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Immigration: Adjustment to Permanent Resident Status Under Section 245(i)

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Summary

The Senate may again consider extending a controversial immigration provision known as §245(i). On March 12, 2002, the House passed such an extension. Section 245(i) of the Immigration and Nationality Act was first enacted as a temporary provision in 1994 and has been extended several times since then. It enables unauthorized aliens in the United States who are eligible for immigrant visas based on family relationships or job skills to become legal permanent residents (LPRs) without leaving the country, provided they pay an additional fee. Before an alien can apply to adjust to LPR status, the alien must have an approved immigrant visa petition and must have a visa number immediately available to him or her. Currently, to be eligible to adjust status under §245(i), an unauthorized alien must be the beneficiary of an immigrant petition or labor certification application filed by April 30, 2001. An unauthorized alien whose petition or application was not filed by April 30, 2001 must go overseas to obtain a visa.

Section 245(i) became more significant after 1996, when Congress enacted a law containing a provision known as the “3 and 10 year bars.” Now an alien who is unlawfully present in the United States for more than 180 days and then leaves the country is barred from re-entry for either 3 or 10 years, depending on the length of the illegal stay. By enabling eligible aliens to become LPRs without departing the country to obtain visas, §245(i) shields them from the effects of these bars.

Bills before the 107th Congress would extend the deadline under §245(i) for filing immigrant petitions or labor certification applications. In September 2001, the Senate amended and passed a §245(i) bill (H.R. 1885). As amended by the Senate, H.R. 1885 would extend the filing deadline to the earlier of April 30, 2002, or the date that is 120 days after the Attorney General issues final regulations. In March 2002, the House passed H.Res. 365, in which it concurred in the Senate amendment to H.R. 1885 with additional amendments. The House amended the Senate-passed §245(i) language to extend the filing deadline to the earlier of November 30, 2002, or the date that is 120 days after the Attorney General issues final regulations. In addition, both the House-passed and Senate-passed bills would add new restrictions to §245(i). In the case of family-sponsored immigrant petitions filed after April 30, 2001, for example, both bills would amend §245(i) to require the alien beneficiary to demonstrate that the underlying family relationship existed prior to August 15, 2001. With respect to the §245(i) extension provision approved by the House in H.Res. 365, the Immigration and Naturalization Service has estimated that there would be approximately 300,000 potential beneficiaries in total.

Section 245(i) sparks heated debate. Supporters characterize it as a humane, pro-family measure that enables prospective immigrants present in the United States to remain with their families while they go through the process of becoming LPRs. Opponents counter that §245(i) is an amnesty provision that rewards lawbreakers and encourages illegal immigration.

This report will be updated as legislative developments occur.

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Immigration: Adjustment to Permanent Resident Status Under Section 245(i)

Obtaining Legal Permanent Residence

Under the Immigration and Nationality Act (INA), as amended,¹ immigrants are aliens who are lawfully admitted to the United States for permanent residence. They are also referred to as legal permanent residents (LPRs). They either arrive in the United States with immigrant visas issued abroad (and become LPRs upon admission), or they *adjust* their immigration status to permanent resident status in the United States. *Adjustment of status* is the process under immigration law by which an eligible alien in the United States obtains LPR status without leaving the country.

Most aliens who become LPRs are eligible for that status on the basis of a close family relationship to a U.S. citizen or LPR (family-sponsored immigration), job skills needed by a U.S. employer (employment-based immigration), or humanitarian circumstances. Family-sponsored and employment-based permanent immigration are both subject to a complex set of numerical limits and preference categories.² Among family-sponsored immigrants, only the immediate relatives of U.S. citizens — minor children, spouses, and parents if the citizen is at least age 21 — are admitted outside the preference system and are not subject to direct numerical limits. Within the family-sponsored preference system, there are four preference categories. First preference, for example, is given to the unmarried adult sons and daughters of U.S. citizens. Employment-based immigration is subject to a similar ranked system with five preference categories. Within the employment-based preference system, aliens who are members of the professions with advanced degrees and aliens of exceptional ability, for example, may petition under the second preference category.

The process of becoming an LPR on the basis of either a family relationship or job skills has multiple steps. In the case of a prospective family-sponsored immigrant, the sponsoring family member must first file an immigrant visa petition on behalf of the alien with the Immigration and Naturalization Service (INS). If the petition is approved, the State Department then must determine if a visa number is immediately available to the alien. Because of the numerical limits and their allocation among the various preference categories and countries of origin, it can take many years between

¹Act of June 27, 1952, ch. 477; 8 U.S.C. 1101 *et seq.* INA is the basis of current immigration law. For background, see: CRS Report RS20916, *Immigration and Naturalization Fundamentals*, by Ruth Ellen Wasem.

