



245(I) EVERYTHING YOU ALWAYS WANTED TO KNOW BUT WERE AFRAID TO ASK (APRIL 2023 UPDATE)

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Introduction

Adjustment of status under § 245(i) is an important avenue that allows some people generally disqualified from applying for adjustment,¹ such as people who came to the United States without inspection or “EWI,” fell out of lawful status, or ever worked without authorization, to apply for permanent residence from within the United States.

Because eligibility for 245(i) turns on the existence of a visa petition filed over 20 years ago, before a certain cut-off date, it is important to understand what types of questions to ask your clients to reveal possible 245(i) eligibility and how to help clients find records that may establish their eligibility.

This practice advisory goes over what 245(i) is, including some of the more confusing aspects like “grandfathering”² and “after acquired,” as well as how to submit an application under 245(i). The advisory also includes screening questions to assist in identifying and evaluating possible 245(i) options for your clients.

Why should I care about 245(i)?

One of the threshold requirements to apply for a green card from within the United States, or adjust status under INA § 245(a), is that the person must have been “inspected and admitted or paroled.”³ In most cases, this means a person must have last come to the United States through a port of entry with a valid visa or parole document. Additionally, people who are not immediate relatives⁴ may be “barred” from adjusting under 245(a), even if they last entered the United States with a valid visa, if they overstayed the visa or ever worked without authorization, among other things.⁵

These provisions pose barriers to adjustment for many people currently in the United States. Those who originally came to the United States without inspection, or who came with a visa but then fell out of status and are the spouse of a permanent resident or other preference beneficiary, will be unable to adjust even if they meet all the other adjustment requirements.⁶ While consular processing may be an alternative way to apply for permanent residency for those who do not meet all the requirements under 245(a), departing to attend a consular interview may trigger unlawful presence bars and pose other risks. Therefore, adjustment of status is usually preferable, if such an option is available. 245(i) makes adjustment an option for people who are generally ineligible due to the 245(c) adjustment bars, or because they last entered the United States without inspection.

Examples of the types of clients who might benefit from 245(i):

Your client who recently married a U.S. citizen (USC) also just lost DACA after getting a DUI. She never traveled with DACA advance parole. Because she originally came to the U.S. without inspection, unless she is protected under 245(i), she will have to consular process in order to immigrate through her USC spouse.

You meet with a prospective client who originally came to the U.S. five years ago on a B-2 visa and has never left. He has an approved I-130 visa petition through his permanent resident (LPR) spouse that is now current. While he meets the “inspected and admitted or paroled” requirement, he still cannot adjust status as long his spouse remains an LPR because he is barred under 245(c) for having failed to continuously maintain lawful status. If he had 245(i) protection, he could overcome this 245(c) bar now, without having to wait for his spouse to naturalize.

Your undocumented client is in removal proceedings after an arrest for a DUI. He has been living in the U.S. for more than a decade and has a USC wife and young USC kids, but proving exceptional and extremely unusual hardship in order to win a cancellation of removal case will be difficult. He came to the U.S. without inspection when he was 17, and has never left. If he has 245(i), he could pursue adjustment instead of cancellation.

Your husband-and-wife clients, both of whom are B-2 overstays, have been waiting for more than 20 years for the petition the husband's brother filed for him to be current. Now that it is finally close to current, they're disappointed to learn that because they are not immediate relatives, have not continuously maintained lawful status, and worked without authorization in the last 20 years they've been living here, they are barred from adjusting status. If you determine that they qualify for 245(i), however, they will be able to adjust status here in the U.S.

You've just informed a client they will not be able to recapture an old priority date as they were hoping to be able to do. While they may not be able to use this old priority date, the silver lining might be that at least they are protected under 245(i) by this old petition, so that if they later become an immediate relative or are the beneficiary of another visa petition that is current, they may be able to adjust notwithstanding having come to the U.S. without inspection, which traditionally prevents someone from applying for adjustment of status.

I've heard about 245(i) before, but what exactly is it?

245(i) is a law that was originally passed by Congress in 1994.⁷ It provided that some noncitizens in the United States who would not normally qualify for adjustment of status—for example, because they came to the United States without inspection (EWI), worked without authorization, or overstayed a visa—*could* apply if they paid a “penalty” fee and met certain requirements. This

allowed families to stay together in the United States to complete the immigration process and avoid the long, uncertain separation required to go through the immigration process outside the United States at a U.S. consulate abroad.

Although the law was extended a few times, the final “sunset” or end-date was April 30, 2001. However, people can continue to benefit today if they were the beneficiaries of qualifying petitions filed before that cut-off date. Those that still benefit may be surprised to learn this, and it may take some investigating to figure out whether someone qualifies for 245(i) protection. For instance, a person will qualify for 245(i) protection where a parent was the principal beneficiary and regardless of whether they were even listed as a child on the application, or where an ex-spouse was the principal beneficiary no matter that the marriage has now been terminated.

What am I looking for with 245(i)?

