

3 of 100 DOCUMENTS

LEXIS PUBLISHING'S CODE OF FEDERAL REGULATIONS  
Copyright © 2003, LEXIS Publishing\*\*\* THIS SECTION IS CURRENT THROUGH THE OCTOBER 1, 2003 ISSUE OF \*\*\*  
\*\*\* THE FEDERAL REGISTER \*\*\*

## TITLE 8 — ALIENS AND NATIONALITY

## CHAPTER I — DEPARTMENT OF HOMELAND SECURITY (IMMIGRATION AND NATURALIZATION)

## SUBCHAPTER B — IMMIGRATION REGULATIONS

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

## 8 CFR 245.10

§ 245.10 Adjustment of status upon payment of additional sum under section 245(i).

(a) Definitions. As used in this section the term:

(1)(i) Grandfathered alien means an alien who is the beneficiary (including a spouse or child of the alien beneficiary if eligible to receive a visa under section 203(d) of the Act) of:

(A) A petition for classification under section 204 of the Act which was properly filed with the Attorney General on or before April 30, 2001, and which was approvable when filed; or

(B) An application for labor certification under section 212(a)(5)(A) of the Act that was properly filed pursuant to the regulations of the Secretary of Labor on or before April 30, 2001, and which was approvable when filed.

(ii) If the qualifying visa petition or application for labor certification was filed after January 14, 1998, the alien must have been physically present in the United States on December 21, 2000. This requirement does not apply with respect to a spouse or child accompanying or following to join a principal alien who is a grandfathered alien as described in this section.

(2) Properly filed means:

(i) With respect to a qualifying immigrant visa petition, that the application was physically received by the Service on or before April 30, 2001, or if mailed, was postmarked on or before April 30, 2001, and accepted for filing as provided in § 103.2(a)(1) and (a)(2) of this chapter; and

(ii) With respect to a qualifying application for labor certification, that the application was properly filed and accepted pursuant to the regulations of the Secretary of Labor, 20 CFR 656.21.

(3) Approvable when filed means that, as of the date of the filing of the qualifying immigrant visa petition under section 204 of the Act or qualifying application for labor certification, the qualifying petition or application was properly filed, meritorious in fact, and non-frivolous ("frivolous" being defined herein as patently without substance). This determination will be made based on the circumstances that existed at the time the qualifying petition or application was filed. A visa petition that was properly filed on or before April 30, 2001, and was approvable when filed, but was later withdrawn, denied, or revoked due to circumstances that have arisen after the time of filing, will preserve the alien beneficiary's grandfathered status if the alien is otherwise eligible to file an application for adjustment of status under section 245(i) of the Act.

(4) Circumstances that have arisen after the time of filing means circumstances similar to those outlined in § 205.1(a)(3)(i) or (a)(3)(ii) of this chapter.

(b) Eligibility. An alien who is included in the categories of restricted aliens under § 245.1(b) and meets the definition of a "grandfathered alien" may apply for adjustment of status under section 245 of the Act if the alien meets the requirements of paragraphs (b)(1) through (b)(7) of this section:

## 8 CFR 245.10

- (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 required fee 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 lawful permanent resident of the United States on or after October 1, 1994.

(c) 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 under the provisions of section 245(i) of the Act must be submitted with an additional sum of \$1,000. An applicant must submit the additional sum of \$1,000 only once per application for adjustment of status submitted under the provisions of section 245(i) of the Act. 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 or 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.

(d) Pending adjustment application with the Service or Executive Office for Immigration Review filed without Supplement A to Form I-485 and additional sum. An alien who filed an adjustment of status application with the Service in accordance with § 103.2 of this chapter will be allowed the opportunity to amend such an application to request consideration under the provisions of section 245(i) of the Act, if it appears that the alien is not otherwise ineligible for adjustment of status. 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 (EOIR), EOIR will allow the respondent an opportunity to amend an adjustment of status application filed in accordance with § 103.2 of this chapter (to include Supplement A to Form I-485 and proof of remittance to the INS of the required additional sum) in order to request consideration under the provisions of section 245(i) of the Act.

