorized employment, failure to continuously maintain a lawful nonimmigrant status, or not being in lawful immigration status at the time of filing, may file a motion to reopen the adjustment application. The motion to reopen must be made in accordance with the provisions of 8 CFR 103.5. The district director will reopen the application for adjustment of status and enter a new decision based upon the provisions of Public Law 101-238, as amended by Public Law 101-649. Any other alien whose application for adjustment of status was denied may file a motion to reopen or reconsider in accordance with normal statutory and regulatory provisions.

(v) *Description of qualifying employment*. Qualifying employment as a registered nurse may have taken place at any time before the alien files the application for adjustment of status. It may have occurred before, on, or after the enactment of Public Law 101-238. All qualifying employment must have occurred in the United States. The qualifying employment as a registered nurse may have occurred while the alien was in any immigration status, provided that the alien had been admitted in or changed to H-1 status for the purpose of performing services as a registered nurse on or before September 1, 1989, and had not thereafter changed from H-1 status to any other status before September 1, 1989. The employment need not have been continuous,

provided the applicant can establish that he or she engaged in qualifying employment for a total of three or more years. Qualifying employment may include periods when the applicant possessed a provisional, temporary, interim, or other permit or license authorizing the applicant to perform services as a registered nurse; provided the license or permit was issued or recognized by the State Board of Nursing of the state in which the employment was performed. Qualifying employment may not include periods when the applicant performed duties as a registered nurse in violation of any state law regulating the employment of registered nurses in that state.

(vi) *Effect of enactment on spouse or child*—(A) *Spouse or child accompanying principal alien.* The accompanying spouse or child of an applicant for adjustment of status who benefits from Public Law 101-238, may also apply for adjustment of status. All benefits and limitations of this section, including those resulting from the implementation of the adjustment of status provisions of section 162(f) of Public Law 101-649, apply equally to the principal applicant and his or her accompanying spouse or child.

(B) *Spouse or child residing outside the United States or ineligible for adjustment of status.* A spouse or child who is ineligible to apply for adjustment of status as an accompanying spouse or child is not immediately eligible for issuance of an immigrant visa under the provisions of Public Law 101-238. However, the spouse or child may be eligible for visa issuance under other provisions of the Act.

(1) *Existing relationship.* A spouse or child acquired by the principal alien prior to the approval of the principal's adjustment of status application may be accorded the derivative priority date and preference category of the principal alien. The spouse or child may use the priority date and category when it becomes current, in accordance with existing limitations outlined in sections 201 and 202 of the Act. The priority date is not considered immediately available for these family members under Public Law 101-238.

(2) *Relationship entered into after adjustment of status is approved.* An alien

who acquires lawful permanent residence under the provisions of Public Law 101-238 may file a petition under section 204 of the Act for an alien spouse, unmarried son or unmarried daughter in accordance with existing laws and regulations. The priority date is not considered immediately available for these family members under Public Law 101-238.

(3) *Special immigrant juveniles.* Any alien qualified for special immigrant classification under section 101(a)(27)(J) of the Act shall be deemed, for the purpose of section 245(a) of the Act, to have been paroled into the United States, regardless of the alien's actual method of entry into the United States. Neither the provisions of section 245(c)(2) nor the exclusion provisions of sections 212(a)(4), (5)(A), or (7)(A) of the Act shall apply to a qualified special immigrant under section 101(a)(27)(J) of the Act. The exclusion provisions of sections 212(a)(2)(A), (2)(B), (2)(C) (except for so much of such paragraph as related to a single offense of simple possession of 30 grams or less of marijuana), (3)(A), (3)(B), (3)(C), or (3)(E) of the Act may not be waived. Any other exclusion provision may be waived on an individual basis for humanitarian purposes, family unity, or when it is otherwise in the public interest; however, the relationship between the alien and the alien's natural parents or prior adoptive parents shall not be considered a factor in a discretionary waiver determination.

(f) *Concurrent applications to overcome grounds of inadmissibility.* Except as provided in 8 CFR parts 235 and 249, an application under this part shall be the sole method of requesting the exercise of discretion under sections 212(g), (h), (i), and (k) of the Act, as they relate to the inadmissibility of an alien in the United States. No fee is required for filing an application to overcome the grounds of inadmissibility of the Act if filed concurrently with an application for adjustment of status under the provisions of the Act of October 28, 1977, and of this part.

(g) *Availability of immigrant visas under section 245 and priority dates*—(1) *Availability of immigrant visas under section 245.* An alien is ineligible for the benefits of section 245 of the Act unless

an immigrant visa is immediately available to him or her at the time the application is filed. If the applicant is a preference alien, the current Department of State Bureau of Consular Affairs Visa Bulletin will be consulted to determine whether an immigrant visa is immediately available. An immigrant visa is considered available for accepting and processing the application Form I-485 if the preference category applicant has a priority date on the waiting list which is earlier than the date shown in the Bulletin (or the Bulletin shows that numbers for visa applicants in his or her category are current), and (if the applicant is seeking status pursuant to section 203(b) of the Act) the applicant presents evidence that the appropriate petition filed on his or her behalf has been approved. An immigrant visa is also considered immediately available if the applicant establishes eligibility for the benefits of Public Law 101-238. Information concerning the immediate availability of an immigrant visa may be obtained at any Service office.

(2) *Priority dates.* The priority date of an applicant who is seeking the allotment of an immigrant visa number under one of the preference classes specified in section 203(a) or 203(b) of the Act by virtue of a valid visa petition approved in his or her behalf shall be fixed by the date on which such approved petition was filed.

(h) *Conditional basis of status.* Whenever an alien spouse (as defined in section 216(g)(1) of the Act), an alien son or daughter (as defined in section 216(g)(2) of the Act), an alien entrepreneur (as defined in section 216A(f)(1) of the Act), or an alien spouse or child (as defined in section 216A(f)(2) of the Act) is granted adjustment of status to that of lawful permanent residence, the alien shall be considered to have obtained such status on a conditional basis subject to the provisions of section 216 or 216A of the Act, as appropriate.

(Title I of Pub. L. 95-145 enacted Oct. 28, 1977 (91 Stat. 1223), sec. 103 of the Immigration and Nationality Act (8 U.S.C. 1103). Interpret or apply secs. 101, 212, 242 and 245 (8 U.S.C. 1101, 1182, 1252 and 1255))

[30 FR 14778, Nov. 30, 1965]

EDITORIAL NOTE: For FEDERAL REGISTER citations affecting §245.1, see the List of Sections Affected in the Finding Aids section of this volume.

§245.2 Application.