245(i) adjustment eligibility is based on the existence of an old petition, filed on or before April 30, 2001, for which your client was the principal or derivative beneficiary. Derivative beneficiaries are the spouses and children (unmarried and under age 21) of the principal beneficiary *at the time the petition was filed, or those relationships that came into being before April 30, 2001 while a petition was still active.*⁸ This means that someone who was a spouse or child *at that time* qualifies for 245(i) *now*, even if they no longer have that relationship. For instance, children who are over 21 and/or married and no longer a “child” would still have 245(i) protection if they were a child of a petition before the cut-off date. Similarly, where a marriage has since ended in divorce, the prior spouse will still carry 245(i) protection from an earlier petition filed on or before April 30, 2001. (Note that a person who is no longer a derivative cannot use the old petition to adjust status, but the old petition will be proof that the person is eligible for 245(i).)

The petition had to have been “approvable when filed” and some beneficiaries are also subject to a physical presence requirement, but the first step is identifying whether your client may have been the beneficiary of one of these old petitions. Thus, you must sufficiently investigate your client’s history to determine if any such prior relationships existed and whether a petition was filed. The following sections consider the remaining requirements and complexities of 245(i). At the end of this advisory you will find suggestions for screening questions and how to find records regarding these old petitions.

Exactly which old petitions count for 245(i)?

To qualify for adjustment of status under 245(i), a person must be the beneficiary of a visa petition (I-130, I-140, I-360, I-526) or labor certification (ETA-750) that was “approvable when filed” on or before April 30, 2001 (see next question for more on “approvable when filed”).

What does “*approvable when filed*” mean?

A petition is “*approvable when filed*” if it was:

- ✓ Properly filed,
- ✓ Meritorious in fact, and
- ✓ Non-frivolous.

“*Properly filed*” means that the petition must have been signed by the petitioner, submitted with the appropriate filing fee, and postmarked on or before April 30, 2001.⁹ Whether a petition was “*meritorious in fact*” and “*non-frivolous*”¹⁰ is assessed based on the circumstances that existed at the time the petition was filed. Therefore, petitions that were later revoked, denied, or withdrawn due to circumstances that arose *after* the petition was filed still qualify as “*approvable when filed.*” This includes situations where a marriage ends in divorce, nullifying a marriage-based petition; a child beneficiary “*ages out*” by turning 21 or marries, losing eligibility as a “*child*”; or an employer goes out of business, canceling an employment-based petition. In all these circumstances, these later events do not affect whether the petition was originally valid and *approvable* at the time it was filed.

Example: Raul filed an I-130 on April 29, 2001 for his wife, Esperanza. However, he forgot to include the filing fee and by the time he had remedied this and re-submitted the petition, it was one week later, May 6, 2001. Unfortunately, Raul did not “*properly file*” the I-130 on or before April 30, 2001, so this petition does not enable his wife to adjust under 245(i).

Example: Luis submitted a petition for his brother Uriel on April 18, 2001. Luis was an LPR at that time, although he later became a USC in June 2001. Although this petition was filed within the 245(i) timeframe, on or before April 30, 2001, there is no visa preference category for siblings of permanent residents. Even though Luis later became a citizen, at the time he filed the petition, he did not qualify to file for his brother. Therefore, this petition was ultimately invalid. When USCIS adjudicates this petition, it will be denied. Uriel would not qualify for 245(i) because it was not, in fact, *approvable when filed*.

Example: Martha’s LPR mother filed a petition for her when she was 14 years old, in March 2000. Martha has now married, and her petition was automatically revoked when she married because there is no immigrant visa category for married sons or daughters of LPRs. Was the petition Martha’s mother submitted on her behalf “*approvable when filed*”?

Yes, Martha's petition was approvable when filed. At the time that the petition was submitted, Martha qualified as the child of an LPR under the family-based 2A preference category, because she was under 21 and unmarried at that time. Even though Martha can no longer immigrate based on this petition, this does not change the fact that at the time that the petition was filed she did qualify for an immigrant visa based on her relationship to her mother. Therefore, Martha may still use this petition, when paired with another one for which an immigrant visa is presently available, for 245(i).

Example: Angelica's USC sister filed a petition for her before April 30, 2001. A request for evidence (RFE) was issued but her sister never received it and a response was never submitted. The petition was denied for failure to respond to the RFE. Angelica can still show that the petition was approvable when filed (i.e. she qualified for a petition by her USC sister), so that although the petition was ultimately denied, she still meets this requirement and can use it for 245(i) purposes, when paired with another petition with current visa availability.

What's the significance of the two different dates, January 14, 1998 and April 30, 2001?

January 14, 1998 and April 30, 2001 represent different cut-off dates for filing petitions under INA § 245(i) before the law ended (Congress extended it multiple times).

Functionally, the only difference now is that petitions filed on or before January 14, 1998 are *not* subject to the December 21, 2000 physical presence requirement, whereas those filed on or after January 15, 1998 *are* subject to the physical presence requirement. This requirement is discussed below.

What are the legal requirements to adjust under 245(i)?

In order to adjust under INA § 245(i), an applicant must meet the following requirements:

- ✓ Be the beneficiary of a visa petition or labor certification that was filed on or before April 30, 2001 and that was approvable when filed;
 - If the petition was filed after January 14, 1998, the principal beneficiary must have been physically present in the United States on December 21, 2000.