(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, provided that such new application is accompanied by: the required fee; Supplement A to Form I-485; the additional sum required by section 245(i) of the Act; and all other required initial and additional evidence.

(f) Effect of section 245(i) on completed adjustment applications before the Service. (1) Any motion to reopen or reconsider before the Service alleging availability of section 245(i) of the Act must be filed in accordance with § 103.5 of this chapter. If said motion to reopen with the Service is granted, the alien must remit to the Service Supplement A to Form

## 8 CFR 245.10

I-485 and the additional sum required by section 245(i) of the Act. If the alien had previously remitted Supplement A to Form I-485 and the additional sum with the application which is the subject of the motion to reopen, then no additional sum need be remitted upon such reopening.

(2) An alien whose adjustment application was adjudicated and denied by the Service because of ineligibility under section 245(a) or (c) of the Act and now alleges eligibility due to the availability of section 245(i) of the Act may file a new application for adjustment of status pursuant to section 245(i) of the Act, provided that such new application is accompanied by the required fee for the application, Supplement A to Form I-485, additional sum required by section 245(i) of the Act and all other required and additional evidence.

(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.

(h) Asylum or diversity immigrant visa applications. An asylum application, diversity visa lottery application, or diversity visa lottery-winning letter does not serve to grandfather the alien for purposes of section 245(i) of the Act. However, an otherwise grandfathered alien may use winning a diversity visa as a basis for adjustment.

(i) Denial, withdrawal, or revocation of the approval of a visa petition or application for labor certification. The denial, withdrawal, or revocation of the approval of a qualifying immigrant visa petition, or application for labor certification, that was properly filed on or before April 30, 2001, and that was approvable when filed, will not preclude its grandfathered alien (including the grandfathered alien's family members) from seeking adjustment of status under section 245(i) of the Act on the basis of another approved visa petition, a diversity visa, or any other ground for adjustment of status under the Act, as appropriate.

(j) Substitution of a beneficiary on an application for a labor certification. Only the alien who was the beneficiary of the application for the labor certification on or before April 30, 2001, will be considered to have been grandfathered for purposes of filing an application for adjustment of status under section 245(i) of the Act. An alien who was previously the beneficiary of the application for the labor certification but was subsequently replaced by another alien on or before April 30, 2001, will not be considered to be a grandfathered alien. An alien who was substituted for the previous beneficiary of the application for the labor certification after April 30, 2001, will not be considered to be a grandfathered alien.

(k) Changes in employment. An applicant for adjustment under section 245(i) of the Act who is adjusting status through an employment-based category is not required to work for the petitioner who filed the petition that grandfathered the alien, unless he or she is seeking adjustment based on employment for that same petitioner.

(l) Effects of grandfathering on an alien's nonimmigrant status. An alien's nonimmigrant status is not affected by the fact that he or she is a grandfathered alien. Lawful immigration status for a nonimmigrant is defined in § 245.1(d)(1)(ii).

(m) Effect of grandfathering on unlawful presence under section (a)(9)(B) and (c) of the Act. If the alien is not in a period of stay authorized by the Attorney General, the fact that he or she is a grandfathered alien does not prevent the alien from accruing unlawful presence under section 212(a)(9)(B) and (C) of the Act.

(n) Evidentiary requirement to demonstrate physical presence on December 21, 2000. (1) Unless the qualifying immigrant visa petition or application for labor certification was filed on or before January 14, 1998, a principal grandfathered alien must establish that he or she was physically present in the United States on December 21, 2000, to be eligible to apply to adjust status under section 245(i) of the Act. If no one document establishes the alien's physical presence on December 21, 2000, he or she may submit several documents establishing his or her physical presence in the United States prior to, and after December 21, 2000.