²Humanitarian immigrants will not be covered in this report, because §245(i) does not apply to them.

the time a family-sponsored immigrant petition is filed and a visa number becomes immediately available to an alien. When a visa number becomes immediately available, the alien can apply for assignment of a visa number. Aliens who are outside the United States must go to a U.S. consulate or embassy in their country of origin to complete the processing. Aliens within the United States when a visa number becomes immediately available may be able to apply to adjust status here, as discussed below.

The process for prospective employment-based immigrants is similar, but may require an additional step at the beginning of the process. In some preference categories, before an employer can file an immigrant petition on behalf of an alien, the employer must first apply for labor certification from the U.S. Department of Labor (DOL). Labor certification reflects a finding by DOL that there are not sufficient U.S. workers available to perform the work, and that the employment of alien workers will not adversely affect the wages and working conditions of similarly employed U.S. workers. The visa process for employment-based immigrants is the same as for family-sponsored immigrants. Due to some recent changes in the employment-based preference system, however, these immigrants have not been experiencing waits for visa numbers.

Admissibility

The INA (§212) enumerates *grounds of inadmissibility* — grounds upon which aliens are ineligible for visas and admission. They include security- and terrorism-related grounds, immigration law violations, and public charge (the likelihood that an alien will require public support). Some grounds of inadmissibility may be waived by the Attorney General, as specified in the INA. As part of the process of becoming an LPR, family-sponsored and employment-based immigrants, like all aliens seeking legal admission to the United States, must be found to be *admissible* to the country. They must satisfy State Department consular officials abroad that they are not ineligible for visas, and they must satisfy INS inspectors upon entry to the United States that they are not ineligible for admission.³

Adjustment of Status Under §245(i)

As mentioned above, aliens who are in the United States when a visa number becomes immediately available to them may be able to apply to adjust to permanent resident status without going abroad to obtain a visa. Section 245 of the INA sets forth the eligibility requirements for adjustment of status, which can be granted at the discretion of the Attorney General. Prior to October 1994, only aliens who had been legally admitted or paroled⁴ into the United States and, with limited exceptions, had

³Under current procedures, aliens adjusting status in the United States are not subject to background checks by State Department officials, but must satisfy INS officials in the United States that they are admissible.

⁴Parole is the discretionary authority granted to the Attorney General under the INA to allow
(continued...)

maintained a lawful status since entry were eligible for adjustment of status. This provision primarily benefitted nonimmigrants — aliens legally admitted to the United States for a temporary and specific purpose, such as foreign students — who were eligible for LPR status.

Legislative History

In 1994, adjustment of status under §245 became available to unauthorized (illegally present) aliens in the United States, with the enactment of the FY1995 Commerce, Justice, State (CJS) Appropriations Act.⁵ This act added a new, temporary Subsection (i) to §245 that enabled unauthorized aliens who were eligible for an immigrant visa, had a visa number immediately available to them, and were admissible for permanent residence, to adjust status in the United States provided they paid an additional fee. The additional fee was set at 5 times the normal fee and, at the time, totaled \$650. As specified in the FY1995 CJS Appropriations Act, §245(i) was to take effect on October 1, 1994, and to expire on October 1, 1997.

In its report on the FY1995 CJS appropriations bill, the Senate Appropriations Committee explained the rationale behind the new §245(i). According to the committee, the requirement that unauthorized aliens obtain their visas abroad was “originally designed to dissuade aliens from circumventing normal visa requirements” (and entering the United States before their visas became available). The committee concluded, however, that this process “has not provided the intended deterrent effect and merely creates consular workload overseas” (as aliens in the United States travel abroad to obtain visas).⁶

INS published an interim rule in October 1994 to implement §245(i).⁷ In information accompanying the rule, the agency echoed the Senate Appropriations Committee’s view that the existing requirements had “burdened” consular officials abroad. INS also identified a burden placed on the intending immigrants, while, at the same time, characterizing them as immigration law violators. It seemed to suggest that §245(i) struck a balance between these competing concerns:

This rule [to implement §245] allows prospective lawful permanent residents to avoid the difficulties and expense of travel to a United States consulate or embassy

⁴(...continued)

an alien to enter the United States temporarily (but not to be formally admitted) for urgent humanitarian reasons or when the entry is determined to be for significant public benefit.

⁵P.L. 103-317, August 26, 1994.

