

# Rules and Regulations

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## DEPARTMENT OF JUSTICE

### Immigration and Naturalization Service

#### 8 CFR Parts 103, 245 and 274a

[INS No. 1676-94]

RIN 1115-AD83

#### Adjustment of Status to That of Person Admitted for Permanent Residence; Temporary Removal of Certain Restrictions of Eligibility

**AGENCY:** Immigration and Naturalization Service, Justice.

**ACTION:** Interim rule with request for comments.

**SUMMARY:** This second interim rule responds to public comments on the first interim rule and also implements various provisions of the Illegal Immigration Reform and Immigration Responsibility Act of 1996. This rule amends the Immigration and Naturalization Service regulations to reflect the new surcharge required of certain persons in the United States who are seeking to apply for adjustment of status pursuant to section 245(i) of the Immigration and Nationality Act. This rule also amends the list of persons prohibited from applying for adjustment of status by adding two new categories that were created by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996. In addition, this interim regulation enables the Immigration and Naturalization Service to complete adjudication of timely filed section 245(i) adjustment applications after September 30, 1997.

**DATES:** *Effective Date:* This rule is effective July 23, 1997.

*Comment Date:* Written comments must be submitted on or before September 22, 1997.

**ADDRESSES:** Written comments must be submitted, in triplicate, to the Director, Policy Directives and Instructions

Branch, Immigration and Naturalization Service, 425 I Street NW, Room 5307, Washington, D.C. 20536. To ensure proper handling, please reference the INS number 1676-94 on your correspondence. Comments are available for public inspection at this location by calling (202) 514-3048 to arrange for an appointment.

**FOR FURTHER INFORMATION CONTACT:** Gerard Casale, Staff Officer, Immigration and Naturalization Service, 425 I Street, NW, Room 3214, Washington, D.C. 20536, Telephone (202) 514-5014 or Lisa Rainville, Center Adjudications Officer, Vermont Service Center, Immigration and Naturalization Service, 75 Lower Welden Street, St. Albans, VT 05479-0001, Telephone (802) 527-3114.

#### SUPPLEMENTARY INFORMATION:

##### Background

Under the Immigration and Nationality Act (the "Act"), an alien seeking to immigrate to the United States normally must obtain an immigrant visa at a United States embassy or consulate abroad. Section 245 of the Act, however, allows certain persons who are physically present in the United States to adjust status to that of lawful permanent resident. Section 245(a) of the Act limits eligibility for adjustment to aliens who have entered the United States after having been inspected and admitted or paroled by an immigration officer. Section 245(c) of the Act, in turn, bars the adjustment of most applicants who have been employed in the United States without authorization; who have not complied with the terms of their nonimmigrant visa; or who are among certain classes of nonimmigrants whose basis for admission precludes them from eligibility for adjustment of status. Many intending immigrants who were physically present in the United States and were ineligible for adjustment of status under the provisions of section 245(a) and 245(c) of the Act had been obliged to depart the United States to obtain immigrant visas and seek admission to the United States as lawful permanent residents. This resulted in an increased burden on United States consulates and embassies abroad. Additionally, aliens physically present in the United States who sought lawful permanent resident status were required to incur the expense and inconvenience of applying for an immigrant visa at a

United States consulate or embassy abroad.

#### Public Law 103-317

To address these problems, Congress enacted section 506(b) of the Department of Commerce, Justice, State, the Judiciary and Related Agencies Appropriations Act, 1995, Pub. L. 103-317 (August 26, 1994). Section 506(b) of Pub. L. 103-317 added a new section 245(i) to the Act which allows certain persons already in the United States to adjust status, despite the provisions of sections 245 (a) and (c) of the Act, upon payment of a fee in addition to the base filing fee for an adjustment of status application. Section 245(i) of the Act does not, however, waive other grounds of ineligibility enumerated elsewhere in section 245. The provisions of section 245(i) apply only to applications filed on or after October 1, 1994, and before October 1, 1997. See section 506(c) of Pub. L. 103-317. It should be emphasized that, despite enactment of section 245(i) of the Act, adjustment of status remains the exception, and not the rule, to the normal process of immigrant visa issuance. See 59 FR 51091-100.

On October 7, 1994, the Immigration and Naturalization Service (the "Service") published an interim rule with request for comments which established procedures for filing for adjustment of status pursuant to the provisions of section 245(i) of the Act. See 59 FR 51091-100. The interim rule took effective retroactively on October 1, 1994. Interested persons were invited to submit written comments on or before December 6, 1994. After publication of the interim rule on October 7, 1994, the Service received seven written comments during the comment period.