- ✓ An immigrant visa must be immediately available to them;
 - Either the original 245(i) petition is now current, and has not been withdrawn, denied, or revoked; or
 - They are also the beneficiary of another petition that is current.
- ✓ Be admissible under all inadmissibility grounds, with the exception of § 212(a)(6)(A).

An applicant for adjustment of status under 245(i) does not need to have been “inspected and admitted or paroled” as required under 245(a) and will not be barred from adjustment under 245(c) even if they fall within the classes of people enumerated under 245(c).

What documents and forms do you submit to apply for adjustment of status under 245(i)?

To apply for adjustment under 245(i), the applicant submits all the normal adjustment of status forms and documents (I-485 Application to Adjust Status, I-864 Affidavit of Support, I-693 Medical Exam, etc.) and must pay the ordinary adjustment of status filing fee.¹¹ However, they must also include the following additional items:

- ✓ Supplement A to Form I-485;
- ✓ Proof they are the beneficiary of a qualifying 245(i) petition, which may be a copy of the 245(i) petition Receipt Notice, Approval Notice, or the actual 245(i) petition if the petition has a receipt date stamp, which can serve as proof of filing the 245(i) petition in place of a Receipt or Approval Notice;
- ✓ If applicant qualifies as a derivative beneficiary of the 245(i) petition, proof of qualifying relationship (spouse or child) to the principal beneficiary;
- ✓ Proof of physical presence on December 21, 2000, if applicable (see next question);
- ✓ An additional \$1,000 “penalty” fee, on top of the normal I-485 filing fee.

Who has to show physical presence on December 21, 2000?

Some, but not all, 245(i) applicants must demonstrate that they were physically present in the United States on December 21, 2000.¹² The physical presence requirement only applies to *principal* beneficiaries of petitions filed *on or after January 15, 1998 and on or before April 30, 2001*. For petitions filed on or before January 14, 1998, there is no physical presence requirement. Derivative beneficiaries do not have to show that they were present on December 21, 2000, but USCIS requires they provide proof that the *principal* beneficiary was, where applicable (i.e., for petitions filed after January 14, 1998).

How do you prove physical presence on December 21, 2000?

You can prove physical presence on December 21, 2000 with a document that shows physical presence on that exact date. Otherwise, you will need to provide multiple documents from as close as possible before and after December 21, 2000, to “bookend” the physical presence date and serve as circumstantial evidence that the beneficiary was likely also in the United States on December 21, 2000, if they were in the United States so soon before and after that date.

For the types of documents USCIS will accept to prove physical presence on December 21, 2000, see:

www.uscis.gov/sites/default/files/files/pressrelease/Section245ProvisionLIFEAct_032301.pdf.¹³

Nonetheless, you should also think outside the box to the relevant and unique evidence your client might have. Applicants have used receipts, pictures, pay stubs, proof of family events, doctor visits, etc. to meet this requirement.

Is a fee waiver available for the 245(i) penalty fee?

No, there is no fee waiver available for the 245(i) penalty fee. However, 245(i) adjustment applicants who are under 17 years old and unmarried do not have to pay the penalty fee, nor do the spouses or children of legalization (amnesty and special agricultural worker) beneficiaries who qualified for family unity status.¹⁴ Spouses or children who qualified for family unity must provide a copy of a receipt or approval notice for Form I-817 Application for Family Unity Benefits as proof they do not have to pay the penalty fee.

What grounds of inadmissibility or other bars does 245(i) forgive?

245(i) allows people to overcome adjustment of status bars at 245(a) and 245(c), and DHS has also interpreted 245(i) as excusing inadmissibility only for § 212(a)(6)(A), being present in the United States without admission or parole (a situation many people are in after coming to the U.S. without inspection).¹⁵ Applicants for adjustment of status under 245(i) must still be admissible under all other grounds of inadmissibility or qualify for a waiver of the inadmissibility ground. A narrow class of applicants who applied for adjustment under 245(i) in the Ninth Circuit within a period of time when the case law was not settled on whether individuals inadmissible under § 212(a)(9)(C) could apply for 245(i) adjustment may also be eligible to have their 245(i) adjustment cases reopened and adjudicated.¹⁶

Why does 245(i) sometimes involve two visa petitions, filed by two different petitioners?

Applicants for adjustment of status using 245(i) must also have a visa petition for which a visa number is currently available—this may be either the original 245(i) petition that is now current after waiting for many, many years, or another petition such as an immediate relative petition.¹⁷

Sometimes the applicant can no longer immigrate using the original 245(i) petition because they are no longer eligible under that petition. For instance, where a derivative child ages out or where spouses divorce. Nonetheless, the petition is still proof that they have eligibility under 245(i), should they become eligible for a new petition. Such a person might qualify under a new visa category, for example through a new marriage. In these cases, the person adjusts status with the new petition, but presents the former petition as proof that they are protected under 245(i).