(a) *General—(1) Jurisdiction.* An alien who believes he or she meets the eligibility requirements of section 245 of the Act or section 1 of the Act of November 2, 1966, and §245.1 shall apply to the director having jurisdiction over his or her place of residence unless otherwise instructed in 8 CFR part 245, or by the instruction on the application form. After an alien, other than an arriving alien, is in deportation or removal proceedings, his or her application for adjustment of status under section 245 of the Act or section 1 of the Act of November 2, 1966 shall be made and considered only in those proceedings. An arriving alien, other than an alien in removal proceedings, who believes he or she meets the eligibility requirements of section 245 of the Act or section 1 of the Act of November 2, 1966, and §245.1 shall apply to the director having jurisdiction over his or her place of arrival. An adjustment application by an alien paroled under section 212(d)(5) of the Act, which has been denied by the director, may be renewed in removal proceedings under 8 CFR part 240 only if:

(i) The denied application must have been properly filed subsequent to the applicant's earlier inspection and admission to the United States; and

(ii) The applicant's later absence from and return to the United States was under the terms of an advance parole authorization on Form I-512 granted to permit the applicant's absence and return to pursue the previously filed adjustment application.

(2) *Proper filing of application—(i) Under section 245.* Before an application for adjustment of status under section 245 of the Act may be considered properly filed, a visa must be immediately available. If a visa would be immediately available upon approval of a visa petition, the application will not be considered properly filed unless such petition has first been approved. If an immediate relative petition filed for classification under section 201(b)(2)(A)(i) of the Act or a preference petition filed for classification under

section 203(a) of the Act is submitted simultaneously with the adjustment application, the adjustment application shall be retained for processing only if approval of the visa petition would make a visa immediately available at the time of filing the adjustment application. If the visa petition is subsequently approved, the date of filing the adjustment application shall be deemed to be the date on which the accompanying petition was filed.

(ii) *Under the Act of November 2, 1966.* An application for the benefits of section 1 of the Act of November 2, 1966 is not properly filed unless the applicant was inspected and admitted or paroled into the United States subsequent to January 1, 1959. An applicant is ineligible for the benefits of the Act of November 2, 1966 unless he or she has been physically present in the United States for one year (amended from two years by the Refugee Act of 1980).

(3) *Submission of documents—(i) General.* A separate application shall be filed by each applicant for benefits under section 245, or the Act of November 2, 1966. Each application shall be accompanied by an executed Form G-325A, if the applicant has reached his or her 14th birthday. Form G-325A shall be considered part of the application. An application under this part shall be accompanied by the document specified in the instructions which are attached to the application.

(ii) *Under section 245.* An application for adjustment of status is submitted on Form I-485, Application for Permanent Residence. The application must be accompanied by the appropriate fee as explained in the instructions to the application.

(iii) *Under section 245(i).* An alien who seeks adjustment of status under the provisions of section 245(i) of the Act must file Form I-485, with the required fee. The alien must also file Supplement A to Form I-485, with any required additional sum.

(iv) *Under the Act of November 2, 1966.* An application for adjustment of status is made on Form I-485A. The application must be accompanied by Form I-643, Health and Human Services Statistical Data Sheet. The application must include a clearance from the local police jurisdiction for any area in the

United States when the applicant has lived for six months or more since his or her 14th birthday.

(4) *Effect of departure—(i) General.* The effect of a departure from the United States is dependent upon the law under which the applicant is applying for adjustment.

(ii) *Under section 245 of the Act.* The departure from the United States of an applicant who is under exclusion, deportation, or removal proceedings shall be deemed an abandonment of the application constituting grounds for termination of the proceeding by reason of the departure. The departure of an applicant who is not under exclusion, deportation, or removal proceedings shall be deemed an abandonment of his or her application constituting grounds for termination, unless the applicant was previously granted advance parole by the Service for such absence, and was inspected upon returning to the United States. If the application of an individual granted advance parole is subsequently denied, the applicant will be treated as an applicant for admission, and subject to the provisions of sections 212 and 235 of the Act.

(iii) *Under the Act of November 2, 1966.* If an applicant who was admitted or paroled subsequent to January 1, 1959, later departs from the United States temporarily with no intention of abandoning his or her residence, and is readmitted or paroled upon return, the temporary absence shall be disregarded for purposes of the applicant's "last arrival" into the United States in regard to cases filed under section 1 of the Act of November 2, 1966.

(5) *Decision—(i) General.* The applicant shall be notified of the decision of the director and, if the application is denied, the reasons for the denial.

(ii) *Under section 245 of the Act.* If the application is approved, the applicant's permanent residence shall be recorded as of the date of the order approving the adjustment of status. An application for adjustment of status, as a preference alien, shall not be approved until an immigrant visa number has been allocated by the Department of State, except when the applicant has established eligibility for the benefits of Public Law 101-238. No appeal lies from the denial of an application by

the director, but the applicant, if not an arriving alien, retains the right to renew his or her application in proceedings under 8 CFR part 240. Also, an applicant who is a parolee and meets the two conditions described in § 245.2(a)(1) may renew a denied application in proceedings under 8 CFR part 240 to determine admissibility. At the time of renewal of the application, an applicant does not need to meet the statutory requirement of section 245(c) of the Act, or § 245.1(g), if, in fact, those requirements were met at the time the renewed application was initially filed with the director. Nothing in this section shall entitle an alien to proceedings under section 240 of the Act who is not otherwise so entitled.

(iii) *Under the Act of November 2, 1966.* If the application is approved, the applicant's permanent residence shall be recorded in accordance with the provisions of section 1. No appeal lies from the denial of an application by the director, but the applicant, if not an arriving alien, retains the right to renew his or her application in proceedings under 8 CFR part 240. Also, an applicant who is a parolee and meets the two conditions described in § 245.2(a)(1) may renew a denied application in proceedings under 8 CFR part 240 to determine admissibility.

(b) *Application under section 2 of the Act of November 2, 1966.* An application by a native or citizen of Cuba or by his spouse or child residing in the United States with him, who was lawfully admitted to the United States for permanent residence prior to November 2, 1966, and who desires such admission to be recorded as of an earlier date pursuant to section 2 of the Act of November 2, 1966, shall be made on Form I-485A. The application shall be accompanied by the Alien Registration Receipt Card, Form I-151 or I-551, issued to the applicant in connection with his lawful admission for permanent residence, and shall be submitted to the director having jurisdiction over the applicant's place of residence in the United States. The decision on the application shall be made by the director. No appeal shall lie from his decision. If the application is approved, the applicant will be furnished with a replacement of his Form I-151 or I-551 bearing the new

date as of which the lawful admission for permanent residence has been recorded.

