the Regional Processing Facility director or the district director will be certified to the Administrative Appeals Unit.

(m) *Date of adjustment to permanent residence.* The status of an alien whose application for permanent resident status is approved shall be adjusted to that of a lawful permanent resident as of the date of filing of the application for permanent residence or the eligibility date, whichever is later. For purposes of making application to petition for naturalization, the continuous residence requirements for naturalization shall begin as of the date the alien's status is adjusted to that of a person lawfully admitted for permanent residence under this part.

(n) *Limitation on access to information and confidentiality.* (1) No person other than a sworn officer or employee of the Department of Justice or bureau of agency thereof, will be permitted to examine individual applications. For purposes of this part, any individual employed under contract by the Service to work in connection with the Legalization Program shall be considered an *employee of the Department of Justice or bureau or agency thereof.*

(2) No information furnished pursuant to an application for permanent resident status under this section shall be used for any purpose except: (i) To make a determination on the application; or (ii) for the enforcement of the provisions encompassed in section 245A(c)(6) of the Act, except as provided in paragraph (n)(3) of this section.

(3) If a determination is made by the Service that the alien has, in connection with his or her application, engaged in fraud or willful misrepresentation or concealment of a material fact, knowingly provided a false writing or document in making his or her application, knowingly made a false statement or representation, or engaged in any other activity prohibited by section 245A(c)(6) of the Act, the Service shall refer the matter to the United States Attorney for prosecution of the alien and/or of any person who created or supplied a false writing or document for use in an application for adjustment of status under this part.

(4) Information contained in granted legalization files may be used by the Service at a later date to make a decision (i) On an immigrant visa petition or other status filed by the applicant under section 204(a) of the Act; (ii) On a naturalization application submitted by the applicant; (iii) For the preparation of reports to Congress under section 404 of IRCA, or; (iv) For the furnishing of information, at the discretion of the Attorney General, in the same manner and circumstances as census information may be disclosed by the Secretary of Commerce under section 8 of title 13, Unites States Code.

(o) *Rescission.* Rescission of adjustment of status under 245a shall occur under the guidelines established in section 246 of the Act.

[54 FR 29449, July 12, 1989; 54 FR 43384, Oct. 24, 1989; as amended at 56 FR 31061, July 9, 1991; 57 FR 3926, Feb. 3, 1992; 59 FR 33905, July 1, 1994]

§ 245a.4 Adjustment to lawful resident status of certain nationals of countries for which extended voluntary departure has been made available.

(a) *Definitions.* As used in this section: (1) *Act* means the Immigration and Nationality Act, as amended by the Immigration Reform and Control Act of 1986.

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

(3) *Resided continuously* 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:

(i) No single absence from the United States has exceeded 45 days, and the aggregate of all absences has not exceeded 180 days between July 21, 1984, 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;

(ii) The alien was maintaining residence in the United States; and

(iii) The alien's departure from the United States was not based on an order of deportation.

An alien who has been absent from the United States in accordance with the Service's advance parole procedures

shall not be considered as having interrupted his or her continuous residence as required at the time of filing an application. 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 stateside criteria program, shall be considered as having *resided continuously*.

(4) *Continous residence* means that the alien shall be regarded as having resided continously in the United States if, at the time of applying for adjustment from temporary residence to permanent resident status: No single absence from the United States has exceeded 30 days, and the aggregate of all absences has not exceeded 90 days between the date on which lawful temporary resident status was granted and the date permanent resident status was applied for, unless the alien can establish that due to emergent reasons or extenuating circumstances beyond his or her control, the return to the United States could not be accomplished within the time period(s) allowed. A single absence from the United States of more than 30 days, and aggregate absences of more than 90 days during the period for which continuous residence is required for adjustment to permanent resident status, shall break the continuity of such residence unless the temporary resident can establish to the satisfaction of the district director that he or she did not, in fact, abandon his or her residence in the United States during such period.

(5) *To make a determination* means obtaining and reviewing all information required to adjudicate an application for the benefit sought and making a decision thereon. If fraud, willful misrepresentation or concealment of a material fact, knowingly providing a false writing or document, knowingly making a false statement or representation, or any other activity prohibited by the Act is established during the process of making the determination on the application, the Service shall refer the matter to the United States Attorney for prosecution of the alien or of any person who created or supplied a false writing or document for use in an application for adjustment of status under this part.

(6) *Continuous physical presence* means actual continuous presence in the United States since December 22, 1987, until filing of any application for adjustment of status. Aliens who were outside of the United States after enactment may apply for temporary residence if they reentered prior to March 21, 1988, provided they meet the continuous residence requirements, and are otherwise eligible for legalization.