Example: Sonja was 12 years old when her uncle Ravi filed a visa petition for her entire family in 1996 (Sonja’s father, Ravi’s sibling, was the primary beneficiary and the rest of Sonja’s immediate family was included as derivatives). This petition did not become current until 2008, when Sonja was 24 years old (and her CSPA calculated age was still over 21). She could not adjust status using the petition, but the fact that she is the beneficiary of the petition qualifies her for 245(i). Sonja is now 37 and married to a USC. Her USC spouse can file a petition for her, and she can present the prior petition as proof of her 245(i) eligibility, allowing her to overcome an entry without inspection or other 245(c) bar that would otherwise prevent her from adjusting status notwithstanding her marriage to a USC.

Other times, the priority date might not yet be current, but the person can now adjust more quickly through a new relationship and petition, coupled with 245(i) eligibility from the older petition. The older petition is still valid, but using a new petition is faster.

Example: USC Gustavo filed a petition for his brother Miguel in 2000. This petition is not yet current—they are from Mexico and the waiting period for siblings of USCs is more than 20 years! Miguel married a USC in 2010. To be able to immigrate now, Miguel can use the petition filed by Gustavo to show he qualifies for 245(i), along with an adjustment based on a new petition, filed by his USC spouse.

What does “grandfathering” under 245(i) mean and how does it work?

An old rule that can still apply to some people today is called a “grandfather” provision.¹⁸ The 245(i) special provision allowing someone to adjust status with a penalty fee was terminated on

April 30, 2001. In this context, the term “grandfathering” refers to someone who can show eligibility under this old 245(i) rule and therefore continue to benefit. Someone who qualifies for 245(i) protection now has been “grandfathered” into the old rule as it was in effect before May 1, 2001.

Beneficiaries of a 245(i) petition, including those who qualified as derivative spouse or child beneficiaries,¹⁹ are independently “grandfathered” under 245(i). For derivative beneficiaries, they are independently “grandfathered” as long as the spouse or child relationship with the principal beneficiary was in existence on or before April 30, 2001 and the petition was filed on or before that date as well.²⁰ In some cases, the petition might have been filed before the relationship was formed.²¹ For example, if Sonja in the example above has a sister who was born on April 1, 2001, after her uncle originally filed the petition, her sister would also be independently grandfathered because she, too, qualified as a “child” of the primary beneficiary before April 30, 2001.²²

In other words, people who qualify for 245(i) in their own right are independently grandfathered under 245(i). This is distinguished from people who do not qualify for 245(i) in their own right, but who may still be able to adjust under 245(i) if they are the current derivative of someone who is independently grandfathered under 245(i), like a spouse, and they adjust at the same time as the person who is independently grandfathered.²³

Example: Lupe’s aunt filed a petition for her mother before April 30, 2001, when Lupe was 13 years old. Lupe and her mother are both independently grandfathered under 245(i)—Lupe as a derivative child and her mother as the principal beneficiary. Lupe can pursue her own adjustment case under 245(i), independent of what her mother does. Lupe can marry a USC and file for adjustment on her own.

Example: Jorge’s sister filed a visa petition on his behalf in 1992. Later, in 1995, Jorge's daughter Dolores was born. Is Dolores grandfathered under 245(i)?

Yes, Dolores is independently grandfathered under 245(i). Although she did not exist when the petition was originally filed in 1992, because she was born before April 30, 2001 her father could still have added her to his petition before April 30, 2001, in time so that she could have been a derivative on the petition. Therefore, she is considered independently grandfathered under 245(i), even if he never actually got around to adding her to the petition, because she was alive/in existence before April 30, 2001.²⁴

As the above example illustrates, the controlling date for determining whether the spouse or child relationship was in existence and therefore the spouse or child is independently grandfathered is April 30, 2001, not necessarily the particular date the 245(i) petition was filed.²⁵

Example: Jojo was married to USC Lana in 1999 and Lana petitioned for Jojo and Jojo's child Peter. Peter got married in 2012 before he could adjust status with that petition. His spouse, Jorge, is undocumented and entered without inspection. Jojo became an LPR and has since naturalized. As a USC, Jojo can petition for Peter as a married son and Peter's spouse can be included as a derivative. Peter is independently grandfathered under 245(i) based on the original petition filed by Lana. Although Peter's spouse Jorge is not independently grandfathered, as Peter's derivative he can adjust with Peter, using Peter's 245(i) eligibility. Jorge is an "after-acquired" derivative (which we will discuss later).

People who are "grandfathered" may benefit from 245(i), allowing them to overcome the inspected and admitted or paroled requirement and also any bars at 245(c), in a later adjustment application no matter how much time has passed since the 245(i) petition was submitted. They continue to be "grandfathered" until they adjust status.

Each beneficiary of a petition filed on or before April 30, 2001 is *independently* grandfathered, meaning that they maintain 245(i) eligibility irrespective of their continuing relationship to the other beneficiaries. For example, a person who was married to a principal beneficiary of an earlier 245(i) petition continues to be grandfathered under 245(i) even after they divorce. They might be able to adjust under 245(i) if they later remarry, and their new spouse is able to submit a petition on their behalf, or they have a U.S. citizen child who turns 21 and can submit a petition for them. As explained in the previous question, these individuals must be the beneficiary of a new petition filed by an immediate relative or other petition with a current priority date. At the time of the adjustment, they must also submit proof of the old petition to demonstrate 245(i) eligibility.