(c) *Application under section 214(d) of the Act.* An application for permanent resident status pursuant to section 214(d) of the Act shall be filed on Form I-485 with the director having jurisdiction over the applicant's place of residence. A separate application shall be filed by each applicant. If the application is approved, the director shall record the lawful admission of the applicant as of the date of approval. The applicant shall be notified of the decision and, if the application is denied, of the reasons therefor. No appeal shall lie from the denial of an application by the director but such denial shall be without prejudice to the alien's right to renew his or her application in proceedings under 8 CFR part 240.

[30 FR 14778, Nov. 30, 1965]

EDITORIAL NOTE: For FEDERAL REGISTER citations affecting § 245.2, see the List of CFR Sections Affected in the Finding Aids section of this volume.

§ 245.3 Adjustment of status under section 13 of the Act of September 11, 1957, as amended.

Any application for benefits under section 13 of the Act of September 11, 1957, as amended, must be filed on Form I-485 with the director having jurisdiction over the applicant's place of residence. The benefits under section 13 are limited to aliens who were admitted into the United States under section 101, paragraphs (a)(15)(A)(i), (a)(15)(A)(ii), (a)(15)(G)(i), or (a)(15)(G)(ii) of the Immigration and Nationality Act who performed diplomatic or semi-diplomatic duties and to their immediate families, and who establish that there are compelling reasons why the applicant or the member of the applicant's immediate family is unable to return to the country represented by the government which accredited the applicant and that adjustment of the applicant's status to that of an alien lawfully admitted for permanent residence would be in the national interest. Aliens whose duties were of a custodial, clerical, or menial

nature, and members of their immediate families, are not eligible for benefits under section 13. In view of the annual limitation of 50 on the number of aliens whose status may be adjusted under section 13, any alien who is prima facie eligible for adjustment of status to that of a lawful permanent resident under another provision of law shall be advised to apply for adjustment pursuant to such other provision of law. An applicant for the benefits of section 13 shall not be subject to the labor certification requirement of section 212(a)(14) of the Immigration and Nationality Act. The applicant shall be notified of the decision and, if the application is denied, of the reasons for the denial and of the right to appeal under the provisions of part 103 of this chapter. Any applications pending with the Service before December 29, 1981 must be resubmitted to comply with the requirements of this section.

(Secs. 103, 245, of the Immigration and Nationality Act, as amended; 71 Stat. 642, as amended, sec. 17, Pub. L. 97-116, 95 Stat. 1619 (8 U.S.C. 1103, 1255, 1255b))

[47 FR 44238, Oct. 7, 1982, as amended at 59 FR 33905, July 1, 1994]

§ 245.4 Documentary requirements.

The provisions of part 211 of this chapter relating to the documentary requirements for immigrants shall not apply to an applicant under this part.

(Secs. 103, 214, 245 Immigration and Nationality Act, as amended; (8 U.S.C. 1103, 1184, 8 U.S.C. 1255, Sec. 2, 96 Stat. 1157, 8 U.S.C. 1255 note))

[30 FR 14779, Nov. 30, 1965. Redesignated at 48 FR 4770, Feb. 3, 1983, and further redesignated at 52 FR 6322, Mar. 3, 1982, and further redesignated at 56 FR 49481, Oct. 2, 1991]

§ 245.5 Medical examination.

Pursuant to section 232(b) of the Act, an applicant for adjustment of status shall be required to have a medical examination by a designated civil surgeon, whose report setting forth the findings of the mental and physical condition of the applicant, including compliance with section 212(a)(1)(A)(ii) of the Act, shall be incorporated into the record. A medical examination shall not be required of an applicant for adjustment of status who entered

the United States as a non-immigrant fiance or fiancée of a United States citizen as defined in section 101(a)(15)(K) of the Act pursuant to § 214.2(k) of this chapter if the applicant was medically examined prior to, and as a condition of, the issuance of the nonimmigrant visa; provided that the medical examination must have occurred not more than one year prior to the date of application for adjustment of status. Any applicant certified under paragraphs (1)(A)(ii) or (1)(A)(iii) of section 212(a) of the Act may appeal to a Board of Medical Officers of the U.S. Public Health Service as provided in section 234 of the Act and part 235 of this chapter.

[56 FR 49841, Oct. 2, 1991, as amended at 62 FR 10384, Mar. 6, 1997]

§ 245.6 Interview.

Each applicant for adjustment of status under this part shall be interviewed by an immigration officer. This interview may be waived in the case of a child under the age of 14; when the applicant is clearly ineligible under section 245(c) of the Act or § 245.1 of this chapter; or when it is determined by the Service that an interview is unnecessary.

[57 FR 49375, Nov. 2, 1992]

§ 245.7 Adjustment of status of certain Soviet and Indochinese parolees under the Foreign Operations Appropriations Act for Fiscal Year 1990 (Pub. L. 101-167).

(a) *Application.* Each person applying for benefits under section 599E of Public Law 101-167 must file Form I-485 (Application for Lawful Permanent Residence) with the director having jurisdiction over the applicant's place of residence and must pay the appropriate fee. Each application shall be accompanied by Form I-643 (Health and Human Services Statistical Data Sheet), the results of a medical examination given in accordance with § 245.8 of this part, and, if the applicant has reached his or her 14th birthday but is not over 79 years of age, Form G-325A and an applicant fingerprint card (Form FD-258).

(b) *Aliens eligible to apply for adjustment.* The benefits of this section shall only apply to an alien who:

(1) Was a national of the Soviet Union, Vietnam, Laos, or Cambodia, and

(2) Was inspected and granted parole into the United States during the period beginning on August 15, 1988, and ending on September 30, 1990, after being denied refugee status.

(c) *Eligibility.* Benefits under Section 599E of Public Law 101–167 are limited to any alien described in paragraph (b) of this section who:

(1) Applies for such adjustment,

(2) Has been physically present in the United States for at least one year and is physically present in the United States on the date the application for such adjustment is filed,

(3) Is admissible to the United States as an immigrant, except as provided in paragraph (d) of this section, and

(4) Pays a fee for the processing of such application.

(d) *Waiver of certain grounds for inadmissibility.* The provisions of paragraphs (14), (15), (20), (21), (25), (28) (other than subparagraph (F)), and (32) of section 212(a) of the Act shall not apply to adjustment under this section. The Attorney General may waive any other provision of section 212(a) (other than paragraph (23)(B), (27), (29), or (33)) with respect to such an adjustment for humanitarian purposes, to assure family unity, or when it is otherwise in the public interest.

