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Immigration: Adjustment to Permanent Residence Status under Section 245(i)

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Summary

Under § 245 of the Immigration and Nationality Act, an alien in the U.S. who, on the basis of family relationship or job skills, becomes eligible for permanent resident status may adjust to that status in the United States without having to go abroad to obtain an immigrant visa. Historically, only those aliens who were here legally (*e.g.*, as a student or a temporary skilled worker) could adjust status under § 245. In 1994, however, Congress enacted § 245(i). That provision, which was set to expire on September 30, 1997, allowed illegal aliens in the U.S. to adjust status under § 245 once they, because of family relationships or job skills, became eligible for permanent residency, provided they paid a surcharge fee.

During debate on extending § 245(i), some viewed extension as an incentive to maintain illegal residency and as a "loophole" to 1996 immigration reforms. Proponents of extension cited the money made available for immigration enforcement by the surcharge fee, and the utility of § 245(i) for allowing families that include an illegal alien member to remain intact.

The question of extending § 245(i) was resolved in the Commerce, Justice, State, and the Judiciary (CJS) Appropriations Act, FY1998 (P.L. 105-119). That Act terminated § 245(i), but did so with a generous "grandfather" provision. Now only a beneficiary of an immigration preference petition or a labor certification application that was filed on or before January 14, 1998, is eligible for adjustment under § 245(i) (along with his or her spouse and minor children). At the same time, a new subsection (k) has been added to § 245 to allow an alien without legal status to adjust to permanent residency under employment-based categories (without paying a surcharge) in certain conditions. Adjustment under this provision is limited to aliens who (1) are here under a lawful admission when they file for adjustment and (2) have been out of status or working without authorization for fewer than 180 days.

Background on § 245 of the INA

The Immigration and Nationality Act (INA) sets preferences for granting legal permanent resident status (*also called* immigrant status) on the basis of family relationship or job skills. Examples of family preference categories include adult children of U.S. citizens, spouses and children of legal permanent residents, and siblings of adult U.S. citizens — the minor children, spouses, and parents of U.S. citizens are given highest family migration priority as "immediate relatives." Examples of employment preference categories include aliens of extraordinary or exceptional ability, certain professionals, and skilled workers. Except for the highest priority of employment-based aliens — aliens of extraordinary ability, outstanding professors and researchers, and certain executives and managers of multinational entities — most aliens seeking immigration preference on the basis of their job skills must obtain a certification from the Secretary of Labor. Labor certification is premised on a finding that there is a shortage of workers and that employing the alien will not adversely affect wages and working conditions.

Qualifying for immigration preference is generally initiated by the appropriate relative or employer (and not by the alien seeking permanent residency). However, obtaining immigration preference is just part of the process of becoming an legal permanent resident, and qualifying for a particular immigration preference does not result in being immediately eligible for permanent residency. Rather, because of numerical limits on granting legal permanent resident status and allocations of those numbers among preference categories and nationalities, there are waiting periods, some of many years, in most preference categories between the time preference is granted and legal permanent resident status becomes available.

Aliens with immigration preference may either be abroad or in the U.S. when permanent resident status becomes immediately available to them. Section 245 of the INA allows those aliens who have been admitted (as nonimmigrant, or temporary, workers or students, for example) or paroled into the U.S. to adjust to legal permanent resident status here with the Immigration and Naturalization Service (INS) once permanent resident status becomes immediately available to them (and assuming that they are not otherwise disqualified, *e.g.*, due to past criminal conduct or as a prospective public charge). Allowing aliens to adjust here has not been meant to bypass any substantive requirement for legal permanent resident status. Instead, domestic adjustment was only meant to bypass the procedural requirement of having to obtain an immigrant visa abroad from a consular officer of the State Department. Obtaining an immigrant visa after screening by a consular officer is the primary process under which an alien who is abroad is allowed to enter for legal permanent residence.

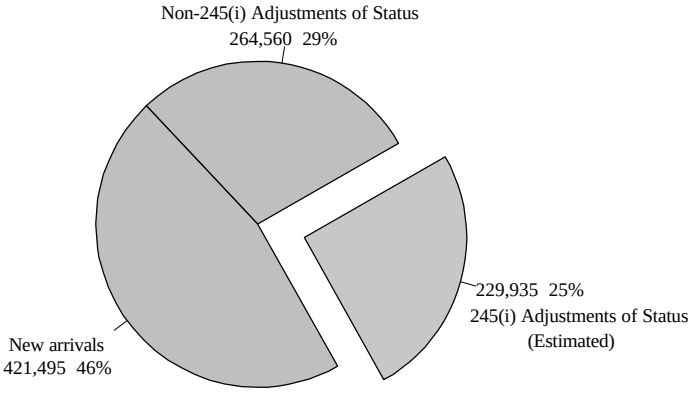
In the past, not all aliens whose immigration preference made them immediately eligible for permanent residence were permitted to adjust under § 245 without leaving the U.S. Until 1994, adjustment under § 245 was available only to those aliens who were maintaining a legal nonimmigrant status — as a temporary skilled worker or as a graduate student, for example — or who still were on parole status under the Attorney General's parole authority. Illegal aliens — those who had entered without formal inspection and admission or who had overstayed the terms of their legal temporary admission — were barred from adjusting status under § 245 when their immigration preference eventually made them eligible for legal permanent residency.