(7) *Brief, casual, and innocent* means a departure authorized by the Service (advance parole) subsequent to March 21, 1988, for not more than 30 days for legitimate emergency or humanitarian purposes unless a further period of authorized departure has been granted in the discretion of the district director or a departure was beyond the alien's control.

(8) *Brief and casual* means temporary trips abroad as long as the alien establishes a continuing intention to adjust to lawful permanent resident status. However, such absences must not exceed the specific periods of time required in order to maintain continuous residence.

(9) *Certain nationals of countries for which extended voluntary departure has been made available on the basis of a nationality group determination at any time during the 5-year period ending on November 1, 1987* is limited to nationals of Poland, Afghanistan, Ethiopia, and Uganda.

(10) *Public cash assistance* means income or need-based monetary assistance to include, but not limited to, supplemental security income received by the alien through federal, state, or local programs designed to meet subsistence levels. It does not include assistance in kind, such as food stamps, public housing, or other non-cash benefits, nor does it include work related compensation or certain types of medical assistance (Medicare, Medicaid, emergency treatment, services to pregnant women or children under 18 years of age, or treatment in the interest of public health).

(11) *Designated entity* means any state, local, church, community, farm

labor organization, voluntary organization, association of agricultural employers or individual determined by the Service to be qualified to assist aliens in the preparation of applications for legalization status.

(12) *Through the passage of time* means through the expiration date of the nonimmigrant permission to remain in the United States, including any extensions and/or change of status.

(13) *Prima facie eligibility* means eligibility is established if the applicant presents a completed I–687 and specific factual information which in the absence of rebuttal will establish a claim of eligibility under this part.

(b) *Application for temporary residence*—(1) *Application for temporary residence.* (i) An alien who is a national of Poland, Uganda, Ethiopia, or Afghanistan who has resided continuously in the United States since prior to July 21, 1984, and who believes that he or she meets the eligibility requirements of section 245A of the Act must make application within the 21-month period beginning on March 21, 1988, and ending on December 22, 1989.

(ii) An alien who fails to file an application for adjustment of status to that of a temporary resident under § 245A.4 of this part during the time period, will be statutorily ineligible for such adjustment of status.

(2) *Eligibility* (i) The following categories of aliens who are not otherwise excludable under section 212(a) of the Act are eligible to apply for status to that of a person admitted for temporary residence:

(A) An alien who is a national of Poland, Uganda, Ethiopia, or Afghanistan, (other than an alien who entered as a nonimmigrant) who establishes that he or she entered the United States prior to July 21, 1984, and who has thereafter resided continuously in the United States, and who has been physically present in the United States from December 22, 1987, until the date of filing the application.

(B) An alien who is a national of Poland, Uganda, Ethiopia, or Afghanistan, and establishes that he or she entered the United States as a nonimmigrant prior to July 21, 1984, and whose period of authorized admission expired through the passage of time prior to January 21, 1985, and who has thereafter resided continuously in the United States, and who has been physically present in the United States from December 22, 1987, until the date of filing the application.

(C) An alien who is a national of Poland, Uganda, Ethiopia, or Afghanistan, and establishes that he or she entered the United States as a nonimmigrant prior to July 21, 1984, and who applied for asylum prior to July 21, 1984, and who has thereafter resided continuously in the United States, and who has been physically present in the United States from December 22, 1987, until the date of filing the application.

(D) An alien who is a national of Poland, Uganda, Ethiopia, or Afghanistan, who would otherwise be eligible for temporary resident status and who establishes that he or she resided continuously in the United States prior to July 21, 1984, and who subsequently reentered the United States as a nonimmigrant in order to return to an unrelinquished residence. An alien described in this paragraph must have received a waiver of 212(a)(19) as an alien who entered the United States by fraud.

(E) An alien who is a national of Poland, Uganda, Ethiopia, or Afghanistan, and was a nonimmigrant who entered the United States in the classification A, A–1, A–2, G, G–1, G–2, G–3, or G–4, for Duration of Status (D/S), and whose qualifying employment terminated or who ceased to be recognized by the Department of State as being entitled to such classification prior to January 21, 1985, and who thereafter continued to reside in the United States.

(F) An alien who is a national of Poland, Uganda, Ethiopia, or Afghanistan, and who was a nonimmigrant who entered the United States as an F, F–1, or F–2 for Duration of Status (D/S), and who completed a full course of studies, including practical training (if any), and whose time period to depart the United States after completion of studies expired prior to January 21, 1985,

and who has thereafter continued to reside in the United States. Those students placed in a *nunc pro tunc* retroactive student status which would otherwise preclude their eligibility for legalization under this section, must present evidence that they had otherwise terminated their status during the requisite time period. A dependent F–2 alien otherwise eligible who was admitted into the United States with a specific time period, as opposed to duration of status, documented on Service Form I–94, Arrival-Departure Record that extended beyond July 21, 1984 is considered eligible if the principal F–1 alien is found eligible.

