245(i)

Memorandum

HQ 70/23.1-P
96-ACT.003

Subject:	Instructions regarding approaching sunset of section 245(i) of the Immigration and Nationality Act; amended procedures for section 245(i) cases submitted by self-petitioning battered aliens; and aliens readmitted in nonimmigrant H-1B, E, or L status after abandoning a section 245(i) application.	Date:	SEP 22 1997
To:	Regional Directors District Directors Officers in Charge Service Center Directors ODTF Glynco, GA ODTF Artesia, NM	From:	Office of Programs (HQPGM)

If Congress enacts an extension of section 245(i) of the Immigration and Nationality Act (the Act) prior to its scheduled sunset date of September 30, 1997, the statute will provide for continued filing for the benefits of that law. However, Congress may also choose either to renew the provisions of section 245(i) after September 30, 1997, or not to renew them at all. Therefore, field offices need to be prepared for the imminent expiration of that statutory provision. With the approaching of September 30, 1997, and the recent policy change regarding "dual intent" for a nonimmigrant in E, H, or L classification, and the Service's commitment to the protection of victims of domestic violence, some rather significant questions have been raised by field offices. The following offers clarification and instructions on how to deal with some of these issues.

1. The effect of the September 30, 1997, sunset date on eligibility to apply for adjustment of status under section 245(i) of the Act.

As explained in a previous policy memorandum, HQ 70/23.1-P, 96-ACT.003, dated February 26, 1997, any alien seeking to file a Form I-485 application pursuant to the provisions of section 245(i) of the Act is required to pay the $1,000 surcharge and the base filing fee of $130 at the time the I-485 application is filed with the Service. Although the Service has determined that section 245(i) adjustment applications filed on or before September 30, 1997, may be processed to completion after that date, the Service's authority to accept such applications, nevertheless, ends with the sunset of section 245(i). As of October 1, 1997, the Service will only be able to accept applications for adjustment of status filed pursuant to section 245(a) of the Act. The Service may not accept the fee either for new 245(i) applications or for section 245(i) amendments (Supplement A Form I-485 and the $1,000 surcharge) to a pending

application on Form I-485 after September 30, 1997.

Any Form I-485 application for adjustment that is filed prior to October 1, 1997, without the Supplement A and the $1,000 surcharge may be considered only under the provisions of 245(a) of the Act. When an adjustment application is determined to be subject to the provisions of section 245(i) of the Act, the application must be considered improperly filed and rejected; 8 CFR 103.2(a)(7)(i). In that case, field offices should immediately advise the applicant to amend his or her application in accordance with 8 CFR 245.10(d) and submit the required Supplement A and the $1,000 surcharge, if applicable, on or before September 30, 1997 (see attachment). Field offices should also make it known to the applicant that the supplement and applicable surcharge must be received by the Service on or before September 30, 1997 in order for his or her application to be considered under the provisions of section 245(i) of the Act.

2. Special filing procedures for section 245(i) cases submitted by self-petitioning battered aliens

Prior to the change this spring which moved the processing of all battered alien I-360 self-petitions to the Vermont Service Center, a self-petitioner for whom a visa number was available could file a Form I-485 concurrently with the Form I-360 in a local INS office. In the May 6, 1997 memorandum on battered alien self-petitioning, offices were instructed not to receipt the I-485 pending adjudication of the I-360 self-petition. Given the September 30, 1997, sunset date for section 245(i), strict enforcement of this instruction may have unduly harsh consequences for spouses and children who would otherwise be eligible to adjust under section 245(i). Accordingly, it is being modified temporarily.

Effective immediately and through September 30, 1997, any battered alien who has properly filed an I-360 self-petition and for whom a visa number is available, **may** file an I-485, with Supplement A and the $1,000 surcharge, directly with the Vermont Service Center. The alien must be advised that **no** refunds of filing fees or surcharges applicable to the I-485 will be issued; if he or she files an I-485, and the I-360 is later denied, he or she will also lose the filing fee and surcharge paid for the I-485.

This centralized filing is for submission purposes only -- the adjustment applications will all be transferred to appropriate INS field offices for interview and adjudication. This is an interim change only: if Congress extends section 245(i) for a substantial period (as distinguished from an extension of a few days or weeks should a continuing resolution be adopted), the INS will revert to the prior filing procedures for battered alien adjustment applications.

Applicants should be apprised that their Form I-485 (with all supporting documentation, Supplement A, the application fee and the surcharge) must be received at the Vermont Service Center on or before September 30, 1997. These applications should be accompanied by evidence of the filing of the Form I-360, which may be either a Form I-797 Notice of Action, a copy of the

Form I-360 accompanied by a registered mail return receipt, or other documentation evidencing proper filing of an I-360. Applicants may file the I-360 and I-485 concurrently with the Vermont Service Center, but any such filings must be accompanied by the appropriate fees in order to be considered complete.