Note: The current USCIS Policy Manual guidance introduces confusion around the principle that the relationship must be formed on or before April 30, 2001 but not necessarily at the time of filing the petition. *Matter of Estrada*, 26 I&N Dec. 180 (BIA 2013), and prior guidance make clear that so long as a person could benefit from a properly filed petition on or before the cut-off date, they are independently grandfathered as illustrated in the above examples. Nonetheless, the USCIS Policy Manual at Volume 7, Part C, Chapter 2, occasionally references that the relationship should be in existence at time of filing, which confuses the notion of a properly filed petition and a properly included beneficiary. If you see incorrect decisions requiring the relationship to be in existence at time of filing, please email equinn@ilrc.org and

abrown@ilrc.org. Advocates should argue against this interpretation as it does not comport with caselaw.²⁶

What does “after acquired” mean?

A spouse or child who comes into existence *after* April 30, 2001 is referred to as “after acquired.” They are not independently grandfathered under 245(i) and can only immigrate as a derivative beneficiary of someone who *is* independently grandfathered under 245(i), based on their continuing qualifying relationship to this person at the time of the adjustment application.²⁷

Example: Martin has a qualifying 245(i) petition that his brother filed for him in 1998. The priority date is finally current, and he wants to include his wife Veronica. He married Veronica in 2005. Can Veronica immigrate under 245(i) as well?

Yes, as long as Veronica immigrates through the same petition as Martin, as his derivative. If she and Martin had divorced before they adjusted, she would not be able to benefit from his 245(i) petition because she has no independent 245(i) eligibility as an “after-acquired” spouse. Here, if they are still married, she can adjust as his derivative on the original petition filed by Martin’s brother.

Example: Before Veronica, Martin was in a relationship with another woman. They had a child together, but the mother of the child returned to Mexico to have the baby. The child was born in Mexico in 2002. Unbeknownst to Martin, his child was brought to the United States. Martin and Veronica now have full custody of the child—is this child independently “grandfathered” under 245(i), or is the child “after acquired” and not independently “grandfathered”?

Because the child was born *after* April 30, 2001, the child is considered “after acquired.” However, if she is still under 21 and adjusts at the same time as her father as his derivative, she can adjust under 245(i). Otherwise, she will not be able to benefit from 245(i). In this case, when the petition filed by Martin’s brother becomes current Martin, Veronica, and his child can all use this petition to adjust status. Veronica and his child will adjust status as Martin’s derivatives on the petition and can thus benefit from his 245(i) eligibility.

Example: Jose Luis, who is originally from Mexico, entered the U.S in 1997 without inspection and is the beneficiary of a fourth preference petition his U.S. citizen brother filed for him. The priority date, April 28, 2001, is not yet current but qualifies Jose Luis for 245(i). In 2010, Jose Luis married Amparo; she is an “after acquired” spouse. Amparo entered the U.S. without inspection in 2000. Together they have a

U.S. citizen daughter who just turned 21 and has filed immediate relative petitions for both her parents. Can Jose Luis and Amparo both adjust now, under 245(i)?

No (this was a bit of a trick question). As an “after-acquired” spouse, Amparo can only benefit from Jose Luis’s 245(i) eligibility if she adjusts as his derivative. However, immediate relative petitions do not allow for derivatives—their daughter would have to file a separate petition for each of them. Amparo cannot use Jose Luis’s 245(i) eligibility in conjunction with a separate petition filed by their daughter on her behalf. The couple’s options are: (1) Jose Luis adjusts now through the immediate relative petition filed by his daughter, using the not-yet-current 2001 petition from his brother to show he qualifies for 245(i) (he cannot adjust on the petition his brother filed for him because it is not yet current), or (2) Jose Luis and Amparo both wait until the fourth preference petition filed by Jose Luis’s brother is current and then proceed to adjust under that petition. If they adjust based on the fourth preference petition, then Jose Luis can include his spouse as his derivative, so she, too, can adjust and benefit from his 245(i) as an after acquired spouse.

There are pros and cons to both options. Using his daughter’s immediate relative petition, Jose Luis can adjust now. His wife would not qualify, but if Jose Luis adjusts, his wife will have a qualifying relative (Jose Luis as an LPR spouse) for an unlawful presence waiver, and she could then consular process. If they both wait for the priority date to become current on the 4th preference petition filed by Jose Luis’s brother, then Amparo can adjust too (and avoid needing to consular process and potentially avoid needing a waiver), but this would delay both of them becoming permanent residents. Different families will make different decisions, depending on the need for a parent to become an LPR quickly, the amount of time needed to wait for the older petition, and feelings about risk of travel and consular processing. Each case presents unique facts and risks.

Can my client apply for 245(i), if they originally came to the U.S. without inspection (EWI) but then left the U.S. and re-entered, again without inspection?