(3) *Ineligible aliens.* (i) An alien who has been convicted of a felony, or three or more misdemeanors.

(ii) An alien who has assisted in the persecution of any person or persons on account of race, religion, nationality, membership in a particular social group, or political opinion.

(iii) An alien excludable under the provisions of section 212(a) of the Act whose grounds of excludability may not be waived.

(4) *Documentation.* Evidence to support an alien's eligibility for temporary residence status shall include documents establishing proof of identity, proof of nationality, proof of residence, and proof of financial responsibility, as well as photographs, a completed fingerprint card (Form FD–258), and a completed medical report of examination (Form I–693). All documentation submitted will be subject to Service verification. Applications submitted with unverifiable documentation may be denied. Failure by an applicant to authorize release to INS of information protected by the Privacy Act and/or related laws in order for INS to adjudicate a claim may result in denial of the benefit sought. Acceptable supporting documents for the four categories of documentation are discussed as follows:

(i) *Proof of identity.* Evidence to establish identity is listed below in descending order of preference:

(A) Passport;

(B) Birth certificate;

(C) Any national identity document from the alien's country of origin bearing photo and fingerprint;

(D) Driver's license or similar document issued by a state if it contains a photo;

(E) Baptismal Record/Marriage Certificate; or

(F) Affidavits.

(ii) *Proof of nationality.* Evidence to establish nationality is listed as follows:

(A) Passport;

(B) Birth certificate;

(C) Any national identity document from the alien's country of origin bearing photo and fingerprint;

(D) Other credible documents, including those created by, or in the possession of the INS, or any other documents (excluding affidavits) that, when taken singly, or together as a whole, establish the alien's nationality.

(iii) *Assumed names*—(A) *General.* In cases where an applicant claims to have met any of the eligibility criteria under an assumed name, the applicant has the burden of proving that the applicant was in fact the person who used that name. The applicant's true identity is established pursuant to the requirements of paragraph (b)(4)(i) and (ii) of this section. The assumed name must appear in the documentation provided by the applicant to establish eligibility. To meet the requirement of this paragraph, documentation must be submitted to prove the common identity, *i.e.*, that the assumed name was in fact used by the applicant.

(B) *Proof of common identity.* The most persuasive evidence is a document issued in the assumed name which identifies the applicant by photograph, fingerprint, or detailed physical description. Other evidence which will be considered are affidavit(s) by a person or persons other than the applicant, made under oath, which identify the affiant by name and address, state the affiant's relationship to the applicant and the basis of the affiant's knowledge of the applicant's use of the assumed name. Affidavits accompanied by a photograph which has been identified by the affiant as the individual known to the affiant under the assumed name in question will carry greater weight.

(iv) *Proof of residence.* Evidence to establish proof of continuous residence in the United States during the requisite

period of time may consist of any combination of the following:

(A) Past employment records, which may consist of pay stubs, W-2 Forms, certification of the filing of Federal income tax returns on IRS Form 6166, a state verification of the filing of state income tax returns, letters from employer(s) or, if the applicant has been in business for himself or herself, letters from banks and other firms with whom he or she has done business. In all of the above, the name of the alien and the name of the employer or other interested organizations must appear on the form or letter, as well as relevant dates. Letters from employers should be on employer letterhead stationery, if the employer has such stationery, and must include:

(*1*) Alien's address at the time of employment;

(*2*) Exact period of employment;

(*3*) Periods of layoff;

(*4*) Duties with the company;

(*5*) Whether or not the information was taken from official company records; and

(*6*) Where records are located, whether the Service may have access to the records.

If the records are unavailable, an affidavit form letter stating that the alien's employment records are unavailable and why such records are unavailable may be accepted in lieu of paragraphs (b)(4)(iv)(A)(*5*) and (*6*) of this section. This affidavit form letter shall be signed, attested to by the employer under penalty of perjury, and shall state the employer's willingness to come forward and give testimony if requested.

(B) Utility bills (gas, electric, phone, etc.) receipts, or letters from companies showing the dates during which the applicant received service are acceptable documentation.

(C) School records (letters, report cards, etc.) from the schools that the applicant or his or her children have attended in the United States must show the name of school and periods of school attendance.

(D) Hospital or medical records showing treatment or hospitalization of the applicant or his or her children must show the name of the medical facility or physician and the date(s) of the treatment or hospitalization.

(E) Attestations by churches, unions, or other organizations as to the applicant's residence by letter which:

(*1*) Identify applicant by name;

(*2*) Are signed by an official (whose title is shown);

(*3*) Show inclusive dates of membership;

(*4*) State the address where applicant resided during membership period;

(*5*) Include the seal of the organization impressed on the letter or the letterhead of the organization, if the organization has letterhead stationery;

(*6*) Establish how the author knows the applicant; and

(*7*) Establish the origin of the information being attested to.

