

subject to sections 212 and 235 of the Act. If an applicant for adjustment of status under this section is under exclusion, deportation, or removal proceedings, USCIS will deem the application for adjustment of status abandoned as of the moment of the applicant's departure from the United States.

(k) *Inapplicability of 8 CFR 245.1 and 245.2.* Sections 245.1 and 245.2 of this chapter do not apply to aliens seeking adjustment of status under this section.

(1) *Annual cap of T-1 principal applicant adjustments.* (1) *General.* The total number of T-1 principal applicants whose status is adjusted to that of lawful permanent residents under this section may not exceed the statutory cap in any fiscal year.

(2) *Waiting list.* All eligible applicants who, due solely to the limit imposed in section 245(l)(4) of the Act and paragraph (m)(1) of this section, are not granted adjustment of status will be placed on a waiting list. USCIS will send the applicant written notice of such placement. Priority on the waiting list will be determined by the date the application was properly filed, with the oldest applications receiving the highest priority. In the following fiscal year, USCIS will proceed with granting adjustment of status to applicants on the waiting list who remain admissible and eligible for adjustment of status in order of highest priority until the available numbers are exhausted for the given fiscal year. After the status of qualifying applicants on the waiting list has been adjusted, any remaining numbers for that fiscal year will be issued to new qualifying applicants in the order that the applications were properly filed.

[73 FR 75558, Dec. 12, 2008]

§ 245.24 Adjustment of aliens in U nonimmigrant status.

(a) *Definitions.* As used in this section, the term:

(1) *Continuous Physical Presence* means the period of time that the alien has been physically present in the United States and must be a continuous period of at least 3 years since the date of admission as a U nonimmigrant continuing through the date of the con-

clusion of adjudication of the application for adjustment of status. If the alien has departed from the United States for any single period in excess of 90 days or for any periods in the aggregate exceeding 180 days, the applicant must include a certification from the agency that signed the Form I-918, Supplement B, in support of the alien's U nonimmigrant status that the absences were necessary to assist in the criminal investigation or prosecution or were otherwise justified.

(2) *Qualifying Family Member* means a U-1 principal applicant's spouse, child, or, in the case of an alien child, a parent who has never been admitted to the United States as a nonimmigrant under sections 101(a)(15)(U) and 214(p) of the Act.

(3) *U Interim Relief* means deferred action and work authorization benefits provided by USCIS or the Immigration and Naturalization Service to applicants for U nonimmigrant status deemed *prima facie* eligible for U nonimmigrant status prior to publication of the U nonimmigrant status regulations.

(4) *U Nonimmigrant* means an alien who is in lawful U-1, U-2, U-3, U-4, or U-5 status.

(5) *Refusal to Provide Assistance in a Criminal Investigation or Prosecution* is the refusal by the alien to provide assistance to a law enforcement agency or official that had responsibility for the investigation or prosecution of persons in connection with the qualifying criminal activity after the alien was granted U nonimmigrant status. The Attorney General will determine whether the alien's refusal was unreasonable under the totality of the circumstances based on all available affirmative evidence. The Attorney General may take into account such factors as general law enforcement, prosecutorial, and judicial practices; the kinds of assistance asked of other victims of crimes involving an element of force, coercion, or fraud; the nature of the request to the alien for assistance; the nature of the victimization; the applicable guidelines for victim and witness assistance; and the specific circumstances of the applicant, including

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fear, severe traumatization (both mental and physical), and the age and maturity of the applicant.

(b) *Eligibility of U Nonimmigrants.* Except as described in paragraph (c) of this section, an alien may be granted adjustment of status to that of an alien lawfully admitted for permanent residence, provided the alien:

- (1) Applies for such adjustment;
- (2)(i) Was lawfully admitted to the United States as either a U-1, U-2, U-3, U-4 or U-5 nonimmigrant, as defined in 8 CFR 214.1(a)(2), and
(ii) Continues to hold such status at the time of application; or accrued at least 4 years in U interim relief status and files a complete adjustment application within 120 days of the date of approval of the Form I-918, Petition for U Nonimmigrant Status;
- (3) Has continuous physical presence for 3 years as defined in paragraph (a)(1) of this section;
- (4) Is not inadmissible under section 212(a)(3)(E) of the Act;
- (5) Has not unreasonably refused to provide assistance to an official or law enforcement agency that had responsibility in an investigation or prosecution of persons in connection with the qualifying criminal activity after the alien was granted U nonimmigrant status, as determined by the Attorney General, based on affirmative evidence; and
- (6) Establishes to the satisfaction of the Secretary that the alien's presence in the United States is justified on humanitarian grounds, to ensure family unity, or is in the public interest.