On September 30, 1996, President Clinton signed the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (the "IIRIRA") into law. Among other changes, effective September 30, 1996, the IIRIRA established two new groups of aliens who are ineligible to adjust status under section 245(a) of the Act. The present rule, which contains regulatory changes to 8 CFR part 245 mandated by statutory amendments to sections 245(c) and 245(i) of the Act, is being published as a second interim rule to provide the public an opportunity to comment on the Service's interpretation of the new

law as well as on the provisions of the first interim rule that remain in effect.

### Comments

The following discussions summarize the issues which were raised by the commenters in response to publication of the first interim rule and explains the Service's position on those issues.

### Conclusion of Application Period

One commenter asserted that the provisions of section 245(i) should apply to all applications properly filed before October 1, 1997, rather than only those applications which have been adjudicated by that date. Upon further consideration of this issue, the Service is persuaded that the commenter's position represents the best reading of these statutory provisions. The first interim regulation provided that, in order to meet the October 1, 1997, sunset date provided in section 506(c) of Pub. L. 103-317, section 245(i) applications should be filed at the earliest possible date to ensure complete processing prior to October 1, 1997. Read together, sections 245(i)(1) of the Act and 506(c) of Pub. L. 103-317, however, provide that an alien may apply to the Attorney General for adjustment of status under section 245(i) through September 30, 1997, and that the Attorney General "may" accept such an adjustment application through September 30, 1997. Section 245(i)(2) of the Act and section 506(c) of Pub. L. 103-317, in turn, specifically provide that the Attorney General may adjust an alien's status under section 245(i) of the Act only through September 30, 1997. Finally, section 506(d) of Pub. L. 103-317, requires the Service to conduct full fingerprint identification checks through the FBI for all individuals over 16 years of age who adjust status pursuant to section 245(i) of the Act.

In drafting the first interim regulation, the Service adopted the position that, based on the language of section 245(i)(2) of the Act and section 506(c) of Pub. L. 103-317, its authority to complete processing of any properly filed section 245(i) adjustment application would lapse on the October 1, 1997, sunset date. If left to stand, the first interim rule, in effect, would have precluded an alien from filing an application for adjustment of status through September 30, 1997, as is mandated in section 506(c) of Pub. L. 103-317, since the normal period of time necessary to complete full fingerprint identification checks on adjustment applicants may be 120 days or more. Upon further consideration, the Service now believes that the first

interim rule is incompatible with the language of section 506(c) of Pub. L. 103-317 and section 245(i)(1) of the Act, which specifically permit an alien to apply for adjustment under section 245(i) through September 30, 1997. In making this determination, the Service is aware that, upon expiration of section 245(i)(2) of the Act on October 1, 1997, the Attorney General no longer will have the explicit authority to adjust an alien's status under section 245(i) of the Act. We nevertheless conclude that, based on the statutory scheme, Congress gave the Service the implicit authority to complete processing of all adjustment applications which were properly filed in accordance with section 245(i)(1) of the Act prior to the October 1, 1997, sunset. Not only was Congress aware that the Service, as a practical matter, is unable to complete processing of an application for adjustment of status on the date such application is received, but Congress also specifically mandated that the Service not act upon section 245(i) applications until a "full" background check has been conducted on the adjustment applicant. See section 506(d) of Pub. L. 103-317. Clearly, Congress did not intend to permit the filing of what would in effect be a meaningless section 245(i) adjustment application, accompanied with, in most cases, a substantial additional surcharge, which the Service would be required to deny soon thereafter because of the passage of the October 1, 1997, sunset date.

In short, this second interim rule reconciles any potential inconsistency between sections 245 (i)(1) and (i)(2) of the Act based on section 506(c) of Pub. L. 103-317 by specifically permitting the filing of section 245(i) applications through September 30, 1997, in accordance with section 245(i)(1) of the Act, while recognizing the Service's implicit authority to complete processing of such properly filed applications, even when that processing takes place after September 30, 1997. This second interim rule therefore revises 8 CFR 245.10(c) to allow the filing of adjustment applications pursuant to section 245(i) of the Act through September 30, 1997.

