Tales from the Arena

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Adjustment and grandfathering under INA 245(i)

ADJUSTMENT of status is the process that allows an alien who was inspected and admitted or paroled into the U.S. to apply for lawful permanent residence (LPR) while in the country. Most adjustment applications are filed under INA 245(a) which requires that an alien be admissible to the U.S. and be eligible for an immigrant visa, which should be immediately available at the time of application. Generally, those who are in unlawful status or have engaged in unlawful employment do not qualify for adjustment but INA 245(i) provides an exception.

Under INA 245(i), an alien, (a) who is physically present in the U.S. and (b) who entered without inspection, who is in unlawful immigration status, who fails to maintain status or who has accepted unauthorized employment, may adjust status if: (1) the alien is the beneficiary of an immigrant petition or application for labor certification filed on or before April 30, 2001; (2) the immigrant petition or labor certification application was properly filed and approvable when filed; and (3) the alien was physically present in the U.S. on December 21, 2000 if the qualifying immigrant petition or labor certification application was filed after January 14, 1998.

An alien who meets the requirements of INA 245(i) is a grandfathered alien. Grandfathering refers to a statutory or regulatory clause that exempts a class of persons or transactions due to circumstances existing before a new rule or regulation takes effect. Members of this exempted class can benefit from their grandfathered status.

In the context of INA 245(i), the policy of USCIS is as follows: (1) an alien who meets the requirements of grandfathering continues to be grandfathered until this alien adjusts status; (2) a grandfathered alien may adjust status on any proper basis and is not limited to seeking adjustment solely on the basis of the qualifying petition or application which grandfathered the alien; and (3) there is no limit to the number of applications a grandfathered alien may file for adjustment.

In Matter of Ilic, 25 I&N Dec. 717 (BIA 2012), the Board of Immigration Appeals distinguished two types of grandfathered aliens under INA 245(i), namely, principal grandfathered aliens and derivative grandfathered aliens. Principal grandfathered aliens are the beneficiaries of the qualifying petitions or applications filed on or before April 30, 2001. Derivative grandfathered aliens are the spouses and children of the principal grandfathered aliens. The status of spouses and children under INA 245(i) has been a contentious issue. Let's examine three scenarios.

First, if a principal alien had been married or had a child at the time of filing of the qualifying petition or application on or before April 30, 2001, this spouse or child is grandfathered. Grandfathered spouses and children preserve their grandfathered status regardless of subsequent changes in relationship with the principal alien. Thus, if the spouse divorces the principal alien, the spouse is still grandfathered and may adjust based on a petition from another spouse or an employer. If the child turns 21 years old and is no longer considered a child under immigration laws, this person is still grandfathered and may also adjust based on a spouse's petition if this person marries.

Second, if the principal alien had married or had a child after the filing of the qualifying petition or application but the relationship existed at the time the principal adjusted status, the spouse or child is not grandfathered although both may adjust as dependents of the principal when the principal adjusts.

Third, if the principal alien had married or had a child after the filing of the qualifying petition or application and there was no longer a spouse or child relationship at the time of the principal's adjustment, such spouse or child may not adjust because neither of the two is grandfathered nor classified as a dependent.

These principles were recently illustrated in Matter of Estrada, 26 I&N Dec.180 (BIA 2013). The male respondent in that case was the beneficiary of an I-130 filed by his first wife on November 1, 2000. The female respondent, who is the second wife of the male respondent, was the beneficiary of an I-140 petition filed on April 9, 2001. This I-140 was later withdrawn. The respondents were married on October 29, 2007.

The BIA found that the male respondent was grandfathered but his second wife was not a grandfathered derivative because the I-130 was filed by the first wife and the second wife cannot be the dependent of the husband's I-130.

The female respondent was also not a grandfathered principal in her I-140 filed before April 30, 2001 because the petition was not approvable when filed. Next time, we'll discuss how a petition or application is considered approvable when filed. Meantime, if you have an old petition, you

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should explore possible grandfathering. You never know how a long forgotten petition could benefit your immigration status.

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Charles Medina practices immigration law. Visit his website at medinalawgroup.net for more details. This article provides general information only and does not provide legal advice on any specific matter or predict the outcome of any legal matter. It does not invite or create an attorney-client relationship.

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