(F) Additional documents to support the applicant's claim may include:

(*1*) Money order receipts for money sent into or out of the country;

(*2*) Passport entries;

(*3*) Birth certificates of children born in the United States;

(*4*) Bank books with dated transactions;

(*5*) Letters or correspondence between applicant and other person or organization;

(*6*) Social Security card;

(*7*) Selective Service card;

(*8*) Automobile license receipts, title, vehicle registration, etc.;

(*9*) Deeds, mortgages, contracts to which applicant has been a party;

(*10*) Tax receipts;

(*11*) Insurance policies, receipts, or letters; and

(*12*) Any other relevant document.

(v) *Proof of financial responsibility.* An applicant for adjustment of status under this part is subject to the provisions of section 212(a)(15) of the Act relating to excludability of aliens likely to become public charges. Generally, the evidence of employment submitted under paragraph (b)(4)(iv)(A) of this section will serve to demonstrate the alien's financial responsibility during the documented period(s) of employment. If the alien's period(s) of residence in the United States include significant gaps in employment or if there is reason to believe that the alien may have received public assistance while employed, the alien may be required to

provide proof that he or she has not received public cash assistance. An applicant for residence who is determined likely to become a public charge and is unable to overcome this determination after application of the Special Rule under paragraph (b)(11)(iv)(C) of this section will be denied adjustment. The burden of proof to demonstrate the inapplicability of this provision of law lies with the applicant who may provide:

(A) Evidence of a history of employment (*i.e.*, employment letter, W-2 forms, income tax returns, etc.);

(B) Evidence that he/she is self-supporting (*i.e.*, bank statements, stocks, other assets, etc.); or

(C) Form I–134. Affidavit of Support, completed by a spouse on behalf of the applicant and/or children of the applicant or a parent in behalf of children which guarantees complete or partial financial support. Acceptance of the Affidavit of Support shall be extended to other family members in unusual family circumstances.

Generally, the evidence of employment submitted under paragraph (b)(4)(iv)(A) of this section will serve to demonstrate the alien's financial responsibility during the documented period(s) of employment. If the alien's period(s) of residence in the United States include significant gaps in employment or if there is reason to believe that the alien may have received public assistance while employed, the alien may be required to provide proof that he or she has not received public cash assistance. An applicant for residence who is likely to become a public charge will be denied adjustment.

(vi) *Burden of proof.* An alien applying for adjustment of status under this part has the burden of proving by a preponderance of the evidence that he or she has resided in the United States for the requisite periods, is admissible to the United States under the provisions of section 245A of the Act, and is otherwise eligible for adjustment of status under this section. The inference to be drawn from the documentation provided shall depend on the extent of the documentation, its credibility and amenability to verification.

(vii) *Evidence.* The sufficiency of all evidence produced by the applicant will be judged according to its probative value and credibility. To meet his or her burden of proof, an applicant must provide evidence of eligibility apart from his or her own testimony. In judging the probative value and credibility of the evidence submitted, greater weight will be given to the submission of original documentation.

(5) *Filing of application.* (i) The application must be filed on Form I–687 at an office of a designated entity or at a Service office within the jurisdiction of the district where the applicant resides. If the application is filed with a designated entity, the alien must have consented to having the designated entity forward the application to the Service office. In the case of applications filed at a Service office, the district director may, at his or her discretion:

(A) Require the applicant to file the application in person; or

(B) Require the applicant to file the application by mail; or

(C) Permit the filing of applications whether by mail or in person.

The applicant must appear for a personal interview at the Service office as scheduled. If the applicant is 14 years of age or older, the application must be accompanied by a completed Form FD–258 (Applicant Card).

(ii) At the time of the interview, whenever possible, original documents must be submitted except the following: Official government records; employment or employment-related records maintained by employers, union, or collective bargaining organizations; medical records; school records maintained by a school or school board; or other records maintained by a party other than the applicant. Copies of records maintained by parties other than the applicant which are submitted in evidence must be certified as true and correct by such parties and must bear their seal or signature or the signature and title of persons authorized to act in their behalf. If at the time of the interview the return of the original document is desired by the applicant, the document must be accompanied by notarized copies or copies certified true and correct by a qualified designated entity or by the alien's representative in the format prescribed in

§ 204.2(j)(1) or (2) of this chapter. At the discretion of the district director, original documents, even if accompanied by certified copies, may be temporarily retained for forensic examination by the Document Analysis Unit at the Regional Processing Facility having jurisdiction over the Service office to which the documents were submitted.

(iii) A separate application (I–687) must be filed by each eligible applicant. All fees required by § 103.7(b)(1) of this chapter must be submitted in the exact amount in the form of a money order, cashier's check, or certified bank check, made payable to the Immigration and Naturalization Service. No personal checks or currency will be accepted. Fees will not be waived or refunded under any circumstances.