3. Renewal of section 245(i) application by aliens who were readmitted in H-1B, E, or L status after abandoning their original section 245(i) application

A previous Office of Programs memorandum, HQ 70/6.2.5, 70/6.2.9, 70/6.2.12, 70/23.1, 120/17.2, dated August 5, 1997, addressed the subject of maintenance of E, H, or L nonimmigrant status while an application for adjustment of status is pending. Citing pertinent parts of sections 214(h) and 101(a)(15)(e) of the Act, 8 CFR parts 214.2(h)(16) and (l)(16), the August 5 memorandum concluded that, consistent with the requirements of sections 214(g)(4) and 214(c)(2)(D)(i) and (ii) of the Act and 8 CFR 245.2(a)(4)(ii), a timely filed application for a extension of stay by an E-1, E-2, H-1B or L-1 nonimmigrant alien may be approved notwithstanding the fact of a pending application for adjustment of status. If such an alien seeks readmission on a valid E-1, E-2, H-1B or an L-1 nonimmigrant visa, he or she may be readmitted in that status. It was noted that the Service is in the process of changing existing regulations to remove the requirement of advance parole for these "dual intent" nonimmigrant aliens for the purposes of overseas travel and preserving their pending adjustment applications. However, until such time as existing regulations are changed, "dual intent" E-1, E-2, H-1B or L-1 nonimmigrants must continue to request advance parole for travel outside of the United States in order to avoid automatically abandoning their adjustment applications. 8 CFR 245.2 (a).

In the meantime, an alien who was maintaining E-1, E-2, H-1B or L-1 nonimmigrant status at the time he or she proceeded abroad without advance parole authorization and thus abandoned his or her pending adjustment application must file a new application on Form I-485, with the required fee, in order to be processed for adjustment of status. 8 CFR 103.2(a)(15). If such an alien wishes to reapply for adjustment under section 245(i) of the Act, he or she must do so by filing a new Form I-485, with the required fee, together with a completed Supplement A and the $1,000 surcharge, on or before September 30, 1997.

This memorandum has the concurrence of the Office of Field Operations, which is issuing additional instructions regarding the handling of section 245(i) cases during the sunset period.

Paul Virtue
ActingExecutive Associate Commissioner

Attachment

Memorandum

HQ 70/23.1-P
96-ACT.003

Subject:	Date:
Processing of section 245(i) applications submitted under September 19, 1997, policy memorandum HQOPS 70/23.1-P prior to October 1, 1997	OCT _ 6 1997

To: Regional Directors
District Directors (including Foreign)
Officers in Charge (including Foreign)
Service Center Directors
Administrative Center Directors
Training facilities Glynco, GA and Artesia, NM

From: Office of Programs
Office of Field Operations

A policy memorandum HQ 70/23.1-P, 96 ACT.003 issued by the Office of Programs on October 1, 1997, advised the field that Congress' continuing resolution (H. J. Res. 94) extended the provisions of section 245(i) of the Immigration and Nationality Act (the "Act") to October 23, 1997. The October 1, 1997, memorandum instructed local Service offices to resume normal filing procedures and to accept additional applications under section 245(i), only if they meet the filing requirements of current Service regulations. The present memorandum provides instructions regarding the handling of applications under section 245(i), received by Service offices from September 19 through 30, 1997, which were not properly filed under existing Service regulations.

Service policy requires review of incoming adjustment applications prior to processing of the filing fee, in order to determine whether they are "properly filed" (i.e., have the applicant's signature, correct fee, and immediate immigrant visa availability, if required). This procedure is distinct from an improper rejection, i.e., refusal to process because of an assessment that the application would be denied for reasons other than failure to meet the threshold filing requirements. When a Service office has inadvertently processed the filing fee for an application which did not meet the requirements for proper filing (e.g., as when a required immigrant visa is not immediately available and cannot become available for the approval of any pending visa petition), OI 245.2(a) prescribes that the application will not be formally denied; rather, the applicant is notified of the reason why the application is ineligible for filing, and is advised that a refund request is being processed. On the other hand, if the fee was processed for an adjustment application (including a section 245(i) case) which was properly filed but still lacks eligibility for admission to permanent residence, the application is normally adjudicated for denial with no refund of the filing fee.

A September 19, 1997, policy memorandum HQOPS 70/23.1-P, entitled "Section 245(i) Sunset," instructed local offices to "accept all applications ... delivered [to them through] September 30" and "not [to] pre-screen, or turn away any applicant who believes that he/she has a claim of

eligibility under section 245(i)" during that time. The purpose of that policy was to prevent irremediable harm to any eligible immigrant whose application might be inadvertently rejected while termination of section 245(i) was imminent. It is expected that the local offices will complete the adjudication of those applications which were in fact properly filed under Service regulations. However, the local offices must now take appropriate action on those section 245(i) applications, **submitted from September 19 through 30**, which did **not** meet the requirements for proper filing. Swift and careful implementation of these instructions is essential in order to meet the Service's obligations and to afford applicants the maximum opportunity to correct any deficiencies in their cases before the approaching sunset date for benefits under section 245(i).

Section 245(i) applications not properly filed, for which the filing fee has not been processed

All section 245(i) adjustment applications on which no action has yet been taken to process the filing fee must be reviewed as soon as possible, to determine whether they were properly filed. The basic requirements for proper filing, as detailed in 8 CFR 103.2(a), 204, and 245.2(a)(2)(i) and 245.10 include proper applicant signature, fee payment, and immigrant visa availability at the time of filing (if applicable). If it is determined that an application meets these basic filing requirements, the fee must be taken immediately, and the I-485 processed for adjudication.