(e) *Date of approval.* Upon approval of such an application for adjustment of status, the Attorney General shall create a record of the alien's admission as a lawful permanent resident as of the date of the alien's inspection and parole described in paragraph (b)(2) of this section.

(f) *No offset in number of visas available.* When an alien is granted the status of having been lawfully admitted for permanent residence under this section, the Secretary of State shall not be required to reduce the number of immigrant visas authorized to be issued under the Immigration and Nationality Act.

[55 FR 24860, July 19, 1990. Redesignated at 56 FR 49841, Oct. 2, 1991, as amended at 59 FR 33905, July 1, 1994]

§245.8 Adjustment of status as a special immigrant under section 101(a)(27)(K) of the Act.

(a) *Application.* Each person applying for adjustment of status as a special immigrant under section 101(a)(27)(K) of the Act must file a Form I-485, Application to Register Permanent Residence or Adjust Status, with the director having jurisdiction over the applicant's place of residence. Benefits under this section are limited to aliens who have served honorably (or are enlisted to serve) in the Armed Forces of the United States for at least 12 years, and their spouses and children. For purposes of this section, special immigrants described in section 101(a)(27)(K) of the Act and his or her spouse and children shall be deemed to have been paroled into the United States pursuant to section 245(g) of the Act. Each applicant must file a separate application with the appropriate fee.

(b) *Eligibility.* The benefits of this section shall apply only to an alien described in section 101(a)(27)(K) of the Act who applies for such adjustment. The accompanying spouse or child of an applicant for adjustment of status who benefits from Public Law 102–110 may also apply for adjustment of status. The provisions of section 245(c) of the Act do not apply to the principal Armed Forces special immigrant or to his or her spouse or child.

(c) *Interview of the applicant.* Upon completion of the adjustment of status interview for a special immigrant under section 101(a)(27)(K) of the Act, the director shall make a *prima facie* determination regarding eligibility for naturalization benefits if the applicant is to be granted status as an alien lawfully admitted for permanent residence. If the director determines that the applicant is immediately eligible for naturalization under section 328 or 329 of the Act, the director shall advise the applicant that he or she is eligible to apply for naturalization on Form N-400, Application to File Petition for Naturalization. If the applicant wishes to apply for naturalization, the director shall instruct the applicant concerning the requirements for naturalization and provide him or her with the necessary forms.

(d) *Spouse or child outside the United States.* When a spouse or child of an alien granted special immigrant status under section 101(a)(27)(K) of the Act is outside the United States, the principal alien may file Form I-824, Application for Action on an Approved Application or Petition, with the office which approved the original application.

(e) *Removal provisions of section 237 of the Act.* If the Service is made aware by notification from the appropriate executive department or by any other means that a section 101(a)(27)(K) special immigrant who has already been granted permanent residence fails to complete his or her total active duty service obligation for reasons other than an honorable discharge, the alien may become subject to the removal provisions of section 237 of the Act, provided the alien is in one or more of the classes of deportable aliens specified in section 237 of the Act. The Service shall obtain a current Form DD-214, Certificate of Release or Discharge from Active Duty, from the appropriate executive department for verification of the alien's failure to maintain eligibility.

(f) *Rescission proceedings under section 246 of the Act.* If the Service determines that a military special immigrant under section 101(a)(27)(K) of the Act was not in fact eligible for adjustment of status, the Service may pursue rescission proceedings under section 246 of the Act.

[57 FR 33862, July 31, 1992, as amended at 58 FR 50836, Sept. 29, 1993; 62 FR 10384, Mar. 6, 1997]

§ 245.9 Adjustment of status of certain nationals of the People's Republic of China under Public Law 102-404.

(a) *Principal applicant status.* All nationals of the People's Republic of China who qualify under the provisions of paragraph (b) of this section may apply for adjustment of status as principals in their own right, regardless of age or marital status. Nationals of other countries who meet the requirements of paragraphs (b) and (c) of this section may apply for adjustment of status as qualified family members.

(b) *Aliens eligible to apply for adjustment.* An alien is eligible to apply for

adjustment of status under the provisions of Public Law 102-404, if the alien:

(1) Is a national of the People's Republic of China or a qualified family member of an eligible national of the People's Republic of China;

(2) Was in the United States at some time between June 5, 1989, and April 11, 1990, inclusive, or would have been in the United States during this time period except for a brief, casual, and innocent departure from this country;

(3) Has resided continuously in the United States since April 11, 1990, except for brief, casual, and innocent absences;

(4) Was not physically present in the People's Republic of China for more than a cumulative total of 90 days between April 11, 1990, and October 9, 1992;

(5) Is admissible to the United States as an immigrant, unless the basis for excludability has been waived;

(6) Establishes eligibility for adjustment of status under all provisions of section 245 of the Act, unless the basis for ineligibility has been waived; and

(7) Properly files an application for adjustment of status under section 245 of the Act.

(c) *Qualified family member who is not a national of the People's Republic of China.* A qualified family member within the meaning of this section includes the spouse, child, son, or daughter of a national of the People's Republic of China who is eligible for benefits under the provisions of paragraph (b) of this section, provided that:

(1) He or she qualified as the spouse or child (as defined in section 101(b)(1) of the Act) of an eligible national of the People's Republic of China as of April 11, 1990; and

(2) The qualifying relationship continues to exist, or the family member is a son or daughter of an eligible national of the People's Republic of China and the family member was unmarried and under the age of 21 on April 11, 1990.

(d) *Waivers of inadmissibility under section 212(a) of the Act.* An applicant for the benefits of the adjustment of status provisions of Pub. L. 102-404 is automatically exempted from compliance with the requirements of sections 212(a)(5) and 212(a)(7)(A) of the Act. A

Pub. L. 102-404 applicant may also apply for one or more waivers of inadmissibility under section 212(a) of the Act, except for inadmissibility under section 212(a)(2)(C), 212(a)(3)(A), 212(a)(3)(B), 212(a)(3)(C) or 212(a)(3)(E) of the Act.

(e) *Waiver of the two-year foreign residence requirement of section 212(e).* An applicant for the benefits of the adjustment of status provisions of Public Law 102-404 is automatically exempted from compliance with the two-year foreign residence requirement of section 212(e) of the Act.

(f) *Waiver of section 245(c) of the Act.* Public Law 102-404 provides that the provisions of section 245(c) of the Act shall not apply to persons applying for the adjustment of status benefits of Public Law 102-404.