(6) *Filing date of application.* The date the alien submits a completed application to a Service office or designated entity shall be considered the filing date of the application, provided that in the case of an application filed at a designated entity the alien has consented to having the designated entity forward the application to the Service office having jurisdiction over the location of the alien's residence. Designated entities are required to forward completed applications to the appropriate Service office within 60 days of receipt.

(7) *Selective Service registration.* At the time of filing an application under this section, male applicants over the age of 17 and under the age of 26, are required to be registered under the Military Selective Service Act. An applicant shall present evidence that he has previously registered under that Act in the form of a letter of acknowledgement from the Selective Service System, or such alien shall present a completed and signed Form SSS–1 at the time of filing Form I–687 with the Immigration and Naturalization Service or a designated entity. Form SSS–1 will be forwarded to the Selective Service System by the Service.

(8) *Continuous residence.* (i) For the purpose of this Act, an applicant for temporary residence status shall be regarded as having resided continuously in the United States if, at the time of filing of the application:

(A) No single absence from the United States has exceeded 45 days, and the aggregate of all absences has not exceeded 180 days between July 21, 1984, 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;

(B) The alien was maintaining a residence in the United States; and

(C) The alien's departure from the United States was not based on an order of deportation.

(ii) An alien who has been absent from the United States in accordance with the Service's advance parole procedures shall not be considered as having interrupted his or her continuous residence as required at the time of filing an application under this section.

(9) *Medical examination.* (i) An applicant under this part shall be required to submit to an examination by a designated civil surgeon at no expense to the government. The designated civil surgeon shall report on the findings of the mental and physical condition of the applicant and the determination of the alien's immunization status on Form I–693, "Medical Examination of Aliens Seeking Adjustment of Status, (Pub. L. 99–603)". Results of the medical examination must be presented to the Service at the time of interview and shall be incorporated into the record. Any applicant certified under paragraphs (1), (2), (3), (4) or (5) of section 212(a) of the Act may appeal to a Board of Medical Officers of the U.S. Public Health Service as provided in section 234 of the Act and part 235 of this chapter.

(ii) All applicants who file for temporary resident status are required to include the results of a serological test for the HIV virus on the I–693. All HIV-positive applicants shall be advised that a waiver is available and shall be provided with the opportunity to apply for a waiver.

(10) *Interview.* Each applicant, regardless of age, must appear at the appropriate Service office and must be fingerprinted for the purpose of issuance of an employment authorization document and Form I–688. Each

applicant shall be interviewed by an immigration officer, except that the interview may be waived for a child under 14 years of age, or when it is impractical because of the health or advanced age of the applicant.

(11) *Applicability of exclusion grounds*—(i) *Grounds of exclusion not to be applied.* Paragraphs (14), (workers entering without labor certification); (20), (immigrants not in possession of a valid entry document); (21), (visas issued without compliance with section 203); (25), (illiterates); and (32) (graduates of non-accredited medical schools) of section 212(a) of the Act shall not apply to applicants for temporary resident status.

(ii) *Waiver of grounds of exclusion.* Except as provided in paragraph (b)(11)(iii) of this section, the Attorney General may waive any other provision of section 212(a) of the Act only in the case of individual aliens for humanitarian purposes, to assure family unity, or when the granting of such a waiver is in the public interest. If an alien is excludable on grounds which may be waived as set forth in this paragraph, he or she shall be advised of the procedures for applying for a waiver of grounds of excludability on Form I–690. When an application for waiver of grounds of excludability is filed jointly with an application for temporary residence under this section, it shall be accepted for processing at the Service office. If an application for waiver of grounds of excludability is submitted after the alien's preliminary interview at the Service office, it shall be forwarded to the appropriate Regional Processing Facility. All applications for waivers of grounds of excludability must be accompanied by the correct fee in the exact amount. All fees for applications filed in the United States must be in the form of a money order, cashier's check, or bank check. No personal checks or currency will be accepted. Fees will not be waived or refunded under any circumstances. An application for waiver of grounds of excludability under this part shall be approved or denied by the director of the Regional Processing Facility in whose jurisdiction the alien's application for adjustment of status was filed except that in cases involving clear statutory ineligibility or fraud, such application may be denied by the district director in whose jurisdiction the application is filed, and in cases returned to a Service office for re-interview, such application may be approved at the discretion of the district director. The applicant shall be notified of the decision and, if the application is denied, of the reason therefore. Appeal from an adverse decision under this part may be taken by the applicant on Form I–694 within 30 days after the service of the notice only to the Service's Administrative Appeals Unit pursuant to the provisions of section 103.3(a) of this chapter.