### Applications Submitted to the Service After September 30, 1997

The statutory authority for granting benefits, as well as for collecting the surcharge, under section 245(i) of the Act ends on September 30, 1997. See section 506(c) of Pub. L. 103-317. By law, the Service may not grant the benefits of section 245(i) of the Act to aliens who attempt to file a new application for adjustment of status

under that subsection after September 30, 1997. All applications for adjustment of status filed pursuant to section 245 of the Act which are submitted after September 30, 1997, must be adjudicated pursuant to section 245(a) of the Act. Therefore, in cases where an applicant attempts to file a new section 245(i) adjustment after September 30, 1997, the Service will retain the base filing fee, return any surcharge, and adjudicate the application pursuant to section 245(a) of the Act.

### Readjustment of Lawful Permanent Residents

One commenter noted the language in the preamble to the first interim regulation which states that (a) person who is currently a lawful permanent resident \* \* \* continues to be ineligible for adjustment." See 59 FR 51093. The commenter asserted that this statement was contrary to established case law and added that the statute does not preclude lawful permanent residents from adjusting status under section 245 of the Act. Contrary to this comment, a lawful permanent resident generally may not "adjust" to the same status he or she already holds. The Service recognizes, however, that there exists at least one limited exception to this general rule in the context of an alien in deportation proceedings. See *Matter of Gabryelsky*, 20 I & Dec. 750 (BIA 1993) (allowing an alien to "bootstrap" eligibility for relief under section 245 and 212(c) of the Act). This should not be construed, however, to mean that any lawful permanent resident, whether or not in proceedings, may apply for adjustment of status under section 245 of the Act. First, the language of the statute itself makes it clear that there is no absolute right to adjustment of status. On the contrary, the Attorney General "may" adjust an alien's status "to" that of an alien lawfully admitted for permanent residence. It is, therefore, within the Attorney General's discretion to determine if it is appropriate to grant such status. In this regard, the Service believes it would be an inappropriate use of its limited resources to accord the same privilege, i.e., permanent residence, to an alien currently holding permanent resident status. In any event, an alien, if otherwise eligible, may change the basis of his or her permanent residence by abandoning such status and obtaining an immigrant visa abroad. Finally, we note that the reference in section 245(a) of adjustment "to that of an alien lawfully admitted for permanent residence" clearly demonstrates that Congress intended aliens to adjust from a different

immigration status. Accordingly, the Service will not adopt the commenter's suggestion.

#### Family Unity

Section 245(i) of the Act and 8 CFR 245.10(b) provide that spouses and unmarried children who are under the age of 21 of aliens who were legalized and special agricultural workers programs are exempt from payment of the additional sum, provided those individuals were qualified for, and had properly applied for, benefits under the Family Unity program. See section 301 of the Immigration Act of 1990, Pub. L. 101-649. One commenter suggested that the first interim rule should clearly specify that persons whose voluntary departure status under the Family Unity program had expired are covered by this provision. The Service agrees that the statute and regulations require only that such persons are qualified for and have applied for Family Unity benefits. Those persons whose voluntary departure status under the Family Unity program has expired remain exempt from paying the additional sum specified in 8 CFR 245.10(b). It is, therefore, not necessary to amend the regulation.

The same commenter contends that persons eligible for benefits under the Family Unity program who had not yet filed Form I-817, Application for Voluntary Departure under the Family Unity Program, should be allowed to apply for that program concurrently with their application for adjustment of status. The commenter asserted that requiring applicants to file Form I-817 and obtain a receipt before applying the adjustment of status is inefficient for the Service and inconvenient for applicants.

The statutory language limits the exemption of payment of the additional sum of those applicants "who \* \* \* applied for benefits under" the Family Unity program. This explicit use of the past tense precludes consideration of persons who have yet to file and be determined eligible for benefits under the Family Unity Program. Accordingly, there has been no change to the rule in response to this comment.

Another commenter disagreed with the language of 8 CFR 245.10(b)(3), which exempts from payment of the additional sum an applicant who is "(t)he child of a legalized alien, is unmarried and less than 21 years of age" and who was qualified for and had properly applied for benefits under the Family Unity program. The commenter asserted that this definition is too restrictive, contending that section 245(i)(1)(i) of the Act extends benefits to any applicant who "as of May 5, 1988, was the unmarried child (under the age

of 21)" of legalized alien and had applied for benefits under the Family Unity program.