(c) *Exception.* An alien is not eligible for adjustment of status under paragraph (b) of this section if the alien's U nonimmigrant status has been revoked pursuant to 8 CFR 214.14(h).

(d) *Application Procedures for U nonimmigrants.* Each U nonimmigrant who is requesting adjustment of status must submit:

- (1) Form I-485, Application to Register Permanent Residence or Adjust Status, in accordance with the form instructions;
- (2) The fee prescribed in 8 CFR 103.7(b)(1) or an application for a fee waiver;

(3) The biometric services fee as prescribed in 8 CFR 103.7(b)(1) or an application for a fee waiver;

(4) A photocopy of the alien's Form I-797, Notice of Action, granting U nonimmigrant status;

(5) A photocopy of all pages of all of the applicant's passports valid during the required period (or equivalent travel document or a valid explanation of why the applicant does not have a passport) and documentation showing the following:

(i) The date of any departure from the United States during the period that the applicant was in U nonimmigrant status;

(ii) The date, manner, and place of each return to the United States during the period that the applicant was in U nonimmigrant status; and

(iii) If the applicant has been absent from the United States for any period in excess of 90 days or for any periods in the aggregate of 180 days or more, a certification from the investigating or prosecuting agency that the absences were necessary to assist in the investigation or prosecution of the criminal activity or were otherwise justified;

(6) A copy of the alien's Form I-94, Arrival-Departure Record;

(7) Evidence that the applicant was lawfully admitted in U nonimmigrant status and continues to hold such status at the time of application;

(8) Evidence pertaining to any request made to the alien by an official or law enforcement agency for assistance in an investigation or prosecution of persons in connection with the qualifying criminal activity, and the alien's response to such request;

(9) Evidence, including an affidavit from the applicant, that he or she has continuous physical presence for at least 3 years as defined in paragraph (a)(1) of this section. Applicants should submit evidence described in 8 CFR 245.22. A signed statement from the applicant attesting to continuous physical presence alone will not be sufficient to establish this eligibility requirement. If additional documentation is not available, the applicant must explain why in an affidavit and provide additional affidavits from others with first-hand knowledge who can

attest to the applicant's continuous physical presence by specific facts;

(10) *Evidence establishing that approval is warranted.* Any other information required by the instructions to Form I-485, including whether adjustment of status is warranted as a matter of discretion on humanitarian grounds, to ensure family unity, or is otherwise in the public interest; and

(11) *Evidence relating to discretion.* An applicant has the burden of showing that discretion should be exercised in his or her favor. Although U adjustment applicants are not required to establish that they are admissible, USCIS may take into account all factors, including acts that would otherwise render the applicant inadmissible, in making its discretionary decision on the application. Where adverse factors are present, an applicant may offset these by submitting supporting documentation establishing mitigating equities that the applicant wants USCIS to consider when determining whether or not a favorable exercise of discretion is appropriate. Depending on the nature of the adverse factors, the applicant may be required to clearly demonstrate that the denial of adjustment of status would result in exceptional and extremely unusual hardship. Moreover, depending on the gravity of the adverse factors, such a showing might still be insufficient. For example, USCIS will generally not exercise its discretion favorably in cases where the applicant has committed or been convicted of a serious violent crime, a crime involving sexual abuse committed upon a child, or multiple drug-related crimes, or where there are security- or terrorism-related concerns.

(e) *Continued assistance in the investigation or prosecution.* Each applicant for adjustment of status under section 245(m) of the Act must provide evidence of whether or not any request was made to the alien to provide assistance, after having been lawfully admitted as a U nonimmigrant, in an investigation or prosecution of persons in connection with the qualifying criminal activity, and his or her response to any such requests.

(1) An applicant for adjustment of status under section 245(m) of the Act

may submit a document signed by an official or law enforcement agency that had responsibility for the investigation or prosecution of persons in connection with the qualifying criminal activity, affirming that the applicant complied with (or did not unreasonably refuse to comply with) reasonable requests for assistance in the investigation or prosecution during the requisite period. To meet this evidentiary requirement, applicants may submit a newly executed Form I-918, Supplement B, "U Nonimmigrant Status Certification."