However, in the CJS Appropriations Act for FY1995 (P.L. 103-317), Congress added a subsection (i) to § 245 that permitted otherwise eligible illegal aliens to adjust status during a 3-year period,[1] provided they paid an additional fee equal to five times the basic adjustment fee (5 x $130 = $650). The Senate Appropriations Committee (S.Rept. 103-309, p. 134) explained the change in part as follows:

> [A]bout 30 percent of persons who receive immigrant visas at consular posts overseas have been living in the United States prior to being issued an immigrant visa. . . . Although the current process was originally designed to dissuade aliens from circumventing normal visa requirements, it has not provided the intended deterrent effect and merely creates consular workload overseas.

In other words, barring adjustment by illegal aliens was considered inadequate to persuade aliens with approved preference petitions to await their turns outside the U.S. Instead, a significant number maintained illegal residency here, and forcing them to go abroad to pick up visas resulted only in burdening consular staff. Worldwide, over 3 million aliens in various preference categories are on waiting lists for legal permanent resident status.

Section 245(i) Immigrants Admitted in FY1996



CRS presentation of Immigration and Naturalization Service estimates.

Approximately 345,000 applied for adjustment under § 245(i) during its first 2 years (FY1995 and FY1996). More than 200,000 reportedly applied under § 245(i) during FY1997. According to the U.S. Department of State (DOS), from December 1994 through November 1996, implementation of §245(i) reduced the number of petitions processed overseas by 25%, resulting in a savings of nearly $5 million for that agency. The DOS further estimates that it would cost over $14 million to resume processing these petitions abroad. Correspondingly, § 245(i) has shifted workload from DOS to INS and has most certainly contributed to the backlog of applications for adjustment (I-485s) pending with INS. As of the end of August 1997, there were over 640 thousand I-485s pending with INS. According to INS, it cannot be determined how much this backlog can be attributed to § 245(i). However, it is estimated that nearly 230 thousands immigrants adjusted status under § 245(i) in FY1996. (See page 4, for a table providing estimate by visa category.)

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[1] The § 245(i) adjustment of status provision originated as part of the Senate-reported CJS appropriations act, FY1995 (H.R. 4603). The House-passed version did not include a similar provision. The conference report included the provision, but with a sunset date of September 30, 1997 (H.Rept. 103-708; p. 84).

1996 Amendments to Immigration Law

In 1996, Congress enacted the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) as Division C of the Omnibus Appropriations Act for FY1997 (P.L. 104-208). A major focus of this legislation is to reduce incentives for illegal entry and stay. To this end, IIRIRA attached new consequences to illegal presence and did so in a way that makes § 245(i) much more of a substantive benefit than the procedural convenience it previously had been.

More particularly, IIRIRA makes an alien who is unlawfully present in the U.S. for longer than 180 days but less than a year (beginning after 4/1/97) inadmissible for 3 years after the alien's departure. An alien who is unlawfully present for at least a year (beginning after 4/1/97) is inadmissible for 10 years after the alien's departure. These bars are subject to limited exceptions and to discretionary waivers for close relatives of citizens and legal permanent residents. However, § 245(i) allows illegal aliens with immigration preference to bypass these restrictions altogether. If it were not for § 245(i), these aliens would have to leave the U.S. to obtain immigration visas in order to become permanent residents, at which point the reentry restrictions would apply.

Estimated Aliens Adjusting to Immigrant Status Under Section 245(i): Fiscal Year 1996

Category[1]	Number	Percent
Spouses of U.S. Citizens	80,972	35.2
Family 2nd Preference (spouses and children of LPRs)	75,583	32.9
Employment 3rd Preference (skilled workers and professionals)	24,190	10.5
Children of U.S. Citizens	15,523	6.8
Parents of U.S. Citizens	11,620	5.1
Diversity	6,873	3.0
Family 1st Preference (unmarried adult children of citizens)	4,528	2.0
Employment 4th Preference (certain “special immigrants”)	2,654	1.2
Family 4th Preference (siblings of citizens)	2,546	1.1
Employment 1st Preference (executives and renown aliens)	2,030	0.9
Family 3rd Preference (married children of citizens)	1,677	0.7
Employment 2nd Preference (exceptional aliens, professionals)	1,428	0.6
Legalization Dependents	172	0.1
Employment 5th Preference (employment creation)	98	0.0
Other	41	0.0
Total	229,935	100.0

Source: Immigration and Naturalization Service Statistics Branch.

[1]For further information on immigrant visa categories, see CRS Report 94-146 EPW, Immigration: Numerical Limits on Permanent Admissions.