(g) *Application.* Each applicant must file an application for adjustment of status on Form I-485, Application to Register Permanent Residence or Adjust Status, accompanied by the prescribed fee, and the supporting documents specified on the instructions to Form I-485 and described in § 245.2. Secondary evidence may be submitted if the applicant is unable to obtain the required primary evidence. Applicants who are nationals of the People's Republic of China should complete Part 2 of Form I-485 by checking box "h—other" and writing "CSPA—Principal" next to that block. Applicants who are not nationals of the People's Republic of China should complete Part 2 of Form I-485 by checking box "h—other" and writing "CSPA—Qualified Family Member" next to that block. Each applicant for the benefits of Public Law 102-404 must also submit evidence of eligibility for the adjustment of status benefits of Public Law 102-404:

(1) A photocopy of all pages of the applicant's most recent passport or an explanation of why the applicant does not have a passport;

(2) An attachment on a plain piece of paper showing:

(i) The date of the applicant's last arrival in the United States before or on April 11, 1990;

(ii) The date of each departure the applicant made from the United States since that arrival (if the applicant did not depart the United States after the

initial date of arrival, the applicant should write "I was in the United States on April 11, 1990, and I have not departed the United States since April 11, 1990");

(iii) The reason for each departure; and

(iv) The date of each return to the United States.

(3) An attachment on a plain piece of paper showing:

(i) The date the applicant arrived in the People's Republic of China; and

(ii) The date the applicant left the People's Republic of China for each trip the applicant made to the People's Republic of China between April 11, 1990, and October 9, 1992 (if the applicant did not travel to the People's Republic of China, the applicant should write "I was not in the People's Republic of China between April 11, 1990, and October 9, 1992");

(4) A copy of evidence showing that the applicant was found eligible for benefits under E.O. 12711, such as deferred enforced departure (DED), employment authorization, and/or waiver of the two-year foreign residence requirement, if the applicant previously applied for benefits under E.O. 12711; and

(5) Primary or secondary evidence of a qualifying family relationship to an eligible national of the People's Republic of China, such as a birth or marriage certificate, if the applicant is a qualified family member who is not a national of the People's Republic of China.

(h) *Secondary evidence.* If any required primary evidence is unavailable, church or school records, or other secondary evidence pertinent to the facts in issue, may be submitted. If such documents are unavailable, affidavits may be submitted. The applicant may submit as many types of secondary evidence as necessary to establish the birth, marriage, or other event. Documentary evidence establishing that primary evidence is unavailable need not accompany secondary evidence of birth or marriage in the People's Republic of China.

(i) *Filing.* The application period begins on July 1, 1993. To benefit from the provisions of Public Law 102-404 (the Chinese Student Protection Act of

1992), an alien must properly file an application for adjustment of status under section 245 of the Act on or before June 30, 1994. All applications for the benefits of Public Law 102-404 must be submitted by mail to the Service Center having jurisdiction over the applicant's place of residence in the United States. Pursuant to the deactivation clause of Public Law 102-404, if the President of the United States determines and certifies to Congress before July 1, 1993, that conditions in the People's Republic of China permit persons covered by Public Law 102-404 to safely return to the People's Republic of China, no applications for lawful permanent resident status under Public Law 102-404 will be processed or granted.

(j) *Immigrant classification and assignment of priority date.* Public Law 102-404 provides eligible applicants with automatic classifications as immigrants under section 203(b)(3)(A)(i) of the Act. No immigrant visa petition is required and applicants need not meet the usual requirements for classification as skilled workers. The applicant's priority date shall be the date his or her application for adjustment of status under Public Law 102-404 is properly filed with the Service.

(k) *Effect of immigrant visa number limitations.* Eligible Public Law 102-404 applicants are exempt from the per-country immigrant visa number limitations of section 202(a)(2) of the Act. Eligible Public Law 102-404 applicants may file an application for adjustment of status under Public Law 102-404 without regard to immigrant visa number limitations of sections 202(a)(2) and 203(b)(3)(A)(i) of the Act. However, the adjustment of status application may not be approved and adjustment of status to that of a lawful permanent resident of the United States may not be granted until a visa number becomes available for the applicant under the worldwide allocation of immigrant visa numbers for employment-based aliens under section 203(b)(3)(A)(i) of the Act. The applicant may request initial or continued employment authorization during this period by filing Form I-765, Application for Employment Authorization. If the applicant needs to travel outside the United States during this

period, he or she may file a request for advance parole on Form I-131, Application for Travel Document.

(l) *Decision.* In the case of an application for adjustment of status filed pursuant to the provisions of Public Law 102-404, the authority conferred upon district directors in 8 CFR part 245 to accept and adjudicate an application for adjustment of status under section 245 of the Act is delegated exclusively to the service center director having jurisdiction over the applicant's place of residence in the United States. If the service center director transfers the application to the district director, authority to adjudicate an application for adjustment of status filed pursuant to the provisions of Public Law 102-404 lies with the district director having jurisdiction over the applicant's place of residence.

(m) *Effect of enactment on family members other than qualified family members.* The adjustment of status benefits and waivers provided by Public Law 102-404 do not apply to a spouse or child who is not a qualified family member as defined in paragraph (c) of this section. However, a spouse or child whose relationship to the principal alien was established prior to the approval of the principal's adjustment-of-status application may be accorded the derivative priority date and preference category of the principal alien, in accordance with the provisions of section 203(d) of the Act. The spouse or child may use the priority date and category when it becomes current, in accordance with the limitations set forth in sections 201 and 202 of the Act.

[58 FR 35838, July 1, 1993, as amended at 62 FR 10384, Mar. 6, 1997; 62 FR 63254, Nov. 28, 1997]

§ 245.10 Adjustment of status upon payment of additional sum under Public Law 103-317.

(a) *Eligibility.* Any alien who is included in the categories of restricted aliens under § 245.1(b) may apply for adjustment of status under section 245 of the Act if the alien:

- (1) Is physically present in the United States;
- (2) Is eligible for immigrant classification and has an immigrant visa

number immediately available at the time of filing for adjustment of status;

(3) Is not inadmissible from the United States under any provision of section 212 of the Act, or all grounds for inadmissibility have been waived;

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

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

(6) Pays an additional sum of \$1,000, unless payment of the additional sum is not required under section 245(i) of the Act; and

(7) Will adjust status under section 245 of the Act to that of a lawful permanent resident of the United States on or after October 1, 1994, and before October 1, 1997.