(2) If the applicant does not submit a document described in paragraph (e)(1) of this section, the applicant may submit an affidavit describing the applicant's efforts, if any, to obtain a newly executed Form I-918, Supplement B, or other evidence describing whether or not the alien received any request to provide assistance in a criminal investigation or prosecution, and the alien's response to any such request.

(i) The applicant should also include, when possible, identifying information about the law enforcement personnel involved in the case and any information, of which the applicant is aware, about the status of the criminal investigation or prosecution, including any charges filed and the outcome of any criminal proceedings, or whether the investigation or prosecution was dropped and the reasons.

(ii) If applicable, an applicant may also provide a more detailed description of situations where the applicant refused to comply with requests for assistance because the applicant believed that the requests for assistance were unreasonable.

(3) In determining whether the applicant has satisfied the continued assistance requirement, USCIS or the Department of Justice may at its discretion contact the certifying agency that executed the applicant's original Form I-918, Supplement B, "U Nonimmigrant Status Certification" or any other law enforcement agency.

(4) In accordance with procedures determined by the Department of Justice and the Department of Homeland Security, USCIS will refer certain applications for adjustment of status to the

Department of Justice for determination of whether the applicant unreasonably refused to provide assistance in a criminal investigation or prosecution. If the applicant submits a document described in paragraph (e)(1) of this section, USCIS will not refer the application for consideration by the Department of Justice absent extraordinary circumstances. In other cases, USCIS will only refer an application to the Department of Justice if an official or law enforcement agency has provided evidence that the alien has refused to comply with requests to provide assistance in an investigation or prosecution of persons in connection with the qualifying criminal activity or if there are other affirmative evidence in the record suggesting that the applicant may have unreasonably refused to provide such assistance. In these instances, USCIS will request that the Department of Justice determine, based on all available affirmative evidence, whether the applicant unreasonably refused to provide assistance in a criminal investigation or prosecution. The Department of Justice will have 90 days to provide a written determination to USCIS, or where appropriate, request an extension of time to provide such a determination. After such time, USCIS may adjudicate the application whether or not the Department of Justice has provided a response.

(f) *Decision.* The decision to approve or deny a Form I-485 filed under section 245(m) of the Act is a discretionary determination that lies solely within USCIS's jurisdiction. After completing its review of the application and evidence, USCIS will issue a written decision approving or denying Form I-485 and notify the applicant of this decision.

(1) *Approvals.* If USCIS determines that the applicant has met the requirements for adjustment of status and merits a favorable exercise of discretion, USCIS will approve the Form I-485. Upon approval of adjustment of status under this section, USCIS will record the alien's lawful admission for permanent residence as of the date of such approval.

(2) *Denials.* Upon the denial of an application for adjustment of status

under section 245(m) of the Act, the applicant will be notified in writing of the decision and the reason for the denial in accordance with 8 CFR part 103. If an applicant chooses to appeal the denial to the Administrative Appeals Office pursuant to the provisions of 8 CFR 103.3, the denial will not become final until the appeal is adjudicated.

(g) *Filing petitions for qualifying family members.* A principal U-1 applicant may file an immigrant petition under section 245(m)(3) of the Act on behalf of a qualifying family member as defined in paragraph (a)(2) of this section, provided that:

(1) The qualifying family member has never held U nonimmigrant status;

(2) The qualifying family relationship, as defined in paragraph (a)(2) of this section, exists at the time of the U-1 principal's adjustment and continues to exist through the adjudication of the adjustment or issuance of the immigrant visa for the qualifying family member;

(3) The qualifying family member or the principal U-1 alien, would suffer extreme hardship as described in 8 CFR 245.24(g) (to the extent the factors listed are applicable) if the qualifying family member is not allowed to remain in or enter the United States; and

(4) The principal U-1 alien has adjusted status to that of a lawful permanent resident, has a pending application for adjustment of status, or is concurrently filing an application for adjustment of status.