(iii) *Grounds of exclusion that may not be waived.* Notwithstanding any other provision of the Act, the following provisions of section 212(a) may not be waived by the Attorney General under paragraph (b)(11)(ii) of this section:

(A) Paragraphs (9) and (10) (criminals);

(B) Paragraph (23) (narcotics) except for a single offense of simple possession of thirty grams or less of marijuana;

(C) Paragraphs (27) (prejudicial to the public interest), (28) (communist), and (29) (subversive);

(D) Paragraph (33) (participated in Nazi persecution).

(iv) *Determination of Likely to become a public charge* and the special rule. (A) Prior to use of the special rule for determination of public charge, an alien must first be determined to be excludable under section 212(a)(15) of the Act. If the applicant is determined to be *likely to become a public charge,* he or she may still be admissible under the terms of the Special Rule.

(B) In determining whether an alien is *likely to become a public charge,* financial responsibility of the alien is to be established by examining the totality of the alien's circumstances at the time of his or her application for legalization. The existence or absence of a particular factor should never be the sole criterion for determining if an alien is likely to become a public charge. The determination of financial responsibility should be a prospective evaluation based on the alien's age, health, income and vocation.

(C) An alien who has a consistent employment history which shows the ability to support himself or herself even

though his or her income may be below the poverty level may be admissible under this section. The alien's employment history need not be continuous in that it is uninterrupted. It should be continuous in the sense that the alien shall be regularly attached to the workforce, has an income over a substantial period of the applicable time, and has demonstrated the capacity to exist on his or her income without recourse to public cash assistance. The Special Rule is prospective in that the Service shall determine, based on the alien's history, whether he or she is likely to become a public charge. Past acceptance of public cash assistance within a history of consistent employment will enter into this decision. The weight given in considering applicability of the public charge provisions will depend on many factors, but the length of time an applicant has received public cash assistance will constitute a significant factor. It is not necessary to file a waiver in order to apply the Special Rule for Determination of Public Charge.

(v) *Public assistance and criminal history verification.* Declarations by an applicant that he or she has not been the recipient of public cash assistance and/or has not had a criminal record are subject to a verification of facts by the Service. The applicant must agree to fully cooperate in the verification process. Failure to assist the Service in verifying information necessary for the adjudication of the application may result in a denial of the application.

(12) *Continuous physical presence since December 22, 1987.* (i) An alien applying for adjustment to temporary resident status must establish that he or she has been continuously physically present in the United States since December 22, 1987. Aliens who were outside of the United States on the date of enactment or departed the United States after enactment may apply for legalization if they reentered prior to March 21, 1988, and meet the continuous residence requirements and are otherwise eligible for legalization.

(ii) A brief, casual and innocent absence means a departure authorized by the Service (advance parole) subsequent to March 21, 1988, of not more than thirty (30) days for legitimate emergency or humanitarian purposes unless a further period of authorized departure has been granted in the discretion of the district director or a departure was beyond the alien's control.

(13) *Departure.* (i) During the time period from the date that an alien's application establishing prima facie eligibility for temporary resident status is reviewed at a Service office and the date status as a temporary resident is granted, the alien applicant can be readmitted to the United States provided his or her departure was authorized under the Service's advance parole provisions contained in §212.5(f) of this chapter.

(ii) An alien whose application for temporary resident status has been approved may be admitted to the United States upon return as a returning temporary resident provided he or she:

(A) Is not under deportation proceedings, such proceedings having been instituted subsequent to the approval of temporary resident status. A temporary resident alien will not be considered deported if that alien departs the United States while under an outstanding order of deportation issued prior to the approval of temporary resident status;

(B) Has not been absent from the United States for more than 30 days on the date application for admission is made;

(C) Has not been absent from the United States for an aggregate period of more than 90 days since the date the alien was granted lawful temporary resident status;

(D) Presents Form I–688;

(E) Presents himself or herself for inspection; and

(F) Is otherwise admissible.

(iii) The periods of time in paragraphs (b)(13)(ii)(B) and (C) of this section may be waived at the discretion of the Attorney General in cases where the absence from the United States was due merely to a brief and casual trip abroad due to emergent or extenuating circumstances beyond the alien's control.

(14) *Employment and travel authorization*—(i) *General.* Authorization for employment and travel abroad for temporary resident status applicants under this section may be granted only by a

Service office. INS district directors will determine the Service location for the completion of processing travel documentation. In the case of an application which has been filed with a designated entity, employment authorization may be granted by the Service only after the application has been properly received at the Service office.

(ii) *Employment and travel authorization prior to the granting of temporary resident status.* (A) Permission to travel abroad and accept employment may be granted to the applicant after an interview has been conducted in connection with an application establishing prima facie eligibility for temporary resident status. Permission to travel abroad may be granted in emergent circumstances in accordance with the Service's advance parole provisions contained in §212.5(f) of this chapter after an interview has been conducted in connection with an application establishing prima facie eligibility for temporary resident status.