(b) *Payment of additional sum.* An adjustment applicant filing under the provisions of section 245(i) of the Act must pay the standard adjustment application filing fee as specified in §103.7(b)(1) of this chapter. Each application submitted to the Service under the provisions of section 245(i) of the Act on or after October 1, 1994, and before December 29, 1996, must be submitted with an additional sum of \$650. Each application submitted to the Service under the provisions of section 245(i) of the Act on or after December 29, 1996, must be submitted with an additional sum of \$1,000. If a determination is made by an officer of the Service on or after December 29, 1996, that an applicant is subject to section 245(i) of the Act, and the Form I-485 is not accompanied by Supplement A to Form I-485 and, if required by section 245(i), the additional sum of \$1,000, the applicant will be afforded the opportunity to amend the application by submitting Supplement A, the additional sum of \$1,000, if required, and any other required documentation. However, an applicant filing under the provisions of section 245(i) of the Act is not required to pay the additional sum if, at the time the application for adjustment of status is filed, the alien is:

(1) Unmarried and less than 17 years of age;

(2) The spouse of a legalized alien, qualifies for and has properly filed

Form I-817, Application for Voluntary Departure under the Family Unity Program, and submits a copy of his or her receipt or approval notice for filing Form I-817; or

(3) The child of a legalized alien, is unmarried and less than 21 years of age, qualifies for and has filed Form I-817, and submits a copy of his or her receipt of approval notice for filing Form I-817. Such an alien must pay the additional sum if he or she has reached the age of 21 years at the time of filing for adjustment of status. Such an alien must meet all other conditions for adjustment of status contained in the Act and in this chapter.

(c) *Application period.* The Service or the Executive Office for Immigration Review may approve an application for adjustment of status pursuant to section 245(i) of the Act if such application was filed either on or after October 1, 1994, and before October 23, 1997 or any other such date as Congress may determine in an extension of section 245(i). If an alien attempts to file an adjustment of status application under the provisions of section 245(i) outside of this time period, the Service will accept the application and base filing fee, as set forth in §103.7(b)(1) of this chapter, return the additional sum of \$1,000 to the alien, and either the Service or the Executive Office for Immigration Review will adjudicate the application pursuant to section 245(a) of the Act. If the alien, in such a case, is not eligible for adjustment of status, either the Service will issue a written notice advising the alien of the denial of the application for adjustment of status, or the Executive Office for Immigration Review will deny the application for adjustment of status.

(d) *Adjustment application filed on or after October 1, 1994, dated before October 23, 1997 or any other such date as Congress may determine in an extension of this provision, without Supplement A to Form I-485 and additional sum.* An adjustment of status applicant will be allowed the opportunity to amend an adjustment of status application filed in accordance with §103.2 of this chapter on or after October 1, 1994, and before October 23, 1997 or any other such date as Congress may determine in an extension of section 245(i) of the Act, in

order to request consideration under the provisions of section 245(i), if it appears that the alien is not otherwise ineligible for adjustment of status. If the application for adjustment of status is pending before the Service, the Service shall notify the applicant in writing of the Service's intent to deny the adjustment of status application, and any other requests for benefits that derive from the adjustment application, unless Supplement A to Form I-485 and any required additional sum is filed within 30 days of the date of the notice. If the application for adjustment of status is pending before the Executive Office for Immigration Review, the Executive Office for Immigration Review will deny the application and permit the applicant to file a motion to reopen in accordance with §§ 3.2(c) and 3.23 of this chapter along with proof of payment to the Immigration and Naturalization Service of the additional sum within 30 days of the denial.

(e) *Applications for Adjustment of Status filed before October 1, 1994.* The provisions of section 245(i) of the Act shall not apply to an application for adjustment of status that was filed before October 1, 1994. The provisions of section 245(i) of the Act also shall not apply to a motion to reopen or reconsider an application for adjustment of status if the application for adjustment of status was filed before October 1, 1994. An applicant whose pre-October 1, 1994, application for adjustment of status has been denied may file a new application for adjustment of status pursuant to section 245(i) of the Act on or after October 1, 1994, and before October 23, 1997, or any other such date as Congress may determine in an extension of section 245(i), provided that such new application is accompanied by: the required fee; Supplement A to Form I-485; and additional sum required by section 245(i) of the Act; and all other required initial and additional evidence.

(f) *Completion of processing of pending applications.* (1) An application for adjustment of status filed on or after October 1, 1994, and before October 23, 1997 or any other such date as Congress may determine in an extension of section 245(i) of the Act, shall be adjudicated to

completion by an officer of the Service or by the Executive Office for Immigration Review, regardless of whether the final decision is made after the termination of this program. The provisions of paragraph (d) of this section regarding amended applications shall apply to all such applications. The Service or the Executive Office for Immigration Review may consider a motion to open or reconsider an application for adjustment of status on the basis of section 245(i) if the applicant submitted a copy of the application for adjustment of status, a copy of Supplement A to Form I-485, and any other required documentation on or after October 1, 1994, and before October 23, 1997 or any other such date as Congress may determine in an extension of section 245(i). However, in order to receive the benefit of a motion to reopen or reconsider that has been granted, the applicant must have remitted to the Immigration and Naturalization Service before October 23, 1997 or any other such date as Congress may determine in an extension of section 245(i), any additional sum required by section 245(i). Even if a motion to reopen or reconsider is granted, failure to pay the additional sum to the Immigration and Naturalization Service before October 23, 1997 or any other such date as Congress may determine in an extension of 245(i) will result in the ultimate denial of the application for adjustment of status.

(2) Any application for adjustment of status submitted pursuant to section 245(i) and considered in deportation or removal proceedings must be filed between October 1, 1994, and October 23, 1997 or any other such date as Congress may determine in an extension of section 245(i).

(g) *Aliens deportable under section 237(a)(4)(B) of the Act are ineligible to adjust status.* Section 237(a)(4)(B) of the Act renders any alien who has engaged, is engaged, or at any time after admission engages in any terrorist activity, as defined in section 212(a)(3)(B)(iii) of the Act, deportable. Under section 245(c)(6) of the Act, persons who are deportable under section 237(a)(4)(B) of the Act are ineligible to adjust status under section 245(a) of the Act. Any person who is deportable under section 237(a)(4)(B) of the Act is also ineligible

to adjust status under section 245(i) of the Act.

[59 FR 51095, Oct. 7, 1994; 59 FR 53020, Oct. 20, 1994, as amended at 62 FR 10384, Mar. 6, 1997; 62 FR 39424, July 23, 1997; 62 FR 55153, Oct. 23, 1997]

§ 245.11 Adjustment of aliens in S nonimmigrant classification.