(h) *Procedures for filing petitions for qualifying family members.*

(1) *Required documents.* For each qualifying family member who plans to seek an immigrant visa or adjustment of status under section 245(m)(3) of the Act, the U-1 principal applicant must submit, either concurrently with, or after he or she has filed, his or her Form I-485:

(i) Form I-929 in accordance with the form instructions;

(ii) The fee prescribed in 8 CFR 103.7(b)(1) or an application for a fee waiver;

(iii) Evidence of the relationship listed in paragraph (a)(2) of this section, such as a birth or marriage certificate. If primary evidence is unavailable, secondary evidence or affidavits may be

submitted in accordance with 8 CFR 103.2(b)(2);

(iv) Evidence establishing that either the qualifying family member or the U-1 principal alien would suffer extreme hardship if the qualifying family member is not allowed to remain in or join the principal in the United States. Extreme hardship is evaluated on a case-by-case basis, taking into account the particular facts and circumstances of each case. Applicants are encouraged to document all applicable factors in their applications, as the presence or absence of any one factor may not be determinative in evaluating extreme hardship. To establish extreme hardship to a qualifying family member who is physically present in the United States, an applicant must demonstrate that removal of the qualifying family member would result in a degree of hardship beyond that typically associated with removal. Factors that may be considered in evaluating whether removal would result in extreme hardship to the alien or to the alien's qualifying family member include, but are not limited to:

(A) The nature and extent of the physical or mental abuse suffered as a result of having been a victim of criminal activity;

(B) The impact of loss of access to the United States courts and criminal justice system, including but not limited to, participation in the criminal investigation or prosecution of the criminal activity of which the alien was a victim, and any civil proceedings related to family law, child custody, or other court proceeding stemming from the criminal activity;

(C) The likelihood that the perpetrator's family, friends, or others acting on behalf of the perpetrator in the home country would harm the applicant or the applicant's children;

(D) The applicant's needs for social, medical, mental health, or other supportive services for victims of crime that are unavailable or not reasonably accessible in the home country;

(E) Where the criminal activity involved arose in a domestic violence context, the existence of laws and social practices in the home country that punish the applicant or the applicant's child(ren) because they have been vic-

tims of domestic violence or have taken steps to leave an abusive household;

(F) The perpetrator's ability to travel to the home country and the ability and willingness of authorities in the home country to protect the applicant or the applicant's children; and

(G) The age of the applicant, both at the time of entry to the United States and at the time of application for adjustment of status; and

(v) Evidence, including a signed statement from the qualifying family member and other supporting documentation, to establish that discretion should be exercised in his or her favor. Although qualifying family members are not required to establish that they are admissible on any of the grounds set forth in section 212(a) of the Act other than on section 212(a)(3)(E) of the Act, USCIS may take into account all factors, including acts that would otherwise render the applicant inadmissible, in making its discretionary decision on the application. Where adverse factors are present, an applicant may offset these by submitting supporting documentation establishing mitigating equities that the applicant wants USCIS to consider when determining whether or not a favorable exercise of discretion is appropriate. Depending on the nature of the adverse factors, the applicant may be required to clearly demonstrate that the denial of adjustment of status would result in exceptional and extremely unusual hardship. Moreover, depending on the gravity of the adverse factors, such a showing might still be insufficient. For example, USCIS will generally not exercise its discretion favorably in cases where the applicant has committed or been convicted of a serious violent crime, a crime involving sexual abuse committed upon a child, or multiple drug-related crimes, or where there are security- or terrorism-related concerns.

(2) *Decision.* The decision to approve or deny a Form I-929 is a discretionary determination that lies solely within USCIS's jurisdiction. The Form I-929 for a qualifying family member may not be approved, however, until such time as the principal U-1 applicant's application for adjustment of status

has been approved. After completing its review of the application and evidence, USCIS will issue a written decision and notify the applicant of that decision in writing.

(i) *Approvals.* (A) For qualifying family members who are outside of the United States, if the Form I-929 is approved, USCIS will forward notice of the approval either to the Department of State's National Visa Center so the applicant can apply to the consular post for an immigrant visa, or to the appropriate port of entry for a visa exempt alien.

(B) For qualifying family members who are physically present in the United States, if the Form I-929 is approved, USCIS will forward notice of the approval to the U-1 principal applicant.

(ii) *Denials.* If the Form I-929 is denied, the applicant will be notified in writing of the reason(s) for the denial in accordance with 8 CFR part 103. If an applicant chooses to appeal the denial to the Administrative Appeals Office pursuant to 8 CFR 103.3, the denial will not become final until the appeal is adjudicated. Denial of the U-1 principal applicant's application will result in the automatic denial of a qualifying family member's Form I-929. There shall be no appeal of such an automatic denial.

