Resource

Beyond the New H-1B Rules: Recent Changes in Immigration Law

Dan Berger and Laura Taylor

The past six months have seen dramatic changes in the immigration laws. Many of these changes have been overshadowed by the bizarre presidential election and important reforms to the H-1B system.[1] This advisory reviews some of the new laws most relevant to international student and scholar advisers.

Temporary Return of Section 245(i)

The first big change is that Congress has revived—albeit temporarily—INA Section 245(i) by passing the Legal Immigration and Family Equity (LIFE) Act. LIFE allows an alien to adjust his or her status in the United States despite unlawful presence, violation of status, unauthorized employment or entry without inspection.[2] To qualify, the alien must be the beneficiary of a petition or application filed before April 30, 2001, and have been physically present in the United States on December 21, 2000.

This was a compromise between the Gore/Democrat version (bringing back 245(i) permanently along with other options for illegal aliens) and the Bush/Republican version (no programs for illegal aliens). minute filings this spring that may cause backlogs at the Immigration and Naturalization Service (INS) and the Department of Labor (DOL) for years to come.

Section 245(i) simply allows a person who was eligible for a green card and who was present in the United States, but who would otherwise be ineligible to adjust his status (because of current or prior immigration violations), to pay a $1,000 fine and adjust status in the United States. Anyone with an employment or family-based immigrant petition or a Labor Certification application filed before January 14, 1998, was "grandfathered in." Those people could, and still can, adjust their status by paying the $1,000 penalty. Those without a petition or Labor Certification filed on their behalf before that date, however, became ineligible for the 245(i) benefit until the passage of the LIFE Act.

The loss of 245(i) was particularly difficult for those caught by the so-called "3 and 10 year bars." INA 212(a)(9)(B) states (in effect) that an alien who departs the United States after being unlawfully present for more than 180 days is ineligible for readmission to the United States for three years. An alien unlawfully present in the United

©Jerry Nelson/gettyone

Many of them have been on lists at lawyers' offices waiting for 245(i) to come back so that they can apply for permanent residence in the United States. Now is their chance. Once permanent residence is obtained, these entry bars no longer apply.

For example, "John" entered the country illegally from Mexico in 1997. His U.S. citizen brother never got around to filing an I-130 relative petition on his behalf before the January 14, 1998 expiration of INA Section 245(i). Had his brother filed the I-130 before that date, his brother now has until April 30, 2001, to file an I-130 to grandfather in John under 245(i). When the I-130 is approved, John is not yet eligible to adjust his status under 245(i), since there is a waiting list of 12 years in John's preference category (siblings of U.S. citizens). During this time, John marries a U.S. permanent resident. At that time, John can choose to use his 245(i) eligibility to pursue permanent residence on that basis; he is not bound to process his permanent residence through his brother's petition, since his grandfathered status "be-

United States for 10 years. Being covered under 245(i), John can become a permanent resident by paying an additional $1,000 penalty fee when he applies for adjustment of status in the United States.

Note that 245(i) does not excuse all immigration violations. For example, misrepresentation cannot be forgiven by paying the $1,000 penalty. If John had entered on his brother's passport and used his brother's name, that would be a misrepresentation to an immigration official to obtain an immigration benefit. Section 245(i) would not help.[4]

Note also that although 245(i) is activated by the filing of an immigrant petition or labor certification application, a person's eligibility under 245(i) "belongs" to the individual. As long as the petition or application that created the qualification is eventually approved, the person remains eligible under 245(i) even if he or she eventually adjusts status on the basis of a different petition or labor certification filed afterwards. Therefore, if John's employer files a Labor Certification and I-140 after the 245(i) deadline, John could choose to adjust his status on that basis under 245(i) because he himself gained 245(i) eligibility when the I-130 was filed.

The extension of 245(i) grandfathers anyone who files an I-130, I-140, I-360, or a Labor Certification before April 30, 2001. Since the law was only passed on December 21, 2000, and word is just getting out, expect a rush of filings with INS and DOL in March and April. Interestingly, the law includes several categories of aliens who can self-petition—they do not need a relative or employer to sponsor them. These are battered spouses or children, special immigrant juveniles (children declared a ward of the court), aliens of extraordinary ability (EB1-1), and National Interest Waiver applicants.

How does this affect the international student and scholar adviser?

As long as the petition or application that created the qualification is eventually approved, the person remains eligible under 245(i) even if he or she eventually adjusts status on the basis of a different petition or labor certification filed afterwards.

Since time is of the essence in this matter, it is important to quickly get the word out, perhaps through your school's web site or school newspaper, that it may be possible to file for permanent residence in the United States despite status violations, unauthorized employment, illegal entry, or overstay. Also, try to remember individuals you have talked to about permanent residence who did not qualify then, but might now under 245(i). Your phone call or e-mail to them about this new law will be much appreciated.

New Visas for Spouses, Children

The LIFE Act also tries to correct the hardship caused by the absence of a temporary (nonimmigrant) visa for the spouses or children of permanent residents (PRs) or U.S. citizens. Consider the following examples that are not uncommon:

"Margaret" is an F-1 student from South Africa working on Optional Practical Training. She falls in love and marries a U.S. citizen, but does not file a permanent residence application right away. At Christmas time, she flies home to see her family. When she goes to the U.S. consulate to renew her F-1 visa, the consular officer sees her wedding ring and discovers that she is married. The F-1 visa is denied because she no longer intends to return home after her studies are completed. She is now forced to wait in South Africa for her husband to file an I-130 in the United States, have it approved, and proceed with consular processing in South Africa. It could be many months before she can return, during which time she is missing her studies and is separated from her husband.