⁶U.S. Congress. Senate. Committee on Appropriations. *Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriation Bill, 1995 and Supplemental Appropriations Bill, 1994*. Report to accompany H.R. 4603. H.Rept. 103-309, 103rd Cong., 2nd Sess. p. 134.

⁷U.S. Department of Justice. Immigration and Naturalization Service. Adjustment of Status to That of Person Admitted for Permanent Residence; Temporary Removal of Certain Restrictions of Eligibility. *Federal Register*, v. 59, no. 194, October 7, 1994. p. 51091-51096.

abroad. It continues, however, to penalize these violators of the immigration laws by requiring most applicants to pay an additional sum in excess of the standard adjustment of status filing fee.⁸

1996 Immigration Law. Section 245(i) took on added significance with the enactment of the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) of 1996.⁹ Under a provision of IIRIRA known as the “3 and 10 year bars,” an alien who is unlawfully present in the United States for more than 180 days and then leaves the country, is barred from admission for a set number of years, depending on the length of the illegal stay.¹⁰ Those who are unlawfully present for more than 180 days but less than 1 year are inadmissible for 3 years; those who are unlawfully present for 1 year or more are inadmissible for 10 years. Prospective LPRs who are unlawfully present in the United States for more than 180 days and go abroad to obtain their visas would be subject to these bars upon trying to re-enter the country. By enabling eligible aliens to become LPRs without leaving the country, §245(i) shields them from the effects of the 3 and 10 year bars. A separate provision of IIRIRA raised the additional fee for §245(i) applicants to \$1,000.

105th Congress Extension of §245(i). The FY1998 CJS Appropriations Act, enacted in November 1997, revised and extended §245(i).¹¹ Between the original October 1, 1997 sunset date and passage of this act, the 105th Congress provided for short-term extensions of the sunset date in a series of continuing resolutions. The Senate-passed version of the FY1998 CJS Appropriations bill had contained a permanent extension of §245(i), while the House-passed bill had been silent on §245(i). The §245(i) provision included in the conference agreement repealed the October 1, 1997 sunset date, and instead placed a deadline of January 14, 1998, on the filing of immigrant visa petitions for family members and employees and on the filing of labor certification applications. Unlike the original 1994 provision, the 1997 amendment made adjustment of status under §245(i) available to all eligible unauthorized aliens who were beneficiaries of immigrant petitions or labor certification applications filed by January 14, 1998. It did not matter how long it took after that deadline for the visa process to be completed or for the adjustment of status application to be filed.

In addition to amending §245(i), the FY1998 CJS Appropriations Act added a new Subsection (k) to §245.¹² Section 245(k) applies to aliens eligible for certain employment-based visas who have been lawfully admitted to the United States and who, subsequent to that admission, have not been in an unauthorized status or have

⁸Ibid., p. 51092.

⁹IIRIRA is Division C of the 1997 Omnibus Consolidated Appropriations Act (P.L. 104-208, September 30, 1996).

¹⁰IIRIRA, §301(b)(1); INA §212(a)(9)(B)(i).

¹¹P.L. 105-119, November 26, 1997, §111(a), (b).

¹²P.L. 105-119, §111(c).

not engaged in unauthorized employment for more than 180 days.¹³ Under §245(k), aliens meeting these requirements can apply for adjustment of status under the main §245(a) adjustment of status provision for legal aliens. Unlike §245(i), §245(k) is a permanent provision with no deadlines and does not require the payment of an additional fee.

106th Congress Extension of §245(i). The January 14, 1998 filing deadline under §245(i) remained in effect until the end of the 106th Congress. The Legal Immigration Family Equity (LIFE) Act Amendments of 2000, enacted on December 21, 2000 as part of the FY2001 Consolidated Appropriations Act, included a provision to extend and modify §245(i).¹⁴ This provision extended the deadline for filing immigrant visa petitions or labor certification applications until April 30, 2001. It also added a new requirement that beneficiaries of petitions or applications filed after January 14, 1998, had to be present in the United States on the date of enactment of the LIFE Act Amendments.¹⁵

Immigration Status of Prospective Beneficiaries

As explained above, unauthorized aliens who are prospective beneficiaries of §245(i) must wait for visa numbers to become immediately available to them before they can file adjustment of status applications. During this waiting period, they are still considered to be illegally present in the country. They cannot legally work and are subject to deportation on the basis of their illegal status. Once visa numbers become immediately available to them and they properly file adjustment of status applications, they are considered to be in a period of stay authorized by the Attorney General and can apply for work authorization. According to INS, during the pendency of their adjustment applications, they are not subject to deportation on the basis of their immigration status, but could be deported on other grounds, such as terrorism-related grounds.¹⁶

Legislation in the 107th Congress

INS did not publish regulations implementing the new §245(i) provision until March 26, 2001, a little over a month before the April 30, 2001 filing deadline. Immigration advocates cited this delay in calling for a further extension of the filing deadline. In a May 1, 2001 letter to House Speaker Dennis Hastert, President George W. Bush similarly questioned whether eligible individuals had adequate time to apply and expressed support for extending the filing deadline. He argued that it was “in our

¹³This provision could apply, for example, to an alien who entered the United States legally on a nonimmigrant visa and then remained in the United States beyond the authorized period of stay, for up to 180 days.