If a person leaves the United States after spending time here with no immigration status, they might be subject to other bars of inadmissibility. Someone who has been unlawfully present in the United States for more than one year, then departs and re-enters or attempts to re-enter without being admitted is inadmissible under INA § 212(a)(9)(C), the “permanent bar.” This bar is called the permanent bar because a waiver is not even possible until the person has been outside the United States for ten years. The Board of Immigration Appeals held in *Matter of*

Torres-Garcia, 23 I&N Dec. 866 (BIA 2006) and *Matter of Briones*, 24 I&N Dec. 355 (BIA 2007) that 245(i) eligibility does not overcome the permanent bar.²⁸

If your client says they left the United States and came back, it's important to take a full chronology of their entries and exits to and from the United States. Unlawful presence does not begin to accrue until April 1, 1997 when the law came into effect. If they left and came back before that date, this particular bar might not apply. For purposes of the permanent bar different periods of unlawful presence are added together, so if a person made multiple trips and accumulated more than a year, then this bar would apply. Unlawful presence for purposes of the permanent bar *does* accrue for minors under 18 (unlike with other unlawful presence bars, under INA § 212(a)(9)(B)). If someone was here as a minor for more than one year after April 1, 1997, left the country, then traveled back to the U.S. without inspection, they will be subject to the permanent bar.

What if my client may have 245(i), but also has other issues, like a criminal record or past fraud or misrepresentation?

You will need to evaluate this case as you would any other possible adjustment case—the applicant must still be admissible, which means either no inadmissibility grounds apply or if they do, your client falls under an exception or is eligible for a waiver. Someone who has 245(i) just means they do not have to worry about the "inspected and admitted or paroled" requirement under INA § 245(a), and they also do not need to worry about the § 245(c) bars to adjusting under 245(a).

What kinds of questions can I ask my clients to uncover possible 245(i) petitions?

The first step in figuring out whether your clients may be 245(i)-eligible is to find out if there is an old petition out there, in which they may have been the principal or derivative beneficiary. Remember, a child in existence before April 30, 2001 can be independently grandfathered under 245(i), even if at the time the petition was filed for a parent the child was not yet born or was left off the petition by mistake. Simply asking whether a petition was ever filed on behalf of your client usually will not reveal all the possible ways a client might qualify under 245(i). Below are examples of the types of questions you want to ask your clients to identify whether they may be the beneficiary of a 245(i) petition:

- Do you have any relatives who have immigration status?
 - Ask about aunts, uncles, grandparents, parents, siblings, and spouses

→ Do you have any ex-spouses?

- You need to know about prior spouses with immigration status AND those without immigration status, as those with status might have filed petitions directly for your client, and those without status might have been the beneficiaries of petitions that your client could be independently grandfathered under as well

→ Did your parents have any prior marriages?

- (Keep in mind you might ask about your client's step-parents, but sometimes parents have a prior marriage that has ended, and in these cases the child does not necessarily identify the prior spouse as a parent or former step-parent)
- Again, you need to know about prior spouses with immigration status AND those without immigration status

After investigating all the possible relationships with people with immigration status, you can begin to research whether a petition was filed by any of these people under which your client could have benefitted. This often requires that the client ask questions of family members, as they usually will not know all the possible petitions filed for family members and prior spouses 20 years ago without some investigation.

- If an aunt or uncle was or is a USC, ask if the aunt/uncle ever filed for a parent. Ascertain the age of the client at time of filing, or whether the client was born on or before April 30, 2001, even if the petition was filed before they were born.²⁹
- If any grandparents have immigration status, determine if they ever filed for a parent. Determine what status they had when they filed for the parent, and how old the parent was. Remember, immediate relative petitions do not have derivatives. But if the grandparent petitioned for the parent when grandparent was an LPR, derivatives would have been allowed. Additionally, if the grandparent was a USC and petitioned for the parent when the parent was over 21 or married, then derivatives count here as well, because this would have been a preference petition. If your client has a parent with a prior marriage, one line of questions is whether the parent's ex-spouse had immigration status and petitioned for the former spouse and your client as a derivative. Additionally, it might also be that the prior spouse did not have immigration status either, but was a principal beneficiary on a 245(i) petition. In that case, it is important to research whether any petitions were filed on behalf of the prior spouse, under which your client could have been classified as a derivative.

- If your client has a prior spouse, ask whether the spouse filed a petition in the past. Additionally, if the prior spouse did not have immigration status either, determine whether the ex-spouse might have been the principal beneficiary of an old petition. For instance, the sister of your client's ex-wife might have petitioned for the ex-wife. If the petition was filed on or before April 30, 2001, and the marriage was also in place on or before April 30, 2001 (and while the petition was still active), your client might have 245(i) eligibility.
- Remember, the person does not have to actually be listed on the petition as a derivative to be 245(i)-eligible—it is enough that they could have properly qualified as a derivative on or before April 30, 2001, on a petition that was filed on or before April 30, 2001 (these two dates do not have to coincide, they both just have to be *before* April 30, 2001).³⁰

You may also need to create a timeline, and ask follow-up questions, to make sure that the petition was approvable when filed. The timing of when the petitioner achieved LPR status or citizenship will need to be checked against marriage dates and ages of beneficiaries. For instance, if your client reports that their LPR grandmother filed a petition for their mother in 1997, or a USC uncle may have filed papers for a father in 2000, you would want to pin down the following dates:

- For a petition filed by an LPR grandparent for a parent, did the client's parent ever marry and if so, when? If the principal beneficiary parent was married before the petition was filed, that petition was not in fact approvable when filed (no visa category for married son or daughter of an LPR) and therefore does not qualify for 245(i) purposes.
- For a petition filed by a USC aunt or uncle for a parent, when did that aunt or uncle naturalize? While unlikely, you will want to double check that the USC aunt or uncle was already a USC at the time they filed the petition. If the petitioning aunt or uncle did not become a U.S. citizen until after the petition was filed, that petition was not approvable when filed (no visa category for sibling of LPR), and beneficiaries of that ultimately invalid petition are not eligible for 245(i).

