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USCIS CLARIFIES ELIGIBILITY UNDER ¤ 245(I)

Posted on March 17, 2005 by Cyrus Mehta

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Although § 245(i) of the Immigration and Nationality Act sunset on April 30, 2001, it still is a boon for non-citizens who are considered "grandfathered" under this provision. A grandfathered individual can still adjust status in the US to permanent residence even though he or she would otherwise be barred by virtue of an immigration violation or by entering the US without inspection. An individual who is eligible to adjust under § 245(i) has to pay a $1,000 surcharge. If such an individual is unable to adjust status in the US, he or she would have to obtain the immigrant visa at a US consulate in the home country. Leaving the US after being unlawfully present can trigger either three or ten year bars against re-entry into the country. § 245(i), therefore, is crucial for many people who would otherwise be caught in a federal Catch 22.

Note that § 245(i) is not an amnesty. A person eligible under § 245(i) must still have a basis to adjust status such as an immigrant visa petition approval or a win under the diversity green card lottery. To be grandfathered under § 245(i) of the Act, the non-citizen must be the beneficiary of an immigrant visa petition or application for labor certification that was filed on or before April 30, 2001, and meets applicable statutory and regulatory requirements.

On March 9, 2005, the USCIS issued a memo, signed by William R. Yates, Associate Director for Operations (HQOPRD 70/23.1), clarifying who can be grandfathered under § 245(i). The memo is noteworthy because it clarifies that there is no restriction on the number of times an alien may properly seek to adjust status under § 245(i). In the past, the USCIS frequently took the position that an alien could file under § 245(i) only once. By way of an example, if an alien first filed an adjustment of status application based on an approved I-140

immigrant visa petition, and if the adjustment application got denied, this individual could not file for adjustment of status under another basis. Thus, if this individual subsequently won the diversity lottery, he or she may not have been permitted to file another adjustment application under § 245(i). The USCIS took the position that such an alien could not file two applications under § 245(i), even though there was nothing in the statute that prevented one from doing so. This prohibition was also not applied universally across the board, and many USCIS offices permitted more that one filing under § 245(i) while others did not. The new memo correctly clarifies that a grandfathered alien is not limited by just one adjustment application.

The memo also clarifies under what circumstances a derivative spouse or child can grandfather under § 245(i). If a spouse was already married to an alien who was the beneficiary of a labor certification or immigrant visa petition filed on or before April 30, 2001, then this spouse would independently grandfathered under § 245(i) even if the marriage is subsequently terminated. Thus, the derivative spouse could file an adjustment application under a wholly independent basis separate from the spouse's immigrant visa petition. The same principle applies to a derivative child. The memo, on the other hand, distinguishes between a spouse who was married to a grandfathered alien prior to April 30, 2001, and a spouse who marries such an alien after April 30, 2001. In the latter situation, such a spouse cannot independently grandfather and is limited to filing an adjustment of status application under § 245(i) as a derivative of the spouse who has been grandfathered. The memo notes that the qualifying relationship must continue to exist at the time the principal alien adjusts status in order for the spouse or child to obtain the derivative benefit.

According to the memo, if an "after acquired" spouse - one who married a grandfathered alien after April 30, 2001 – subsequently divorces, such a spouse is not considered to be grandfathered and may not file for adjustment of status under § 245(i) either independently or as a dependent of the principal alien. For further details, please read the memo.

USCIS Memo On § 245(i).

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