(2) To demonstrate physical presence on December 21, 2000, the alien may submit Service documentation. Examples of acceptable Service documentation include, but are not limited to:

- (i) A photocopy of the Form I-94, Arrival-Departure Record, issued upon the alien's arrival in the United States;
- (ii) A photocopy of the Form I-862, Notice to Appear;
- (iii) A photocopy of the Form I-122, Notice to Applicant for Admission Detained for Hearing before Immigration

## 8 CFR 245.10

Judge, issued by the Service on or prior to December 21, 2000, placing the applicant in exclusion proceedings under section 236 of the Act (as in effect prior to April 1, 1997);

(iv) A photocopy of the Form I-221, Order to Show Cause, issued by the Service on or prior to December 21, 2000, placing the applicant in deportation proceedings under section 242 or 242A of the Act (as in effect prior to April 1, 1997);

(v) A photocopy of any application or petition for a benefit under the Act filed by or on behalf of the applicant on or prior to December 21, 2000, which establishes his or her presence in the United States, or a fee receipt issued by the Service for such application or petition.

(3) To demonstrate physical presence on December 21, 2000, the alien may submit other government documentation. Other government documentation issued by a Federal, state, or local authority must bear the signature, seal, or other authenticating instrument of such authority (if the document normally bears such instrument), be dated at the time of issuance, and bear a date of issuance not later than December 21, 2000. For this purpose, the term Federal, state, or local authority includes any governmental, educational, or administrative function operated by Federal, state, county, or municipal officials. Examples of such other documentation include, but are not limited to:

(i) A state driver's license;

(ii) A state identification card;

(iii) A county or municipal hospital record;

(iv) A public college or public school transcript;

(v) Income tax records;

(vi) A certified copy of a Federal, state, or local governmental record which was created on or prior to December 21, 2000, shows that the applicant was present in the United States at the time, and establishes that the applicant sought on his or her own behalf, or some other party sought on the applicant's behalf, a benefit from the Federal, state, or local governmental agency keeping such record;

(vii) A certified copy of a Federal, state, or local governmental record which was created on or prior to December 21, 2000, that shows that the applicant was present in the United States at the time, and establishes that the applicant submitted an income tax return, property tax payment, or similar submission or payment to the Federal, state, or local governmental agency keeping such record;

(viii) A transcript from a private or religious school that is registered with, or approved or licensed by, appropriate State or local authorities, accredited by the State or regional accrediting body, or by the appropriate private school association, or maintains enrollment records in accordance with State or local requirements or standards.

(4) To demonstrate physical presence on December 21, 2000, the alien may submit non-government documentation. Examples of documentation establishing physical presence on December 21, 2000, may include, but are not limited to:

(i) School records;

(ii) Rental receipts;

(iii) Utility bill receipts;

(iv) Any other dated receipts;

(v) Personal checks written by the applicant bearing a bank cancellation stamp;

(vi) Employment records, including pay stubs;

(vii) Credit card statements showing the dates of purchase, payment, or other transaction;

(viii) Certified copies of records maintained by organizations chartered by the Federal or State government, such as public utilities, accredited private and religious schools, and banks;

(ix) If the applicant established that a family unit was in existence and cohabiting in the United States, documents evidencing the presence of another member of the same family unit; and

(x) For applicants who have ongoing correspondence or other interaction with the Service, a list of the types and dates

## 8 CFR 245.10

of such correspondence or other contact that the applicant knows to be contained or reflected in Service records.

(5)(i) The adjudicator will evaluate all evidence on a case-by-case basis and will not accept a personal affidavit attesting to physical presence on December 21, 2000, without requiring an interview or additional evidence to validate the affidavit.

(ii) In all cases, any doubts as to the existence, authenticity, veracity, or accuracy of the documentation shall be resolved by the official government record, with records of the Service and the Executive Office for Immigration Review (EOIR) having precedence over the records of other agencies. Furthermore, determinations as to the weight to be given any particular document or item of evidence shall be solely within the discretion of the adjudicating authority (i.e., the Service or EOIR). It shall be the responsibility of the applicant to obtain and submit copies of the records of any other government agency that the applicant desires to be considered in support of his or her application.

