CYRUS D. MEHTA & PARTNERS PLLC
US IMMIGRATION & NATIONALITY LAW

# NEW INTERPRETATIONS ON SECTION 245(K)

*Posted on August 8, 2008 by Cyrus Mehta*

**by**
**Cyrus D. Mehta** *

Section 245(k) of the Immigration & Nationality Act (INA) is a great boon for aliens who are applicants for adjustment of status to permanent residence (Form I-485), but have violated their status for less than 180 or less days from their last lawful admission. If an alien is unable to adjust status, he or she would have to leave the US to pursue an immigrant visa at a US consular post, which could trigger either a 3- or 10-year bar of inadmissibility.[1]

§245(k) is applicable only to those filing adjustment of status applications based on approved immigrant petitions in the employment-based first EB-1), second (EB-2), third (EB-3), and only for religious workers in the employment-based fourth (EB-4) preference categories.

Specifically, §245(k) excuses potential applicants who have violated status as contemplated in §§245(c)(2), (c)(7) or (c)(8) of the INA.[2]

A *Memo* from Donald Neufeld, Acting Associate Director, USCIS, dated July 14, 2008, provides further clarification on the applicability of §245(k).[3]

The Memo confirms that the 180-day period starts accruing only from the alien's last lawful admission in the US and does not include violations that occur before the alien's last lawful admission. For instance, if an alien arrived in H-1B status on January 1, 2008, only violations of 180 days or less after that admission will be considered to determine eligibility under §245(k). If this alien had prior to January 1, 2008 been in F-1 status, and had violations relating to the previous F-1 status, those violations do not count towards the 180 days.

On the other hand, the Memo goes on to state that an applicant who came into

the US on advance parole is not considered "lawful admission." Thus, re-entry based on advance parole does not start the clock for the purposes of Section 245(k).

The Memo also clarifies that violations will be treated in the aggregate. Thus, if an alien violated status on three separate occasions, all of the days during the three separate occasions will be considered in determining eligibility under §245(k).

The filing of Form I-485 will not stop the counting period of unauthorized employment, according to the Memo. Suppose an alien has already been working in an unauthorized capacity for 170 days, and files the adjustment of status application on the 171 st day, and continues working thereafter, the clock will still run for purposes of the 180-day period even after the adjustment application has been filed. It will continue until the date the unauthorized employment ends, which is the date that an employment authorization document (EAD) is approved or the date that the adjustment of status application is adjudicated for permanent residence.[4]

Days of unauthorized employment will be counted regardless of whether or not the alien unlawfully worked a few hours on a given day, a part-time schedule, or a full-time schedule with leave benefits and weekend and holidays off. Thus, according to the example in the Memo, if an alien worked without authorization for four days a day Monday through Friday throughout the month of April, all 30 days must be counted including any holidays or days off over the weekend.

The filing of an adjustment of status application will stop the 180-day counting period. For instance, if an individual overstayed the B-1 visa status by 170 days and files an adjustment of status application on the 170 th day, the filing of that adjustment application stops the status violation provided the alien does not continue working after the filing of the adjustment application and before the receipt of the EAD.

The Memo also contemplates the applicability of Section 245(k) with respect to a second adjustment of status application. For example, an alien filed Form I-485 while in H-1B status, the H-1B status expired and the H-1B status was not renewed because of the pending I-485 application and the EAD allowed the alien to remain in the US and continue working. Suppose this I-485 application is denied, and the alien finds that he or she is out status. If the adjustment

application was denied within 180 days of the expiration of the underlying H-1B status, it may be possible for this alien to file a new adjustment of status application under Section 245(k) claiming that the violation was for less than 180 days. It is assumed that there is an underlying EB-1, EB-2, EB-3 or EB-4 (Religious Worker) petition, which provides the basis for the new I-485 application.

Finally, the Memo clarifies that the §245(k) benefit also extends to the derivative spouse and children.

---

• **Cyrus D. Mehta, a graduate of Cambridge University and Columbia Law School, is the Managing Member of Cyrus D. Mehta & Associates, PLLC in New York City. He is also an Adjunct Associate Professor of Law at Brooklyn Law School where he will teach a course on Immigration and Work. Mr. Mehta has received an AV rating from Martindale-Hubbell and is listed in Chambers USA, International Who's Who of Corporate Immigration Lawyers, Best Lawyers and New York Super Lawyers. Mr. Mehta is a former Chairman of the Board of Trustees of the American Immigration Law Foundation (2004-2006). He was also the Secretary and member of the Executive Committee (2003-2007) and the Chair of the Committee on Immigration and Nationality Law (2000-2003) of the New York City Bar. He is a frequent speaker and writer on various immigration related topics.**

[1] INA §212(a)(9)(B)(i) imposes a three-year bar on a person who has been unlawfully in the US for more than 180 days and a ten-year to a person who has accrued unlawful presence in the US for more than one year. A noncitizen is unlawfully present in the US "after the expiration of the period of stay authorized by the Attorney General or is present in the US without being admitted or paroled." INA §212(a)(9)(B)(ii). For details on which status constitutes "unlawful presence," see INS Memorandum, Paul W. Virtue, Acting Exec. Assoc. Comm, "INS on Unlawful Presence" (Sept. 19, 1997), *published on* AILA InfoNet at Doc. No. 97092240 (*posted* Sept. 22, 1997).

[2] INA §245(c)(2) is a general disqualification to adjust status for an applicant who accepts unauthorized employment prior to filing the application or who is in unlawful immigration status on the date of filing such an application or who

has failed to maintain continuous lawful status since entering into the US. INA §245(c)(7) disqualifies a noncitizen who seeks adjustment of status under the employment-based preferences and is not in a lawful nonimmigrant status. INA §245(c)(8) disqualifies a noncitizen who was employed in an unauthorized capacity or who has otherwise violated the terms of a nonimmigrant visa. The latter two provisions apply to an alien even after the filing of an adjustment of status application. For example, if the individual works without an EAD while the application is pending. INA §245(c)(8) would disqualify him or her from adjusting to permanent residence.

[3] Memo, Donald Neufeld, Acting Associate Director, Domestic Operations, USCIS, *Applicability of Section 245(k) to Certain Employment-Based Adjustment of Status Application filed under Section 245(a) of the Immigration and Nationality Act* HQDOMO 70/23.1-P AD06-07, July 14, 2008, *published on* AILA InfoNet at Doc. No. 08073061 (posted on July 30, 2008).

[4] It takes approximately just under 3 months before an EAD is issued after filing the Form I-765 application along with the I-485 application.