¹⁴P.L. 106-554, December 21, 2000, Title XV, §1502. Title XV amended the Legal Immigration Family Equity Act (LIFE; Title XI of P.L. 106-553).

¹⁵For a fuller discussion of the LIFE Act and related issues, see: CRS Report RL30780, *Immigration Legalization and Status Adjustment Legislation*, by Ruth Ellen Wasem.

¹⁶Conversation with Michael Hardin, INS Adjudications Division, March 27, 2002.

national interest to legitimize those resident immigrants eligible for legal status,” but that it would be impossible to do so if we required them to return to their home countries and be separated from their families for up to 10 years (in accordance with the 3 and 10 year bars, discussed above). While the President indicated his support for extending the April 30, 2001 filing deadline, he did not recommend a new deadline.¹⁷

S. 778

Multiple bills to extend the filing deadline have been introduced in the 107th Congress. S. 778, introduced in April 2001 by Senator Chuck Hagel, proposed to extend the deadline for filing immigrant petitions or labor certification applications until April 30, 2002. In July 2001, the Senate Judiciary Committee reported S. 778 with amendments.¹⁸ As amended by the Committee, S. 778 would extend the filing deadline to April 30, 2002, and would impose a new restriction. In the case of petitions or applications filed after January 14, 1998, the bill would require the beneficiaries to show that the underlying family or employment relationship existed on or before the date of enactment.

H.R. 1885

H.R. 1885, as introduced in May 2001 by Representative George Gekas, would amend the filing deadline under §245(i) to require that immigrant petitions or labor certification applications be filed by the current April 30, 2001 deadline or during a 120-day period beginning on the date of enactment. In the case of petitions or applications filed after January 14, 1998, H.R. 1885 would also require that the underlying family or employment relationship have existed by April 30, 2001. In this way, H.R. 1885, as introduced, would not make any additional unauthorized aliens eligible to adjust status under §245(i). Rather, it would give those individuals who were eligible under the previous extension additional time to have their petitions or labor certification applications filed. On May 21, 2001, the House passed H.R. 1885 without amendments under suspension of the rules by a vote of 336 to 43.

On September 6, 2001, the Senate passed H.R. 1885 with an amendment by unanimous consent. The Senate-passed version of the bill would extend the filing deadline to the earlier of April 30, 2002, or the date that is 120 days after the Attorney General promulgates final regulations. It would also require in the case of immigrant petitions or labor certification applications filed after April 30, 2001, that the beneficiaries show the underlying family relationship existed before August 15, 2001, or the labor certification application was filed before August 15, 2001.

The House was scheduled to consider H.R. 1885, as passed by the Senate, under suspension of the rules on September 11, but the events of that day precluded House action. A subsequent effort in the House in December 2001 to consider a §245(i)

¹⁷U.S. President (G. W. Bush). *A Letter Regarding Section 245(i) of the Immigration and Nationality Act*. H.Doc. 107-62, 107th Cong., 1st Sess. May 1, 2001.

¹⁸The Committee did not issue a written report.

extension provision as part of border security and visa entry reform legislation (H.R. 3525) failed. Opponents of such an extension succeeded in stripping the provision from H.R. 3525 prior to House consideration and passage of that bill.

H.Res. 365

President Bush, in advance of a scheduled meeting with Mexican President Vicente Fox on March 22, 2002, again urged Congress to extend §245(i). On March 12, the House approved §245(i) extension legislation under suspension of the rules. In H.Res. 365, the House concurred in the Senate amendment to H.R. 1885 with additional amendments. The House amended the Senate-passed §245(i) provision by changing the filing deadline to the earlier of November 30, 2002 (as compared to April 30, 2002, in the Senate-passed version) or the date that is 120 days after the Attorney General promulgates final regulations. It retained the Senate-approved requirement that beneficiaries of immigrant petitions filed after April 30, 2001, show that the underlying family relationship existed before August 15, 2001, or that the labor certification application was filed before August 15, 2001. In addition, pursuant to H.Res. 365, the House attached previously enacted border security legislation (H.R. 3525) to H.R. 1885. Thus, H.R. 1885, which had been a discrete §245(i) extension bill, became a border security bill with a §245(i) extension provision (§607 of the new H.R. 1885). Attaching H.R. 3525 to §245(i) extension legislation was widely seen as an attempt on the part of the House to prompt the Senate to act on border security legislation. As of this writing, the Senate has taken no further action on H.R. 1885, but an amendment to extend §245(i) may be offered as the Senate debates H.R. 3525.