(i) *Application procedures for qualifying family members who are physically present in the United States to request adjustment of status.* (1) *Required documents.* Qualifying family members in the United States may request adjustment of status by submitting:

(i) Form I-485, Application to Register Permanent Residence or Adjust Status, in accordance with the form instructions;

(ii) An approved Form I-929, Petition for Qualifying Family Member of a U-1 Nonimmigrant;

(iii) The fee prescribed in 8 CFR 103.7(b)(1) or an application for a fee waiver; and

(iv) The biometric services fee as prescribed in 8 CFR 103.7(b)(1) or an application for a fee waiver.

(2) *Decision.* The decision to approve or deny Form I-485 is a discretionary determination that lies solely within USCIS's jurisdiction. After completing

its review of the application and evidence, USCIS will issue a written decision approving or denying Form I-485 and notify the applicant of this decision in writing.

(i) *Approvals.* Upon approval of a Form I-485 under this section, USCIS shall record the alien's lawful admission for permanent residence as of the date of such approval.

(ii) *Denial.* Upon the denial of any application for adjustment of status, the applicant will be notified in writing of the decision and the reason for the denial in accordance with 8 CFR part 103. If an applicant chooses to appeal the denial to the Administrative Appeals Office pursuant to the provisions of 8 CFR 103.3, the denial will not become final until the appeal is adjudicated. During the appeal period, the applicant may not obtain or renew employment authorization under 8 CFR 274a.12(c)(9). Denial of the U-1 principal applicant's application will result in the automatic denial of a qualifying family member's Form I-485; such an automatic denial is not appealable.

(j) *Effect of departure.* If an applicant for adjustment of status under this section departs the United States, he or she shall be deemed to have abandoned the application, and it will be denied. If, however, the applicant is not under exclusion, deportation, or removal proceedings, and he or she filed a Form I-131, Application for Travel Document, in accordance with the instructions on the form, or any other appropriate form, and was granted advance parole by USCIS for such absences, and was inspected and paroled upon returning to the United States, he or she will not be deemed to have abandoned the application. If the adjustment of status application of such an individual is subsequently denied, he or she will be treated as an applicant for admission subject to sections 212 and 235 of the Act. If an applicant for adjustment of status under this section is under exclusion, deportation, or removal proceedings, USCIS will deem the application for adjustment of status abandoned as of the moment of the applicant's departure from the United States.

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(k) *Exclusive jurisdiction.* USCIS shall have exclusive jurisdiction over adjustment applications filed under section 245(m) of the Act.

(1) *Inapplicability of 8 CFR 245.1 and 245.2.* The provisions of 8 CFR 245.1 and 245.2 do not apply to aliens seeking adjustment of status under section 245(m) of the Act.

[73 FR 75560, Dec. 12, 2008; 74 FR 395, Jan. 6, 2009]

PART 245a—ADJUSTMENT OF STATUS TO THAT OF PERSONS ADMITTED FOR LAWFUL TEMPORARY OR PERMANENT RESIDENT STATUS UNDER SECTION 245A OF THE IMMIGRATION AND NATIONALITY ACT

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AUTHORITY: 8 U.S.C. 1101, 1103, 1255a and 1255a note.

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Subpart A—Immigration Reform and Control Act of 1986 (IRCA) Legalization Provisions

§ 245a.1 Definitions.

As used in this chapter:

(a) *Act* means the Immigration and Nationality Act, as amended by The Immigration Reform and Control Act of 1986.

(b) *Service* means the Immigration and Naturalization Service (INS).

(c)(1) *Resided continuously* as used in section 245A(a)(2) of the Act, means that the alien shall be regarded as having resided continuously in the United States if, at the time of filing of the application for temporary resident status:

An alien who after appearing for a scheduled interview to obtain an immigrant visa at a Consulate or Embassy in Canada or Mexico but who subsequently is not issued an immigrant visa and who is paroled back into the United States, pursuant to the state-side criteria program, shall be regarded as having been granted advance parole by the Service.

(i) No single absence from the United States has exceeded forty-five (45) days, and the aggregate of all absences has not exceeded one hundred and eighty (180) days between January 1, 1982 through the date the application for temporary resident status is filed, unless the alien can establish that due to emergent reasons, his or her return to the United States could not be accomplished within the time period allowed;