

(c) Section 245(i) of the Act: Exemptions to the Section 245(a) and 245(c) Bars to Adjustment for Certain Aliens.

1. **Background.** First enacted in 1994, section 245(i) of the Act allows certain aliens to adjust status in the U.S. despite entering without inspection or being otherwise barred from adjustment under section 245(c). Prior to the LIFE Act, section 245(i) of the Act had sunset at various times, most recently on January 14, 1998. The LIFE Act reinstated section 245(i) until April 30, 2001. The regulations for section 245(i) of the Act are found at 8 CFR 245.10. The LIFE Act also added a physical presence requirement for aliens who can use section 245(i) of the Act to apply to adjust status because they are grandfathered by a visa petition or application for labor certification filed after January 14, 1998 and on or before April 30, 2001.

2. **Eligibility.**

A. *Determining Who Is a Grandfathered Alien.*

- i. The term “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 petition for classification under section 204 of the Act (on Form I-130, I-140, I-360, or I-526) which was properly filed with the Attorney General on or before April 30, 2001, and which was approvable when filed; or
 - An application for labor certification (Form ETA 750) 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. The term “properly filed” means:
 - With respect to a qualifying immigrant visa petition, that the application was physically received on or before April 30, 2001, or if mailed, was postmarked on or before April 30, 2001, and accepted for filing as provided in 8 CFR 103.2(a)(1) and (a)(2); and
 - 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.
- iii. The term “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. See 8 CFR 245.10(a)(3).

- B. *Applying for Adjustment.* An alien who is included in the categories of restricted aliens under section 245(c) of the Act and meets the definition of a "grandfathered alien" found at 8 CFR 245.10(a) may apply for adjustment of status under section 245 of the Act if the alien meets the requirements of paragraphs 8 CFR 245.10(b)(1) through (b)(7), listed below as (i) through (vii):
- i. Is physically present in the U.S.;
 - ii. Is eligible for immigrant classification and has an immigrant visa number immediately available at the time of filing for adjustment of status;
 - iii. Is not inadmissible from the U.S. under any provision of section 212 of the Act, or all grounds for inadmissibility have been waived;
 - iv. 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;
 - v. Properly files Supplement A to Form I-485 on or after October 1, 1994;
 - vi. Pays an additional sum of \$1,000, unless payment of the additional sum is not required under section 245(i) of the Act; and,
 - vii. Will adjust status under section 245 of the Act to that of lawful permanent resident of the U.S. on or after October 1, 1994.
3. ***Payment of Additional Sum.*** An adjustment applicant filing under the provisions of section 245(i) of the Act must pay the standard adjustment application fee. 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. The \$1,000 fee cannot be waived. 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:
- A. Unmarried and less than 17 years of age;

- B. 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
 - C. The child of a legalized alien, 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 8 CFR.
4. **Physical Presence Requirement.** Aliens who are grandfathered on the basis of a visa petition or LCA filed after January 14, 1998, and on or before April 30, 2001, must demonstrate physical presence in the U.S. on December 21, 2000. Only principal aliens must meet this requirement. Dependent aliens do not need to demonstrate physical presence on December 21, 2000, in order to use section 245(i) of the Act.
5. **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.
6. **The Effects of Grandfathering.**
- A. *On Continuing Availability.* Once an alien is grandfathered, he or she does not lose the ability to apply for adjustment of status under section 245(i) of the Act even if the alien does not adjust status on the basis of the petition or LCA that qualifies him or her for grandfathering. For example, an alien who worked without permission and is grandfathered by a second (family) preference visa petition may apply to adjust status under an employment based classification if he or she later becomes the beneficiary of an approved I-140 petition with a current priority date.
 - B. *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 8 CFR 245.1(d)(1)(ii).
 - C. *On Unlawful Presence under Section 212(a)(9)(B) and (C) of the Act.* If the alien is not in an authorized period of stay, 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.