Number of §245(i) Extension Beneficiaries

As the 107th Congress considers extending §245(i), questions are being asked about how many unauthorized aliens have adjusted status under past extensions and how many might be eligible to adjust under the current proposals. As discussed below, it is not possible using currently available INS data to determine the number of aliens who benefitted from past extensions of §245(i). INS, however, does have some recent, if limited, data relevant to a discussion of §245(i). According to INS, in FY2001, it received a total of about 640,000 adjustment of status applications. Of these, some 215,000 were filed under §245(i).¹⁹ INS does not have data on §245(i) application approvals.

Problems arise in attempting to tie these 215,000 FY2001 §245(i) adjustment applicants to a particular extension of §245(i). Given the multi-step process of obtaining LPR status, it is not known how many of the FY2001 applicants were covered by the current April 30, 2001 deadline for the filing of immigrant petitions or labor certification applications and how many were covered by prior deadlines. As

¹⁹INS has comparable data for FY1995 (about 183,000 §245(i) adjustment of status applications received) and FY1996 (about 224,000 §245(i) adjustment of status applications received). For other years, data on adjustment of status application receipts do not distinguish between §245(i) applications and other adjustment applications.

explained above, filing deadlines apply only to the filing of the initial petitions or applications by sponsors. After the filing of immigrant petitions, beneficiaries must wait — sometimes for many years — for the petitions to be approved and for visa numbers to become immediately available to them before they can file adjustment of status applications. In light of these time lags, it seems reasonable to assume that many of the unauthorized alien beneficiaries of petitions or applications received by INS in FY2001 were filed by aliens covered by the January 14, 1998 deadline that preceded the current deadline, and that many of the beneficiaries of the current April 30, 2001 filing deadline may not show up in INS statistics on adjustment application receipts until FY2002 or later.

With respect to the §245(i) extension provision passed by the House in H.Res. 365 and pending before the Senate, INS has estimated that there would be approximately 300,000 potential beneficiaries in total.²⁰

Pro/Con Arguments

Section 245(i) is a controversial immigration provision and arguably has become more so in the wake of the September 11 terrorist attacks. Supporters argue that §245(i) bestows no special rights and only benefits aliens who are eligible for legal permanent residency on the basis of family or employment ties. They characterize it as a practical, humane, pro-family measure that enables prospective immigrants present in the United States to remain with their families while they go through the long process of becoming LPRs. In addition, proponents argue that §245(i) prevents disruptions to the economy by enabling these prospective immigrants to continue performing their jobs. More broadly, §245(i) supporters maintain that it is in the national interest to fully integrate resident prospective immigrants into society.

Opponents characterize §245(i) as an amnesty and maintain that it rewards those who violate immigration laws. They argue that it undermines immigration law generally and IIRIRA's "3 and 10 year bar" provision (see above) in particular, which was intended to deter illegal presence. They further argue that §245(i) promotes fraud, as unauthorized aliens enter sham relationships in order to take advantage of the provision. Opponents contend that §245(i) (and the expectation of future extensions) encourages illegal immigration by giving aliens a tangible incentive to enter the country illegally rather than wait overseas to complete the visa process. They maintain that this is unfair to prospective immigrants overseas who follow proper procedures and endure long waits and separations from their families in order to enter the United States legally.

Since September 11, both supporters and opponents of §245(i) have cited security- and terrorism-related concerns in making their arguments. Supporters point out that beneficiaries of §245(i) are subject to background checks. More generally, they maintain that in the absence of §245(i), many unauthorized aliens would choose to remain underground, subject to no checks and representing potential security threats. Opponents counter that the background checks performed on §245(i)

²⁰Conversation with Don Neufeld, INS Immigration Services Division, March 19, 2002.

applicants in the United States are not as comprehensive as those performed on visa applicants abroad, where State Department officials also check for criminal records in the applicants' home countries. They contend §245(i) is a possible avenue for potential terrorists to legalize their immigration status.