

U.S. Department of Homeland Security  
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**U.S. Citizenship  
and Immigration  
Services**

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## Memorandum

TO: Field Leadership

FROM: Donald Neufeld /s/  
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DATE: July 14, 2008

SUBJECT: Applicability of Section 245(k) to Certain Employment-Based Adjustment of Status Applications filed under Section 245(a) of the Immigration and Nationality Act

Revisions to *Adjudicator's Field Manual* (AFM) Chapter 23.5(d)  
(AFM Update AD06-47)

### **1. Purpose**

This memorandum clarifies how section 245(k) of the Immigration and Nationality Act (the Act) renders certain section 245(c) bars to adjustment of status under section 245(a) inapplicable to certain employment-based adjustment of status applicants.

### **2. Background**

In general, Section 245(a) allows an admissible alien who was inspected and admitted or paroled into the United States to apply for permanent resident status from within the United States if the alien is the beneficiary of an approved immigrant visa petition and has an immigrant visa number immediately available.

Section 245(c) establishes eight (8) bars to adjustment under Section 245(a). For certain employment-based adjustment applicants, section 245(k) grants relief from three (3) of those bars: sections 245(c)(2), (c)(7) and (c)(8). Section 245(k), however, does not provide an exemption from any other basis of ineligibility, such as entry without inspection or any ground of inadmissibility.

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### **3. Field Guidance and AFM Update**

The adjudicator is directed to comply with the following guidance. The Adjudicator's Field Manual (AFM) is revised to add a new section (d) to subchapter 23.5, "Adjustment of Status under Section 245 of the INA." Current sections (d) through (k) proceed thereafter and should be renumbered accordingly.

#### **(d) Section 245(k) of the Act: Exemptions to the 245(c)(2), (c)(7) and (c)(8) Bars to Adjustment for Certain Employment-Based Adjustment of Status Applicants.**

**(1) General Provisions.** Section 245(k) can render the normal bars to adjustment of status found in section 245(c)(2), (c)(7), and (c)(8) inapplicable to certain employment-based adjustment of status applicants who, since their last lawful admission to the United States have not, for an aggregate period of more than 180 days:

- (A) failed to maintain, continuously, a lawful status;
- (B) engaged in unauthorized employment; or
- (C) otherwise violated the terms and conditions of his or her admission.

**(2) Applicability.** The following classes of employment-based adjustment of status applicants under section 245(a) are eligible for relief under 245(k):

(A) An alien who is present in the United States pursuant to a lawful admission and whose adjustment of status application is based on an approved immigrant petition for them as the beneficiary in one of the following classifications:

- EB-1: aliens of extraordinary ability, outstanding professors and researchers, and certain multinational managers and executives;
- EB-2: aliens who are members of the professions holding advanced degrees or aliens of exceptional ability;
- EB-3: skilled workers, professionals, and other workers; or
- EB-4: religious workers described in section 101(a)(27)(C) of the Act only.

Other employment-based immigrant classifications and other immigrant classifications are not a basis for consideration under section 245(k).

(B) An eligible derivative of an alien described in (A) may benefit from section 245(k) in his or her own right if he or she has failed to maintain continuously a lawful status, worked without authorization, or otherwise violated the terms and conditions of his or her admission for an aggregate of 180 days or less pursuant to a lawful admission.

**(3) Application Process.** An alien must properly file an adjustment of status application under section 245(a) in accordance with 8 CFR 245.2 and 103.2. An applicant invoking 245(k) is not required to submit additional application forms or payment of a penalty surcharge. Thus, it is the responsibility of USCIS to determine section 245(k) applicability based on the evidence submitted in support of the adjustment of status application. To the extent evidence is deficient or absent, USCIS

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may issue a request(s) for evidence or notice of intent to deny asking for specific evidence in support of eligibility for relief under section 245(k).

#### **(4) Counting against the 180 days timeframe in (d)(1).**

(A) General Guidelines. If the adjudicator determines that an employment-based adjustment of status applicant described in (d)(2) above is subject to any of the bars to adjustment of status set forth in Sections 245(c)(2), (c)(7), or (c)(8), then the adjudicator must determine whether the aggregate period in which the alien failed to continuously maintain lawful status, worked without authorization, or otherwise violated the terms and conditions of the alien's admission since the date of alien's last lawful admission to the United States is 180 days or less.