Section 245(i) Application Fees

Despite its disincentives for illegal residency, IIRIRA did not repeal § 245(i). Instead, IIRIRA increased fees under § 245(i) without extending its duration. In addition to the basic adjustment fee under § 245, IIRIRA now requires an additional fee of $1,000. Of this sum, an amount (not to exceed $200) is to be deposited into the Examinations Fee Account to cover administrative costs. The remaining amount (of at least $800) is to be deposited into a new Immigration Detention Account. In FY1997, INS collected $121 million in 245(i) penalty fees.[2]

IIRIRA's fee provision was a compromise between versions added to House and Senate-passed immigration bills (H.R. 2202 and S. 1664) by floor amendments. Significantly, the House passed an amendment by voice vote that would have eliminated section 245(i) entirely.

§ 245(i) Revised: The FY1998 CJS Appropriations

Section 245(i) was enacted in the Commerce, Justice, State, and the Judiciary (CJS) appropriations Act for FY 1995 (P.L. 103-317), and as the September 30, 1997, sunset date that was included in that law drew closer, the question of whether to extend § 245(i) was debated in the context of the CJS appropriations bill for FY1998 (H.R. 2267). The Senate-passed CJS appropriations bill for FY1998 included a provision that would have repealed the sunset date and made § 245(i) permanent. The House-passed CJS appropriations bill did not include a similar repeal. In the House opposition to § 245(i) remained strong among some Members, and opponents called for a floor vote on the issue. Meanwhile, short-term continuing appropriations Acts twice extended § 245(i) temporarily.

The breadth of House opposition to extension was finally tested in an October 29, 1997, floor vote. At that time, the House considered a motion introduced by Representative Dana Rohrabacher to instruct the House conferees on the CJS appropriations bill (H.R. 2267) to oppose the Senate's proposed extension of § 245(i). In debate on the motion, opponents stated that almost two-thirds of the aliens who adjusted under § 245(i) had come here illegally and were not visa overstayers. They further claimed that § 245(i) allowed illegal aliens to bypass sanctions on illegal presence enacted in 1996, to "jump" waiting lines, and to avoid the allegedly more thorough background screening conducted by DOS consular officers. In brief, the proponents of the motion claimed that § 245(i) created incentives to break the law and undermined important congressional immigration policies.

Opponents of the motion to instruct conferees emphasized that § 245(i) only benefitted those who otherwise were eligible for permanent residency, that it aided high tech industries in retaining valuable employees, that it kept families together, and that it generated significant sums for immigration enforcement. In brief, opponents emphasized

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[2] These fee receipts were not expended in FY1997 and, therefore, have been included in the agency's FY1998 funding as obligational budget authority. Furthermore, § 110 of the FY1998 CJS appropriations act eliminates the Immigration Detention Account established under IIRIRA and requires these receipts be deposited in the Breached Bond/Detention Fund.

that § 245(i) benefitted the economy and facilitated enforcement programs, while claiming that its repeal would cause many families hardship. Other opponents of the motion cited its language, asserting that it precluded the possibility of a compromise. In the end, the opponents prevailed by a vote of 153-268.

The House floor vote notwithstanding, the CJS bill did not come out of conference with a repeal of the § 245(i) sunset. Instead, the conference version limited § 245(i) to those aliens who are beneficiaries of (1) a petition for family-based or employment-based immigration preference filed on or before January 14, 1998 or (2) an application for labor certification filed on or before January 14, 1998. *Beneficiaries* includes not only those aliens who, because of their family relationships or job skills, are the direct object of a petition or application, but also includes the alien spouses and children of these principal beneficiaries. Additionally, there does not appear to be a requirement that an alien actually be in the U.S. as of January 14, 1998, in order to be able to adjust under § 245(i) once permanent resident status becomes available to them.

Though the conference CJS bill made § 245(i) available only to those aliens with preference petitions or labor certification applications pending as of January 14, 1998, adjustment of status was not completely foreclosed to all out-of-status aliens in the future. Apart from modifying § 245(i), the bill also added a new subsection (k) to § 245. Under this provision, aliens seeking permanent residency on the basis of employment skills may adjust status here under certain circumstances even though they are not be in legal status at time of adjustment. More specifically, the new § 245(k) allows these aliens to adjust if (1) they were in the U.S. pursuant to a lawful admission when they applied for adjustment, (2) subsequent to lawful admission, they did not work illegally or fail to maintain lawful status for an aggregate period exceeding 180 days, and (3) they did not otherwise violate the terms and conditions of their admission. It is unclear whether § 245(k) would benefit the spouse and children of aliens who qualify under it.

The conference report on the CJS appropriations bill (H.Rept. 105-405) was filed in the House on November 13, 1997, where it was passed the same day by a vote of 282-110. The Senate, by unanimous consent, also approved the conference report, and the conference version of the CJS appropriations Act for FY1998 (H.R. 2267) was cleared for delivery to the President. On November 26, 1997, the President signed the CJS appropriation, and it became law as P.L. 105-119.