(a) *Eligibility.* An application on Form I-854, requesting that an alien witness or informant in S nonimmigrant classification be allowed to adjust status to that of lawful permanent resident, may only be filed by the federal or state law enforcement authority (“LEA”) (which shall include a federal or state court or a United States Attorney’s Office) that originally requested S classification for the alien. The completed application shall be filed with the Assistant Attorney General, Criminal Division, Department of Justice, who will forward only properly certified applications to the Commissioner, Immigration and Naturalization Service, for approval. Upon receipt of an approved Form I-854 allowing the S nonimmigrant to adjust status to that of lawful permanent resident, the alien may proceed to file with that Form, Form I-485, Application to Register Permanent Residence or Adjust Status, pursuant to the following process.

(1) *Request to allow S nonimmigrant to apply for adjustment of status to that of lawful permanent resident.* The LEA that requested S nonimmigrant classification for an S nonimmigrant witness or informant pursuant to section 101(a)(15)(S) of the Act may request that the principal S nonimmigrant be allowed to apply for adjustment of status by filing Form I-854 with the Assistant Attorney General, Criminal Division, in accordance with the instructions on, or attached to, that form and certifying that the alien has fulfilled the terms of his or her admission and classification. The same Form I-854 may be used by the LEA to request that the principal nonimmigrant’s spouse, married and unmarried sons and daughters, regardless of age, and parents who are in derivative S nonimmigrant classification and who are qualified family members as described in paragraph (b) of this section similarly be allowed to apply for adjust-

ment of status pursuant to section 101(a)(15)(S) of the Act.

(2) *Certification.* Upon receipt of an LEA’s request for the adjustment of an alien in S nonimmigrant classification on Form I-854, the Assistant Attorney General, Criminal Division, shall review the information and determine whether to certify the request to the Commissioner in accordance with the instructions on the form.

(3) *Submission of requests for adjustment of status to the Commissioner.* No application by an LEA on Form I-854 requesting the adjustment to lawful permanent resident status of an S nonimmigrant shall be forwarded to the Commissioner unless first certified by the Assistant Attorney General, Criminal Division.

(4) *Decision on request to allow adjustment of S nonimmigrant.* The Commissioner shall make the final decision on a request to allow an S nonimmigrant to apply for adjustment of status to lawful permanent resident.

(i) In the event the Commissioner decides to deny an application on Form I-854 to allow an S nonimmigrant to apply for adjustment of status, the Assistant Attorney General, Criminal Division, and the relevant LEA shall be notified in writing to that effect. The Assistant Attorney General, Criminal Division, shall concur in or object to that decision. Unless the Assistant Attorney General, Criminal Division, objects within 7 days, he or she shall be deemed to have concurred in the decision. In the event of an objection by the Assistant Attorney General, Criminal Division, the matter will be expeditiously referred to the Deputy Attorney General for a final resolution. In no circumstances shall the alien or the relevant LEA have a right of appeal from any decision to deny.

(ii) Upon approval of the request on Form I-854, the Commissioner shall forward a copy of the approved form to the Assistant Attorney General and the S nonimmigrant, notifying them that the S nonimmigrant may proceed to file Form I-485 and request adjustment of status to that of lawful permanent resident, and that, to be eligible for adjustment of status, the nonimmigrant must otherwise:

(A) Meet the requirements of paragraph (b) of this section, if requesting adjustment as a qualified family member of the certified principal S nonimmigrant witness or informant;

(B) Be admissible to the United States as an immigrant, unless the ground of inadmissibility has been waived;

(C) Establish eligibility for adjustment of status under all provisions of section 245 of the Act, unless the basis for ineligibility has been waived; and

(D) Properly file with his or her Form I-485, Application to Register Permanent Residence or Adjust Status, the approved Form I-854.

(b) *Family members*—(1) *Qualified family members*. A qualified family member of an S nonimmigrant includes the spouse, married or unmarried son or daughter, or parent of a principal S nonimmigrant who meets the requirements of paragraph (a) of this section, provided that:

(i) The family member qualified as the spouse, married or unmarried son or daughter, or parent (as defined in section 101(b) of the Act) of the principal S nonimmigrant when the family member was admitted as or granted a change of status to that of a nonimmigrant under section 101(a)(15)(S) of the Act;

(ii) The family member was admitted in S nonimmigrant classification to accompany, or follow to join, the principal S-5 or S-6 alien pursuant to the LEA's request;

(iii) The family member is not inadmissible from the United States as a participant in Nazi persecution or genocide as described in section 212(a)(3)(E) of the Act;

(iv) The qualifying relationship continues to exist; and

(v) The principal alien has adjusted status, has a pending application for adjustment of status or is concurrently filing an application for adjustment of status under section 101(a)(15)(S) of the Act.

(vi) Paragraphs (b)(1)(iv) and (v) of this section do not apply if the alien witness or informant has died and, in the opinion of the Attorney General, was in compliance with the terms of his or her S classification under section 245(i) (1) and (2) of the Act.

(2) *Other family member*. The adjustment provisions in this section do not apply to a family member who has not been classified as an S nonimmigrant pursuant to a request on Form I-854 or who does not otherwise meet the requirements of paragraph (b) of this section. However, a spouse or an unmarried child who is less than 21 years old, and whose relationship to the principal S nonimmigrant or qualified family member was established prior to the approval of the principal S nonimmigrant's adjustment of status application, may be accorded the priority date and preference category of the principal S nonimmigrant or qualified family member, in accordance with the provisions of section 203(d) of the Act. Such a spouse or child:

(i) May use the principal S nonimmigrant or qualified member's priority date and category when it becomes current, in accordance with the limitations set forth in sections 201 and 202 of the Act;

(ii) May seek immigrant visa issuance abroad or adjustment of status to that of a lawful permanent resident of the United States when the priority date becomes current for the spouse's or child's country of chargeability under the fourth employment-based preference classification;

(iii) Must meet all the requirements for immigrant visa issuance or adjustment of status, unless those requirements have been waived;

(iv) Is not applying for adjustment of status under 101(a)(15)(S) of the Act, is not required to file Form I-854, and is not required to obtain LEA certification; and

(v) Will lose eligibility for benefits if the child marries or has his or her twenty-first birthday before being admitted with an immigrant visa or granted adjustment of status.

(c) *Waivers of inadmissibility*. An alien seeking to adjust status pursuant to the provisions of section 101(a)(15)(S) of the Act may not be denied adjustment of status for conduct or a condition that:

(1) Was disclosed to the Attorney General prior to admission; and

(2) Was specifically waived pursuant to the waiver provisions set forth at

section 212(d)(1) and 212(d)(3) of the Act.