HISTORY: [59 *FR* 51095, Oct. 7, 1994, as corrected at 59 *FR* 53020, Oct. 20, 1994; 62 *FR* 10312, 10384, March 6, 1997; 62 *FR* 39417, 39424, July 23, 1997; 62 *FR* 50999, 51000, Sept. 30, 1997; 62 *FR* 55152, 55153, Oct. 23, 1997; 66 *FR* 16383, 16388, Mar. 26, 2001]

AUTHORITY: AUTHORITY NOTE APPLICABLE TO ENTIRE PART:

8 *U.S.C.* 1101, 1103, 1182, 1255; sec. 202, Pub. L. 105-100, 111 Stat. 2160, 2193; sec. 902, Pub. L. 105-277, 112 Stat. 2681; 8 CFR part 2.

NOTES: [EFFECTIVE DATE NOTE: 66 *FR* 16383, 16388, Mar. 26, 2001, amended this section, effective Mar. 26, 2001.]

NOTES APPLICABLE TO ENTIRE TITLE:

Other regulations issued by the Department of Justice appear in title 4, chapter II, title 21, chapter II, and title 28, chapters I, III, and V.

NOTES APPLICABLE TO ENTIRE CHAPTER:

CROSS REFERENCE: For State Department regulations pertaining to visas and Nationality and Passports, see 22 CFR, chapter I, subchapters E and F.

This table shows sections of title 8 of the United States Code and corresponding sections of the Immigration and Nationality Act and of parts in subchapters A, B, and C of chapter I of title 8 of the Code of Federal Regulations. Those sections of title 8 of the United States Code bearing an asterisk do not have a corresponding part in chapter I of title 8 of the Code of Federal Regulations.

Section 8 USC	Sections I. & N. Act and 8 CFR
1101*	101
1102*	102
1103*	103
1104*	104
1105*	105
1105a*	106
1151	201
1152*	202
1153*	203
1154	204
1155*	205
1156*	206
1181	211
1182	212
1183	213
1184	214

Section 8 USC	Sections I. & N. Act and 8 CFR
1185	215
1201	221
1202*	222
1203	223
1204*	224
1221	231
1222	232
1223	233
1224	234
1225	235
1226	236
1227	237
1228	238
1229	239
1230*	240
1251	241
1252	242
1253	243
1254	244
1255	245
1256	246
1257	247
1258	248
1259	249
1260	250
1281	251
1282	252
1283	253
1284*	254
1285*	255
1286*	256
1287*	257
1301*	261
1302*	262
1303*	263
1304	264
1305	265
1306*	266
1321*	271
1322*	272
1323*	273
1324	274
1325*	275
1326*	276
1327*	277
1328*	278
1329*	279
1330	280
1351*	281
1352	282
1353*	283
1354*	284

## 8 CFR 245.10

Section 8 USC	Sections I. & N. Act and 8 CFR
1355*	285
1356*	286
1357	287
1358*	288
1359	289
1360*	290
1361*	291
1362	292
1401*	301
1402*	302
1403*	303
1404*	304
1405*	305
1406	306
1407*	307
1408*	308
1409*	309
1421*	310
1422*	311
1423	312
1424*	313
1425*	314
1426*	315
1427	316
1428*	317
1429	318
1430	319
1431*	320
1432*	321
1433	322
1434	323
1435	324
1436*	325
1437	326
1438	327
1439	328
1440	329
1441	330
1442*	331
1443	332
1444	333
1445	334
1446	335
1447	336
1448	337
1449	338
1450	339
1451	340
1452	341
1453	342
1454	343
1455	344

## 8 CFR 245.10

Section 8 USC	Sections I. & N. Act and 8 CFR
1457*	346
1458*	347
1459*	348
1481	349
1482*	350
1483*	351
1484*	352
1485*	353
1486*	354
1487*	355
1488*	356
1489*	357
1501*	358
1502*	359
1503*	360

2963 words