Many clients will have no idea if, for example, an aunt filed a petition for their mother twenty years ago, so most likely they will have to go ask their parents or other relatives before being able to answer the above questions, and you should encourage them to investigate. They may discover that their relatives were part of the mad rush in the days and weeks leading up to the April 30, 2001 sunset of 245(i) and filed petitions. Your client may have heard nothing about these petitions because some are still waiting for the priority date to be current, especially where filed by USC siblings because there is such a long wait for visas in that category, even after 20

years of waiting. Others may no longer be viable because the underlying relationships ended, so people did not realize the petition might still benefit them in some other way.

For qualifying petitions filed after January 14, 1998, you will also need to ask questions to determine if the principal beneficiary was present in the United States on December 21, 2000. In some cases, the principal beneficiary might be a prior spouse or a parent who is now deceased. Thus, even this question takes some investigation.

Once you have found possible 245(i) eligibility for your clients—let them know! Because 245(i) eligibility stays with the independently grandfathered client until they adjust, even if there is no immediate option to adjust, they may have an option in the future. Many people can no longer use the original petition because they aged out or the relationships have changed, but will still be able to use 245(i) eligibility for an adjustment based on a new petition. It is important that people know they have 245(i) eligibility, even if a new petition is not yet possible. In the future, their USC child will turn 21, or they might marry a USC or permanent resident down the road.

The next step, if it appears there may be a 245(i) petition out there, is to obtain the records (see next question for more on this).

How do you find old records for 245(i) petitions, which may have been filed 20 years ago or longer?

While some people will have saved a petition receipt notice or approval notice for decades, most will not have proof of this petition anymore. The best way to find proof of an old 245(i) petition is by filing a Freedom of Information Act, or FOIA, request.

For more on how to file FOIA requests, see ILRC advisory “A Step-by-Step Guide to Completing FOIA Requests with DHS,” available at www.ilrc.org/step-step-guide-completing-foia-requests-dhs.

End Notes

¹ Note in this advisory when we discuss “adjustment of status” we are primarily referring to adjustment of status under INA § 245(a); other sections of the INA govern other, special adjustment of status processes, such as INA § 245(m) specifically for adjustment of status for U nonimmigrants, or INA § 209, which governs adjustment of status for refugees. These other adjustment processes have their own specific requirements but for adjustment applicants who are not asylees, refugees, Special Immigrant Juveniles, or T or U nonimmigrants, § 245(a) sets forth the requirements for their application for permanent residence from within the United States.

² The ILRC recognizes and condemns the racist history of the term “grandfathering,” which was first used to describe voting laws that had the effect of allowing poor white people to vote and preventing Black people from voting. However, USCIS policy guidance and caselaw use the term “grandfathering,” thus the ILRC uses it in this advisory for instructional purposes only.

³ INA § 245(a).

⁴ An immediate relative is the *spouse* of a U.S. citizen, *parent* of a U.S. citizen child who is at least 21 years old, or *child* who is unmarried and under age 21 of a U.S. citizen. See INA § 201(b)(2)(A)(i).

⁵ See INA § 245(c) for the complete list, which includes crewmen, people who last came to the U.S. under the Visa Waiver Program (VWP), and people who violated the terms of their nonimmigrant visa. INA § 245(c)(2) affects many would-be adjustment applicants, as it applies to any non-immediate relative who has ever worked without authorization or fallen out of lawful status (other than VAWA self-petitioners, who are exempt from 245(c)).

⁶ See INA § 245(a).

⁷ P.L. 103-317, Title V § 506(b), 108 Stat. 1724 (1994).

⁸ When we refer to petitions in this advisory as “active,” we mean petitions that have been filed and are still viable. For instance, if the principal beneficiary already adjusted using the petition, then it is no longer an active petition and the principal beneficiary cannot use it to adjust again, nor can derivative beneficiaries not already in existence use it to immigrate in the future. In other words, a new derivative who was not in existence *on or before April 30, 2001* (independently grandfathered) or *after April 30, 2001 but before the principal’s adjustment of status* (after acquired) could not also use the petition to immigrate once the principal has used the petition to adjust. Additionally, if the principal beneficiary of a family-based 2A petition marries before the petitioning parent naturalizes, this is another example of a situation in which the petition is no longer valid, and so it is not still viable or “active.” See discussion of grandfathering, “What does ‘grandfathering’ under 245(i) mean and how does it work?” for a caveat on current USCIS Policy Manual interpretation of who may benefit from 245(i) if the relationship came into being after the petition was initially filed, but still on or before April 30, 2001.

⁹ If no postmark or the postmark is illegible, it will be deemed timely filed as long as received by May 3, 2001. Memo, Yates, (Apr. 26, 2001), reprinted in 78 No. 18 Interpreter Releases 774, 790-93 (May 7, 2001).