(d) *Application.* Each S nonimmigrant requesting adjustment of status under section 101(a)(15)(S) of the Act must:

(1) File Form I-485, with the prescribed fee, accompanied by the approved Form I-854, and the supporting documents specified in the instructions to Form I-485 and described in 8 CFR 245.2. Secondary evidence may be submitted if the nonimmigrant is unable to obtain the required primary evidence as provided in 8 CFR 103.2(b)(2). The S nonimmigrant applying to adjust must complete Part 2 of Form I-485 by checking box “h-other” and writing “S” or “S-Qualified Family Member.” Qualified family members must submit documentary evidence of the relationship to the principal S nonimmigrant witness or informant.

(2) Submit detailed and inclusive evidence of eligibility for the adjustment of status benefits of S classification, which shall include:

(i) A photocopy of all pages of the alien’s most recent passport or an explanation of why the alien does not have a passport; or

(ii) An attachment on a plain piece of paper showing the dates of all arrivals and departures from the United States in S nonimmigrant classification and the reason for each departure; and

(iii) Primary evidence of a qualifying relationship to the principal S nonimmigrant, such as birth or marriage certificate. If any required primary evidence is unavailable, church or school records, or other secondary evidence may be submitted. If such documents are unavailable, affidavits may be submitted as provided in 8 CFR 103.2(b)(2).

(e) *Priority date.* The S nonimmigrant’s priority date shall be the date his or her application for adjustment of status as an S nonimmigrant is properly filed with the Service.

(f) *Visa number limitation.* An adjustment of status application under section 101(a)(15)(S) of the Act may be filed regardless of the availability of immigrant visa numbers. The adjustment of status application may not, however, be approved and the alien’s adjustment of status to that of lawful permanent resident of the United

States may not be granted until a visa number becomes available for the alien under the worldwide allocation for employment-based immigrants under section 201(d) and section 203(b)(4) of the Act. The alien may request initial or continued employment authorization while the adjustment application is pending by filing Form I-765, Application for Employment Authorization. If the alien needs to travel outside the United States during this period, he or she may file a request for advance parole on Form I-131, Application for Travel Document.

(g) *Filing and decision.* An application for adjustment of status filed by an S nonimmigrant under section 101(a)(15)(S) of the Act shall be filed with the district director having jurisdiction over the alien’s place of residence. Upon approval of adjustment of status under this section, the district director shall record the alien’s lawful admission for permanent residence as of the date of such approval. The district director shall notify the Commissioner and the Assistant Attorney General, Criminal Division, of the adjustment.

(h) *Removal under section 237 of the Act.* Nothing in this section shall prevent an alien adjusted pursuant to the terms of these provisions from being removed for conviction of a crime of moral turpitude committed within 10 years after being provided lawful permanent residence under this section or for any other ground under section 237 of the Act.

(i) *Denial of application.* In the event the district director decides to deny an application on Form I-485 and an approved Form I-854 to allow an S nonimmigrant to adjust status, the Assistant Attorney General, Criminal Division, and the relevant LEA shall be notified in writing to that effect. The Assistant Attorney General, Criminal Division, shall concur in or object to that decision. Unless the Assistant Attorney General, Criminal Division, objects within 7 days, he or she shall be deemed to have concurred in the decision. In the event of an objection by the Assistant Attorney General, Criminal Division, the matter will be expeditiously referred to the Deputy Attorney General for a final resolution. In

no circumstances shall the alien or the relevant LEA have a right of appeal from any decision to deny. A denial of an adjustment application under this paragraph may not be renewed in subsequent removal proceedings.

[60 FR 44269, Aug. 25, 1995; 60 FR 52248, Oct. 5, 1995, as amended at 62 FR 10384, Mar. 6, 1997]

§245.12 Adjustment of status of certain Polish and Hungarian parolees under the Illegal Immigration Reform and Immigrant Responsibility Act of 1996.

(a) *Application.* Each person applying for adjustment of status under section 646(b) of Pub. L. 104-208 must file a completed Form I-485, Application to Register Permanent Residence or Adjustment Status, accompanied by the appropriate filing fee, with the district director having jurisdiction over the applicant's place of residence. Each application shall be accompanied by specific evidence that the applicant meets the requirements for eligibility under section 646 of Pub. L. 104-208; a Form I-643, Health and Human Services Statistical Data; the results of the medical examination made in accordance with §245.5; Form G-325A, Biographic Information, and, unless the applicant is under the age of 14 years or over the age of 79 years, a properly executed Form FD-258, Fingerprint Card.

(b) *Effect of departure.* Departure from the United States by an applicant for benefits under this provision shall be deemed an abandonment of the application as provided in §245.2(a)(4)(ii).

[62 FR 28315, May 23, 1997]

PART 245a—ADJUSTMENT OF STATUS TO THAT OF PERSONS ADMITTED FOR LAWFUL TEMPORARY OR PERMANENT RESIDENT STATUS UNDER SECTION 245A OF THE IMMIGRATION AND NATIONALITY ACT

Sec.

245a.1 Definitions.

245a.2 Application for temporary residence.

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245a.4 Adjustment to lawful resident status of certain nationals of countries for which extended voluntary departure has been made available.

245a.5 Temporary disqualification of certain newly legalized aliens from receiving benefits from programs of financial assistance furnished under federal law.

AUTHORITY: 8 U.S.C. 1101, 1103, 1255a and 1255a note.

SOURCE: 52 FR 16208, May 1, 1987, unless otherwise noted.

§245a.1 Definitions.

As used in this chapter:

(a) *Act* means the Immigration and Nationality Act, as amended by The Immigration Reform and Control Act of 1986.

(b) *Service* means the Immigration and Naturalization Service (INS).

(c)(1) *Resided continuously* as used in section 245A(a)(2) of the Act, means that the alien shall be regarded as having resided continuously in the United States if, at the time of filing of the application for temporary resident status:

An alien who after appearing for a scheduled interview to obtain an immigrant visa at a Consulate or Embassy in Canada or Mexico but who subsequently is not issued an immigrant visa and who is paroled back into the United States, pursuant to the state-side criteria program, shall be regarded as having been granted advance parole by the Service.

(i) No single absence from the United States has exceeded forty-five (45) days, and the aggregate of all absences has not exceeded one hundred and eighty (180) days between January 1, 1982 through the date the application for temporary resident status is filed, unless the alien can establish that due to emergent reasons, his or her return to the United States could not be accomplished within the time period allowed;

(ii) The alien was maintaining residence in the United States; and

(iii) The alien's departure from the United States was not based on an order of deportation.

An alien who has been absent from the United States in accordance with the Service's advance parole procedures