(B) If an appointment cannot be scheduled within 30 days, authorization to accept employment will be granted, valid until the scheduled appointment date. The appointment letter will be endorsed with the temporary employment authorization. An employment authorization document will be given to the applicant after an interview has been completed by an immigration officer unless a formal denial is issued by a Service office. This temporary employment authorization will be restricted to six-months duration, pending final determination on the application for temporary resident status.

(iii) *Employment and travel authorization upon grant of temporary resident status.* Upon grant of an application for adjustment to temporary resident status by a Regional Processing Facility, the processing facility will forward a notice of approval to the alien at his or her last known address, or to his or her legal representative. The alien will be required to return to the appropriate INS office, surrender the I–688A or employment authorization document previously issued, and obtain Form I–688, Temporary Resident Card, authorizing employment and travel abroad.

(iv) *Revocation of employment authorization upon denial of temporary resident status.* Upon denial of an application for adjustment to temporary resident status, the alien will be notified that if a timely appeal is not submitted, employment authorization shall be automatically revoked on the final day of the appeal period. An applicant whose appeal period has ended is no longer considered to be an Eligible Legalized Alien for the purposes of the administration of State Legalization Impact Assistance Grants (SLIAG) funding.

(15) *Decision.* The applicant shall be notified in writing of the decision. If the application is denied, the reason(s) for the decision shall be provided to the applicant. An appeal from an adverse decision under this part may be taken by the applicant on Form I–694.

(16) *Appeal process.* An adverse decision under this part may be appealed to the Associate Commissioner, Examinations (Administrative Appeals Unit), the appellate authority designated in §103.1(f)(2). Any appeal shall be submitted to the Regional Processing Facility (RPF) with the required fee within 30 days after service of the Notice of Denial in accordance with the procedures of §103.3(a) of this chapter. An appeal received after the 30-day period will not be accepted. The 30-day period for submission of an appeal begins three days after the Notice of Denial is mailed as provided in §103.5a(b) of this Act. If a review of the Record of Proceeding (ROP) is requested by the alien or his or her legal representative and an appeal has been properly filed, an additional 30 days will be allowed for this review beginning at the time the ROP is mailed. A brief may be submitted with the appeal form or submitted up to 30 calendar days from the date of receipt of the appeal form at the RPF. Briefs filed after submission of the appeal should be mailed directly to the RPF. For good cause shown, the time within which a brief supporting an appeal may be submitted may be extended by the Director of the Regional Processing Facility.

(17) *Motions.* The Regional Processing Facility director may *sua sponte* reopen and reconsider any adverse decision. When an appeal to the Associate Commissioner, Examinations (Administrative Appeals Unit) has been filed, the

INS director of the Regional Processing Facility may issue a new decision granting the benefit which has been requested. The director's new decision must be served on the appealing party within 45 days of receipt of any briefs and/or new evidence, or upon expiration of the time allowed for the submission of any briefs. Motions to reopen a proceeding or reconsider a decision shall not be considered under this part.

(18) *Certifications.* The Regional Processing Facility director may, in accordance with § 103.4 of this chapter, certify a decision to the Associate Commissioner, Examinations (Administrative Appeals Unit) when the case involves an unusually complex or novel question of law or fact. The decision on an appealed case subsequently remanded to the Regional Processing Facility director will be certified to the Administrative Appeals Unit.

(19) *Date of adjustment to temporary residence.* The status of an alien whose application for temporary resident status is approved shall be adjusted to that of a lawful temporary resident as of the date indicated on the application fee receipt issued at the Service office.

(20) *Termination of temporary resident status*—(i) *Termination of temporary resident status (General).* The status of an alien lawfully admitted for temporary residence under § 245a.4 of this part may be terminated at any time. It is not necessary that a final order of deportation be entered in order to terminate temporary resident status. The temporary resident status may be terminated upon the occurrence of any of the following:

(A) It is determined that the alien was ineligible for temporary residence under § 245a.4 of this part;

(B) The alien commits an act which renders him or her inadmissible as an immigrant unless a waiver is obtained, as provided in this part;

(C) The alien is convicted of any felony, or three or more misdemeanors;

(D) The alien fails to file for adjustment of status from temporary resident to permanent resident within 31 months of the date he or she was granted status as a temporary resident.

