AUTHORITY: 8 U.S.C. 1101, 1103, 1182, 1255; section 202, Public Law 105–100, 111 Stat. 2160, 2193; section 902, Public Law 105–277, 112 Stat. 2681; Title VII of Public Law 110–229.

SOURCE: Duplicated from part 245 at 68 FR 9842, Feb. 28, 2003.

EDITORIAL NOTE: Nomenclature changes to part 1245 appear at 68 FR 9846, Feb. 28, 2003, and 68 FR 10357, Mar. 5, 2003.

§ 1245.1 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 §1245.10, is not included in the categories of aliens prohibited from applying for adjustment of status listed in §1245.1(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 8 CFR 212.1(e) or (q), other than an immediate relative as defined in section 201(b) of the Act;

(8) Any alien admitted as a Visa Waiver Pilot Program visitor under the provisions of section 217 of the Act and part 217 of 8 CFR chapter I 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 §1274a.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 §1212.8(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 §1212.7(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 8 CFR chapter 1;

(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 8 CFR chapter 1;

(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 defined in section 101(a)(15)(K) of the Act, unless:

(i) In the case of a K–1 fianceé(e) under section 101(a)(15)(K)(i) of the Act or the K–2 child of a fianceé(e) under section 101(a)(15)(K)(iii) of the Act, the alien is applying for adjustment of status based upon the marriage of the K–1 fianceé(e) which was contracted within 90 days of entry with the United States citizen who filed a petition on behalf of the K–1 fianceé(e) pursuant to §214.2(k) of 8 CFR chapter 1;

(ii) In the case of a K–3 spouse under section 101(a)(15)(K)(ii) of the Act or the K–4 child of a spouse under section 101(a)(15)(K)(iii) of the Act, the alien is applying for adjustment of status based upon the marriage of the K–3 spouse to the United States citizen who filed a petition on behalf of the K–3 spouse pursuant to §214.2(k) of 8 CFR chapter I;

(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 1245.11;

(8) 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 8 CFR chapter I;

(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 8 CFR chapter I or an exchange propram sponsor under §214.2(j)

of 8 CFR chapter I 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 nonimmigrant stay from the Service either in person or by mail (as, for example, an individual who is hospitalized with an illness at the time nonimmigrant 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, nonimmigrant 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 here 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 §1245.2 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 1235 and 1249, 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 is 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). 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.

(i) *Adjustment of status from K–3/K–4 status.* An alien admitted to the United States as a K–3 under section 101(a)(15)(K)(ii) of the Act may apply for adjustment of status to that of a permanent resident pursuant to section 245 of the Act at any time following the approval of the Form I–130 petition filed on the alien's behalf, by the same citizen who petitioned for the alien's K–3 status. An alien admitted to the United States as a K–4 under section 101(a)(15)(K)(iii) of the Act may apply for adjustment of status to that of permanent residence pursuant to section 245 of the Act at any time following the approval of the Form I–130 petition filed on the alien's behalf, by the same citizen who petitioned for the alien's parent's K–3 status. Upon approval of the application, the director shall record his or her lawful admission for permanent residence in accordance with that section and subject to the conditions prescribed in section 216 of the Act. An alien admitted to the U.S. as a K–3/K–4 alien may not adjust to that of permanent resident status in any way other than as a spouse or child of the U.S. citizen who originally filed the petition for that alien's K–3/K–4 status.

(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 §1245.1, see the List of CFR Sections Affected, which appears in the Finding Aids section of the printed volume and on GPO Access.

§ 1245.2 Application.

(a) General—(1) *Jurisdiction.* (i) *In General.* In the case of any alien who has been placed in deportation proceedings or in removal proceedings (other than as an arriving alien), the immigration judge hearing the proceeding has exclusive jurisdiction to adjudicate any application for adjustment of status the alien may file.

(ii) *Arriving Aliens.* In the case of an arriving alien who is placed in removal proceedings, the immigration judge does not have jurisdiction to adjudicate any application for adjustment of status filed by the arriving alien unless:

(A) The alien properly filed the application for adjustment of status with USCIS while the arriving alien was in the United States;

(B) The alien departed from and returned to the United States pursuant to the terms of a grant of advance parole to pursue the previously filed application for adjustment of status;

(C) The application for adjustment of status was denied by USCIS; and

(D) DHS placed the arriving alien in removal proceedings either upon the arriving alien's return to the United States pursuant to the grant of advance parole or after USCIS denied the application.

(2) *Proper filing of application*—(i) *Under section 245.* (A) An immigrant visa must be immediately available in order for an alien to properly file an adjustment application under section 245 of the Act See §1245.1(g)(1) to determine whether an immigrant visa is immediately available.

(B) If, at the time of filing, approval of a visa petition filed for classification under section 201(b)(2)(A)(i), section 203(a) or section 203(b)(1), (2) or (3) of the Act would make a visa immediately available to the alien beneficiary, the alien beneficiary's adjustment application will be considered properly filed whether submitted concurrently with or subsequent to the visa petition, provided that it meets the filing requirements contained in parts 103 of 8 CFR chapter I and 1245 of this chapter. For any other classification, the alien beneficiary may file the adjustment application only after the Service has approved the visa petition.

(C) A visa petition and an adjustment application are concurrently filed only if:

(*1*) The visa petitioner and adjustment applicant each file their respective form at the same time, bundled together within a single mailer or delivery packet, with the proper filing fees on the same day and at the same Service office, or;

(*2*) the visa petitioner filed the visa petition, for which a visa number has