¹⁰ USCIS defines “frivolous” in this context as “patently without substance.” See AFM Ch. 23.5(b)(2)(A)(iii).

¹¹ See www.uscis.gov/i-485 and www.uscis.gov/i-485supa for more information on the adjustment fees, forms, and evidence.

¹² December 21, 2000 is the enactment date for the LIFE Act Amendments of 2000, which extended the sunset of 245(i) to April 30, 2001.

¹³ See also 8 CFR § 245.10(n)(3)-(5).

¹⁴ Includes spouses or children of individuals who obtained temporary or permanent resident status under INA § 210, INA § 245A, or § 202 of the Immigration Reform and Control Act (IRCA) of 1986. See INA § 245(i)(1)(C) for more details.

¹⁵ See Legal Opinion, Martin, General Counsel, INA, CO 245(i), CO 212(a)(6)(A) (Feb. 19, 1997), reprinted in 74 No. 11 Interpreter Releases 499, 516-22 (Mar. 24, 1997).

¹⁶ See *Garfias-Rodriguez v. Holder*, 702 F.3d 504 (9th Cir. 2012) (deferring to the BIA's decision in *Matter of Briones*, 24 I&N Dec. 355 (BIA 2007), that individuals ineligible under INA § 212(a)(9)(C)(i)(I) are ineligible for 245(i), overruling its contrary decision in *Acosta v. Gonzales*, 439 F.3d 550 (9th Cir. 2006), and outlining a retroactivity test for application of *Briones*). See also *Matter of Torres Garcia*, 23 I&N Dec. 866 (BIA 2006) (individuals ineligible under INA § 212(a)(9)(C)(i)(II) are ineligible for 245(i)).

¹⁷ Also includes someone who was selected for a Diversity Visa for the current fiscal year.

¹⁸ See Note 2, *supra*, for information on the racist history of this term, and the ILRC's position on using it.

¹⁹ Eligible to receive a visa under INA § 203(d).

²⁰ See *Matter of Estrada*, 26 I&N Dec. 180, 184 (BIA 2013). Note the current version of the USCIS Policy Manual appears to suggest that in order to be independently grandfathered as a derivative beneficiary, the qualifying relationship had to come into existence *before the petition was filed*, not just on or before April 30, 2001. See USCIS Policy Manual, Volume 7, Part C, Ch. 2. The ILRC and others are working with USCIS to clarify the guidance in the policy manual so that it clearly comports with *Estrada*, but in the meantime practitioners must be on notice that if the qualifying relationship arose after the 245(i) petition was originally filed, even if still on or before April 30, 2001, USCIS may find that that individual is not independently grandfathered. Advocates should argue this is legally incorrect. 245(i) requires the petition to be approvable when filed, and that the relationship that creates the possibility of benefitting from that petition must have come into existence on or before April 30, 2001.

²¹ See Note 20.

²² See Note 20, *supra*.

²³ This includes those following to join. To follow to join, the requirements are that: (1) their relationship to the principal beneficiary existed at the time the principal adjusted, (2) continues to exist at the time the derivative applies to adjust, and (3) the principal beneficiary is still an LPR/has not naturalized; there is no time limit to follow to join. See 7 USCIS-PM A.6(C)(6).

²⁴ See Note 20, *supra*.

²⁵ See Note 20, *supra*.

²⁶ See Note 20, *supra*.

²⁷ See USCIS Policy Memo, "Clarification of Certain Eligibility Requirements Pertaining to an Application to Adjust Status under Section 245(i) of the Immigration and Nationality Act," HQOPRD 70/23.1, available at www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/Static_Files_Memoranda/Archives%201998-2008/2005/245iclarification030905.pdf, and *Matter of Estrada*, 26 I&N Dec. 180 (BIA 2013) for more on "grandfathering" and "after-acquired" spouses and children under 245(i). After acquired derivative beneficiaries can apply to adjust under 245(i) at the same time as the principal, or at any point thereafter as long as they still qualify as a derivative ("following to join"). Compare this with derivative beneficiaries who are independently grandfathered: beneficiaries who are independently grandfathered can adjust at a later point even if they no longer qualify as the principal beneficiary's derivative spouse or child because of divorce or aging out (but in these situations, they will need to pair the 245(i) petition with a new petition for visa availability, e.g., a spousal petition). To follow to join, the requirements are that: (1) their relationship to the principal beneficiary existed at the time the principal adjusted, (2) continues to exist at the time the derivative applies to adjust, and (3) the principal beneficiary is still an LPR/has not naturalized; there is no time limit to follow to join. See 7 USCIS-PM A.6(C)(6).

²⁸ However, a class of people who filed applications while this caselaw was not yet resolved on the issue of the permanent bar and 245(i) are protected. See *Duran Gonzales v. Dep't of Homeland Sec'y*, 712 F.3d 1271 (9th Cir. 2013); *Garfias-Rodriguez*, 702 F.3d 504.

²⁹ See Note 20, *supra*.

³⁰ See Note 20, *supra*.



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About the Immigrant Legal Resource Center

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