If an application does **not** meet the basic requirements for proper filing, the office that received it should not process the filing fee. Such applications include those which:

- returned no fee, or an incorrect fee amount,
- lack the required signature of the applicant; or
- lack immediate availability of an immigrant visa, if such availability is required for the type of I-485 application being filed.

In such a case, OI 245.2(a) prescribes that the application and the fee must be returned immediately to the applicant, with an explanation of the reason(s) for the rejection. However, in view of the previous section 245(i) sunset instructions and the limited opportunity for applicants to make a timely correction of these defects, an exception to this policy will be instituted for certain applications submitted under section 245(i) **from September 19 through 30, 1997**, as follows:

- An application which, at the time of submission, would have been improperly filed solely because of the unavailability of a required preference visa number, which has become available on the October 1997 Visa Bulletin, should be recorded as filed in October when the fee processing determination is made, and placed in processing for adjudication.

- An application which was improperly filed because of the unavailability of a required preference visa which remains unavailable on the October 1997 Visa Bulletin, should be returned to the applicant, together with the attached fee and a written explanation of the reason for the rejection.

- An application which was not properly filed solely because of the lack of a proper signature or correct fee will be returned, together with any fee submitted, and a written explanation of the reason for the rejection and notice of necessity of filing it properly before the new sunset deadline for section 245(i). A copy of the rejection notice will be retained in the office's files for future reference.

Section 245(i) applications not properly filed, for which the filing fee has been processed

Since the September 19 "Section 245(i) Sunset" memorandum instructed local offices to "accept all applications" and "not [to] pre-screen, or turn away any applicant who believes that he/she has a claim of eligibility under section 245(i)" prior to October 1, it is probable that prior to the receipt of this memorandum, fees have been processed for some applications which were not properly filed. Because of the exceptional circumstances discussed in the previous section, local Service offices should immediately (1) review all fee-processed section 245(i) applications received from **September 19 through September 30, 1997**, (2) identify any which **did not meet the requirements for proper filing**, and (3) apply to them the following procedures:

- An application which is found to have been improperly filed solely because of the unavailability of a required immigrant visa number, which has become available on the October 1997 Visa Bulletin, should be recorded as filed in October when the case review took place, and retained for completion of adjudication.

- An application which is found to have been improperly filed solely because of the unavailability of a required immigrant visa number which remains unavailable on the October 1997 Visa Bulletin, should be retained by the office. A written notice will be sent to advise the applicant regarding the reason for the rejection and the initiation of a request for refund of the filing fee. After ensuring the validity of the applicant's fee check previously deposited, the Form G-266, Refund of Immigration and Naturalization Fees, should be prepared and sent to the Administrative Center having jurisdiction over the requesting office.

- An application which is found to have been improperly filed solely because of the lack of a proper signature or the correct fee should be returned immediately with a written explanation of the reason for the rejection and a notice regarding the initiation of a refund request and the importance of properly filing the application with all the required fees, prior to the new section 245(i) sunset date. The refund request will be processed as provided above. A copy of the rejection notice will be retained in the office's files for future reference.

Special Filing Procedures for section 245(i) cases submitted by self-petitioning battered aliens

The special filing instructions regarding section 245(i) cases submitted by self-petitioning

battered aliens that were set forth in the September 22 memorandum, HQ 70/23.1-P, will be extended through October 23, 1997. During this period, any battered alien who has properly filed an I-360 self-petition and for whom a visa number is available may file an I-485, with Supplement A and the $1,000 surcharge directly with the Vermont Service Center at the following address:

INS Vermont Service Center
Attn. Family Services Product Line -- 245(i) case
75 Lower Weldon Street
St. Albans, VT 05479-0001

These applications should be accompanied by evidence of the filing of the Form I-360, which may be either a Form I-797 Notice of Action, a copy of the Form I-360 accompanied by a registered mail return receipt or other documentation evidencing proper filing of an I-360. Applicants may file the I-360 and I-485 concurrently with the Vermont Service Center, but all filings must be accompanied by the appropriate fees in order to be considered properly filed. Any alien who files a section 245(i) adjustment application prior to adjudication of the I-360 assumes the risk that all sums paid will be lost if the I-360 is ultimately denied, no refunds of filing fees or surcharges will be issued.

Filing of the section 245(i) adjustment application by a self-petitioning battered alien at a local INS office continues to be appropriate if the applicant presents evidence that the I-360 has been approved and that a visa is available.

Section 245(i) closeout procedures

The October 1 policy memorandum advised the field that if section 245(i) is not extended beyond the revised sunset date of October 23, 1997, local offices are to apply the procedures set forth in the recent instructions for the previous September 30 sunset date, during the last two days in which section 245(i) remains in force. However, in the event that those procedures are implemented, local offices are instructed **not to process the application fee until a determination has been made that the application is properly filed**, thereby they will avoid a greater administrative burden and inconvenience to the applicant.

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