"Alex" has been a professor on an H-1B visa for several years and has just obtained his permanent residence. He returns home to Estonia and marries his high school sweetheart, "Mary." She then applies for a tourist visa to join him in the United States. The visa is denied because Mary does not have temporary intent. She is now stuck in Estonia while Alex returns to the United States, files an I-130 for her, and waits for a visa to become available in the Family 2A category for spouses of permanent residents. Immigrant visas in that category are currently being processed for I-130 petitions filed in August 1996. It will be a long wait (even if Alex does obtain his citizenship after five

ately, but the spouse of a lawful permanent resident or a U.S. citizen cannot.

Section 1102(a)(3) of LIFE addresses the problems faced by spouses and minor children of PRs by adding a new "V" visa that allows them to enter the United States and work while waiting for permanent residency through their PR spouse or parent. However, this new visa category is much more limited than it appears. The law only affects those who had filed an I-130 before December 21, 2000, and who have been waiting at least three years to apply for a green card. Those PRs who did not file I-130s—because they decided to wait for citizenship and then apply for their spouses under a faster category—are not included. The new law also allows individuals who qualify to obtain V status in the United States despite being unlawfully present. A V visa holder is eligible for employment authorization.

Section 1103(a) of LIFE amends INA 101(a)(15)(K), the fiancé visa category, which used to be available only to fiancees of U.S. citizens. The "K" visa is available for the spouse of a U.S. citizen who wants to enter the United States while an I-130 is pending. Since fiancé visas are generally processed much faster than I-130s, this is a great benefit to those like Margaret who are waiting to join their U.S. citizen spouse in the United States. If the marriage took place outside of the United States, the K visa must be issued in that

Premium-Processing Fee

Congress has added INA 286(u), which creates an optional $1,000 premium-processing fee that an employer can pay to receive "premium processing" of the "business petitions" it files with INS. Neither "business" nor "premium processing" is defined in the statute; the "premium" service will in all likelihood include expedited processing of at least H, O, and L nonimmigrant petitions and I-140 employment-based immigrant petitions. Theoretically, petitioners can pay the fee and INS will act on the petition within a limited period of time. Discussions indicate that INS is considering 15 day processing. This would be a great benefit for many employers; H-1Bs, for example, are now taking at least three months from filing to be acted on by INS. However, the details have not been worked out yet, including whether an employer would be entitled to premium service even if INS issues a Request for Evidence (RFE).

It is unlikely that the new fee will have a practical effect on visa processing in the near future. INS has announced that it will try to implement the new fee in the middle of 2001, but that it will not start with H-1Bs. Also, expect litigation on this point since there is a serious question of fairness if a wealthy petitioner can obtain an H-1B visa faster

It is unlikely that the new fee will have a practical effect on visa processing in the near future. INS has announced that it will try to implement the new fee in the middle of 2001, but that it will not start with H-1Bs.

◗ The permanent residence category for religious workers has been extended.[5] While ministers could always apply for permanent residence, other religious workers had become ineligible on September 30, 2000. To qualify, the individual must have a job offer from a religious organization in the United States and have worked for the same denomination abroad for at least two years. (In contrast, the R-1 temporary visa category does not require two years work abroad, simply two years "affiliation.")

◗ Children adopted internationally as orphans will automatically become citizens on February 27, 2001.[6] There is no need to file for naturalization. Parents can simply apply for a U.S. passport as proof of citizenship for their child. The standards for citizenship for other children born abroad to U.S. parents and non-orphan international adoptions have also changed.

◗ The oath of citizenship can be waived for applicants who are disabled.[7]

◗ The Visa Waiver Program (VWP) has been made permanent.[8] In its "pilot" stage, before being made permanent, the program had to be extended on a yearly basis by Congress. During the pilot program, Congress usually failed to act before the yearly expiration date, leaving

◗ The Violence Against Women Act (VAWA) was expanded to provide additional protection for battered spouses and children.[10] The goal of the law is to stop U.S. citizens from keeping a spouse in an abusive relationship by using visa status as a weapon. Battered spouses and children can self-petition for permanent residence on Form I-360 without the husband or father involved. The law also creates a new "T" visa for victims of the international sex trafficking trade.

— Dan Berger is an immigration lawyer with Joseph Curran Associates in Northampton, Massachusetts. Laura Taylor is the Associate Director of the International Students and Scholars Office at Cornell University.

End Notes

1 NAFSA Immigration Adviser Quarterly 2000-3, Appendix 5.

2 Unauthorized employment on or after January 1, 1977, is a bar to adjustment of status under INA 245(C)(2). INA 245(a) requires that an alien be "inspected and admitted" or "paroled" into the United States to be eligible for adjustment of status.

3 Waivers of the 3/10 year bar may be possible for immigrant and nonimmigrant visas, but are discretionary and may require waiting quite a long time for a decision outside the U.S.

4 A separate waiver of misrepresentation may still be possible.

5 H.R. 4068, enacted November 1, 2000, as Pub. L. No. 106-409.

6 H.R. 2883, enacted October 30, 2000, as Pub. L. No. 106-395.

7 S. 2812, enacted November 6,