The guidance below describes the periods of time to be examined for purposes of calculating time against the 180-day period.

- The adjudicator must only examine the period from the date of the alien's last lawful admission to the United States and must not count violations that occurred before the alien's last lawful admission.
- An alien, however, who entered the United States pursuant to an advance parole document is not "lawfully admitted," because the parole is not a final act with respect to admission. Thus, reentry based on a parole or advance parole does not start the clock over for the purpose of section 245(k).
- An alien may be subject to more than one bar or violation described in section 245(k)(2) at the same time. For example, an alien in B-2 status who worked without authorization will also have violated a lawful status and failed to maintain continuously a lawful status. USCIS reads the phrase "aggregate period exceeding 180 days" in section 245(k)(2) to refer to the total of all three types of violations rather than permit up to 180 days of each type of violation. Accordingly, the aggregate 180 day period must be calculated by adding together any and all days in which there is one or more of the violations, and each day in which one or more of these violations existed must be counted as one day. If USCIS reads section 245(k) to permit up to 180 days of each type of violation an alien could potentially accrue more than 180 total days of violations and remain eligible for adjustment of status. USCIS holds that the statute was not intended to permit such egregious violations.

#### **(B) Engaged in Unauthorized Employment**

(1) General. "Unauthorized employment" means any service or labor performed by an alien for an employer within the United States that is not authorized under 8 CFR 274a.12(a), (b), or (c) or exceeds the authorized period of employment. The filing of an adjustment of status application does not, in itself, authorize employment or excuse unauthorized employment, and accordingly the filing of an adjustment of status application will not stop the counting period of unauthorized

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employment. Therefore, all periods of unauthorized employment since the date of the alien's last lawful admission, including any periods after the filing of an application for adjustment of status, must be counted until the date of the adjudication of the pending adjustment of status application.

- With respect to engaging in unlawful employment, the count commences on the first date of the unauthorized employment and continues until the date the unauthorized employment ended, the date an employment authorization document (EAD) is approved, or the date the pending adjustment of status application is adjudicated.
- It is completely within the control of the alien as to whether he or she engages in employment without authorization and, as stated above, the filing of an application for adjustment of status does not automatically authorize employment in the United States. Therefore, it is possible for an alien to accrue days of unauthorized employment against the 180 day period after the filing of the application for adjustment of status. To hold otherwise would not only reward an alien for engaging in unauthorized employment but it would also effectively eliminate the incentive and the need for an alien to maintain a valid employment authorization document in connection with the pending application for adjustment of status. Unlike an alien who has failed to maintain lawful nonimmigrant status, an alien who has worked without authorization may unilaterally avoid the accrual of additional days counted against such violation by simply terminating the unauthorized employment.
- An alien's engagement in unauthorized employment is dependent upon the existence of the alien's employment or employer-employee relationship rather than simply the number of days the alien actually works or claims to have worked. Each day an alien engaged in unauthorized employment must be counted against the 180-day period 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. Absent evidence of interruptions in unauthorized employment, the adjudicator must consider each day since the date the unauthorized employment began as a day of unauthorized work regardless of the work schedule agreed to or maintained by the alien for the particular employer. For example, if an alien worked without authorization for four hours a day Monday through Friday throughout the month of April, all 30 days for that month must be counted as unauthorized employment.
- For periods in which it appears that the alien has engaged in unauthorized employment, the alien bears the burden of establishing that any such periods were authorized or that he or she did not in fact engage in

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unauthorized employment. In addition, an alien who works without authorization after filing for adjustment of status will not stop the clock by departing the United States and re-entering pursuant to a valid advance parole document.

(2) Special Considerations. For purposes of section 245(c)(8) of the Act, an alien is not considered to be engaged in unauthorized employment while his or her properly filed adjustment of status application is pending final adjudication, if:

- The alien has obtained permission from USCIS to engage in employment based on his or her pending adjustment of status application and such authorization remains valid; or
- The alien had been granted employment authorization prior to the filing of the adjustment of status application and such authorization does not expire while the adjustment of status application is pending.