(ii) *Procedure.* Termination of an alien's status will be made only on notice to the alien sent by certified mail directed to his or her last known address, and, if applicable, to his or her representative. The alien must be given an opportunity to offer evidence in opposition to the grounds alleged for termination of his or her status. Evidence in opposition must be submitted within 30 days after the service of the Notice of Intent to Terminate. If the alien's status is terminated, the director of the Regional Processing Facility shall notify the alien of the decision and the reason for the termination, and further notify the alien that any Service Form issued to the alien authorizing employment and/or travel abroad, or any Form I–688, Temporary Resident Card previously issued to the alien will be declared void by the director of the Regional Processing Facility within 30 days if no appeal of the termination decision is filed within that period. The alien may appeal the decision to the Associate Commissioner, Examinations (Administrative Appeals Unit). Any appeal along with the required fee, shall be filed with the Regional Processing Facility within 30 days after the service of the notice of termination. If no appeal is filed within that period, the official Service document shall be deemed void, and must be surrendered without delay to an immigration officer or to the issuing office of the Service.

(iii) *Termination not construed as rescission under section 246.* For the purposes of this part the phrase *termination of status* of an alien granted lawful temporary residence under this section shall not be construed to necessitate a rescission of status as described in section 246 of the Act, and the proceedings required by the regulations issued thereunder shall not apply.

(iv) *Return to unlawful status after termination.* Termination of the status of any alien previously adjusted to lawful temporary residence shall act to return such alien to the status held prior to the adjustment, and render him or her amenable to exclusion or deportation proceedings under sections 236 or 242 of the Act, as appropriate.

(21) *Ineligibility for immigration benefits.* An alien whose status is adjusted to that of a lawful temporary resident

under §245a.4 of this part is not entitled to submit a petition pursuant to section 203(a)(2), nor is such alien entitled to any other benefit or consideration accorded under the Act to aliens lawfully admitted for permanent residence.

(22) *Declaration of intending citizen.* An alien who has been granted the status of temporary resident under §245a.4 of this part may assert a claim of discrimination on the basis of citizenship status under section 274B of the Act only if he or she has previously filed Form I–772 (Declaration of Intending Citizen) after being granted such status. The Declaration of Intending Citizen is not required as a basis for filing a petition for naturalization; nor shall it be regarded as a right to United States citizenship; nor shall it be regarded as evidence of a person's status as a resident.

(23) *Limitation on access to information and confidentiality.* (i) No person other than a sworn officer or employee of the Department of Justice or bureau or agency thereof, will be permitted to examine individual applications. For purposes of this part, any individual employed under contract by the Service to work in connection with the Legalization Program shall be considered an *employee of the Department of Justice or bureau or agency thereof.*

(ii) No information furnished pursuant to an application for temporary or permanent resident status under this section shall be used for any purpose except:

(A) To make a determination on the application; or,

(B) for the enforcement of the provisions encompassed in section 245A(c)(6) of the Act, except as provided in paragraph (b)(23)(iii) of this section.

(iii) If a determination is made by the Service that the alien has, in connection with his or her application, engaged in fraud or willful misrepresentation or concealment of a material fact, knowingly provided a false writing or document in making his or her application, knowingly made a false statement or representation, or engaged in any other activity prohibited by section 245A(c)(6) of the Act, the Service shall refer the matter to the United States Attorney for prosecution of the alien or of any person who created or supplied a false writing or document for use in an application for adjustment of status under this part.

(iv) Information contained in granted legalization files may be used by the Service at a later date to make a decision on an immigrant visa petition (or other status petition) filed by the applicant under section 204(a), or for naturalization applications submitted by the applicant.

(c) *Adjustment from temporary to permanent resident status.* The provisions of §245a.3 of this part shall be applied to aliens adjusting to permanent residence under this part.

[54 FR 6505, Feb. 13, 1989, as amended at 54 FR 29455, July 12, 1989; 54 FR 47676, Nov. 16, 1989; 60 FR 21976, May 4, 1995; 65 FR 82256, Dec. 28, 2000]

§ 245a.5 Temporary disqualification of certain newly legalized aliens from receiving benefits from programs of financial assistance furnished under federal law.

(a) Except as provided in §245a.5(b), any alien who has obtained the status of an alien lawfully admitted for temporary residence pursuant to section 245A of the Act (Adjustment of Status of Certain Entrants Before January 1, 1982, to that of Person Admitted for Lawful Residence) or 210A of the Act (Determinations of Agricultural Labor Shortages and Admission of Additional Special Agricultural Workers) is ineligible, for a period of five years from the date such status was obtained, for benefits financed directly or indirectly, in whole or in part, through the programs identified in §245a.5(c) of this chapter.

(b)(1) Section 245a.5(a) shall not apply to a Cuban or Haitian entrant (as defined in paragraph (1) or (2)(A) of section 501(e) of Public Law 96–422, as in effect on April 1, 1983), or in the case of assistance (other than aid to families with dependent children) which is furnished to an alien who is an aged, blind, or disabled individual (as defined in section 1614(a)(1) of the Social Security Act).

(2) With respect to any alien who has obtained the status of an alien lawfully admitted for temporary residence pursuant to section 210A of the Act only,