(C) Failed to Maintain a Lawful Status and/or Violated the Terms of a Nonimmigrant Visa.

(1) General. Expiration, revocation, or violation of status puts a nonimmigrant out of status, and the alien remains out of status until some adjudication restores status or the alien departs the United States.

In most cases, the 180-day counting period commences on the date the alien's status expires, is revoked, or is violated following the alien's most recent admission. In addition, with the exception of a dual intent nonimmigrant, a nonimmigrant is only required to maintain his or her nonimmigrant status until the time he or she properly files an adjustment of status application with USCIS, because most nonimmigrants who apply for adjustment of status are presumed to be intending immigrants and are no longer eligible to maintain a nonimmigrant status. Therefore, for purposes of the 180-day counting period, calculation of the number of days for failing to maintain status or violating a nonimmigrant visa will stop as of the date USCIS receives a properly filed adjustment of status application.

Notwithstanding, a properly filed adjustment of status application, in and of itself, does not accord lawful status or cure any violation of a nonimmigrant visa. For example, if an alien applied for adjustment of status three days prior to the expiration of his or her nonimmigrant status and the adjustment of status application was eventually denied, the alien will not be considered to be in lawful status after the expiration of the nonimmigrant status. Consequently, if the same alien files a second application for adjustment of status, the period after which the nonimmigrant status expired and during which the first adjustment of status application was pending counts against the 180-day period when considering

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eligibility for relief under 245(k) in the adjudication of the second adjustment of status application.

(2) **Special Considerations.** The adjudicator must consider the following when calculating the number of days an alien has failed to maintain a lawful status or violated the terms of a nonimmigrant visa.

- The regulations define “lawful immigration status” at 8 CFR 245.1(d)(1). In examining any period where an application for extension of stay (EOS) or change of status (COS) was ultimately approved, the period during which the EOS or COS had been pending would be considered, in retrospect, a period in which the alien was in a lawful nonimmigrant status regardless of whether the EOS or COS application was timely or untimely filed. The period would not be disqualifying for section 245(c) purposes, and the period would not count against any 180-day period under section 245(k).
- The period during which an alien has a pending EOS, COS, or adjustment of status application does not constitute, in and of itself, a period in which the alien is in a lawful “status.”
- A period of unlawful status found to result only from a “technical violation” or through no fault of the applicant, as described in 8 CFR 245.1(d)(2), does not invoke the 245(c)(2) bar. Thus, such period does not count against the 180-day period.
- An alien who complies with all the terms and conditions of his or her nonimmigrant status does not violate the terms of such status merely by properly filing an adjustment of status application, provided the filing occurred before the alien’s nonimmigrant status expired.
- An F (student) or J (exchange visitor) nonimmigrant is considered in “status” for such authorized period of time before and after completion of his or her educational objective or program in accordance with 8 CFR 214.2(f) and 8 CFR 214.2(j), respectively, provided that the F or J nonimmigrant has not violated the terms and conditions of his or her status.
- A reinstatement of F status under 8 CFR 214.2(f) or J status under 22 CFR 62.45 cures time out of or in violation of status only for the particular period of time covered by the reinstatement, so that such period does not count against the 180-day period.

**(5) Effect of 245(k) Exemption.** A determination of eligibility under section 245(k) renders inapplicable the normal bars to adjustment found in section 245(c)(2), (c)(7),

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and (c)(8). Section 245(k), however, does not provide an exemption from any other basis of ineligibility, such as entry without inspection or any ground of inadmissibility.

#### **4. Use**

This memorandum is intended solely for the training and guidance of USCIS personnel in performing their duties relative to the adjudication of applications for adjustment of status. It is not intended to, does not, and may not be relied upon to create any right or benefit, substantive or procedural, enforceable at law or by any individual or other party in removal proceedings, in litigation with the United States, or in any other form or manner.

#### **5. Contact Information**

Questions regarding this memorandum and USCIS policy regarding section 245(k) of the Act may be directed to Carol Vernon, Office of Policy and Strategy, Rishiram “Rishi” Lekhram, Service Center Operations, and Vinay Singla, Field Operations, through appropriate supervisory channels.

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