The Service disagrees with the commenter for the following reasons. The Service recognizes that Congress, in establishing the Family Unity program under section 301 of the Immigration Act of 1990 (IMMACT 90), intended, in part, to ensure that families of legalized aliens are able to remain together until such time as their dependents become statutorily eligible to apply for permanent resident status in the United States. In particular, Congress recognized that such dependents must wait a significant period of time in order for a visa number to become available. Section 301 of IMMACT 90, however, did not address the question of what fee such person must pay in order to apply for adjustment of status. The fee issue, instead, was specifically addressed in section 245(i)(1) of the Act, which clearly provides that the alien must have been an unmarried child both in 1988 as well as at the time he or she applies for permanent resident status in order to be exempt from payment of the surcharge. Further, requiring payment of the surcharge from offspring over the age of 21 years if they wish to remain permanently in this country is in no way contrary to Congress' intent to ensure family unification. For this reason, the Service cannot accept the commenter's suggestion, and will continue to follow the plain language of section 245(i)(1)(i) of the Act.

#### Payment of Additional Sum

One commenter asserted that the first interim regulation required applicants to submit a sum in excess of that required by statute. The first interim regulation requires applicants to submit the standard application fee plus an additional sum equal to five times that fee. The commenter contended that section 245(i) requires applicants to submit the "penalty" portion of the filing fee in lieu of the standard filing fee for adjustment of status applications.

Section 245(i)(1)(b)(iii) of the Act states that "(t)he sum specified herein shall be *in addition to* the fee normally required for the processing of an application under this section" (emphasis added). The placement of this sentence within a subparagraph of the statute may have caused some confusion. Nonetheless, the statute refers to this additional amount not as a "fee" but as a "sum" which is to accompany the application and fee under section 245(i). The Service has no discretion to alter this statutory provision.

One commenter objected to 8 CFR 103.7(c)(1), which states that "[t]he payment of the additional sum . . . may not be waived except as directed in section 245(i)." The commenter contended that section 245(i) of the Act does not address the issue of fee waivers and argued that the Service should take "the standard regulatory approach to fees" found in 8 CFR 103.7(c). Section 245(i) of the Act, however, specifically lists which categories of applicants are not required to submit the additional sum. Unlike the case of other types of petitions and applications filed with the Service, under the plain language of section 245(i) of the Act, the additional sum is specifically mandated by statute. Absent specific statutory authority to waive the surcharge, the Service, therefore, may not waive the additional sum. Accordingly, the Service will not adopt the commenter's suggestion.

#### Technical Revision to 8 CFR 103.7(c)(1)

This second interim regulation modifies the final sentence of 8 CFR 103.7(c)(1) by removing the words "except as directed in section 245(i) of the Act." As one commenter noted, the first regulation is misleading in that it implies that a statutory exemption of the surcharge equates to a waiver of payment of such surcharge. This technical change clarifies that, under the plain language of the statute, persons listed in section 245(i)(1) (i) through (iii) of the Act are exempt from payment of the surcharge, and the Service lacks discretionary authority to waive the surcharge. Since, to date, the Service has not required payment of the surcharge from the individuals listed in section 245(i)(1) (i) through (iii), this technical change, as a practical matter, will have no adverse effect on such persons.

#### Clarification of Instructions to Supplement A to Form I-485

One of the commenters indicated that the instructions which accompany Supplement A to Form I-485 "seem to suggest that an applicant must be the approved beneficiary of a valid unexpired visa petition in order to file the form." Supplement A clearly does not limit eligibility for adjustment of status to an applicant who is the beneficiary of an approved immigrant visa petition. The instructions to the form specify only that an applicant "have an immediately available immigrant visa number." This language echoes section 245(i)(2)(B) of the Act, which requires "an immigrant visa [to be] immediately available to the alien at the time the application is filed." Furthermore, apart from its instructions,

Supplement A lists a broad spectrum of grounds for eligibility for adjustment of status. Accordingly, no change has been made to the rule as a result of this recommendation.

#### **Interview Waivers**

One commenter requested that the Service incorporate language regarding interview waivers into the regulation. However, as the same commenter noted, 8 CFR 245.6 currently allows for a waiver of the interview for adjustment of status applications. Applications filed under section 245(i) of the Act are adjudicated in accordance with the regulations at 8 CFR part 245, which already contain provisions authorizing immigration officers to waive the interview under certain specified circumstances. Further regulatory language relating to interview waivers would be redundant. Accordingly, the Service will not adopt the commenter's suggestion.

#### **Adjustment as a Means of Relief From Deportation**

One commenter urged the Service to clarify that prospective immigrants who qualify for adjustment under section 245(i) may file such an application while they are in deportation proceedings. (While no new deportation cases may be brought after March 31, 1997, section 309(c) of the IIRIRA permits the continuation of deportation proceedings initiated prior to April 1, 1997.) However, under 8 CFR 242.17(a), respondents in deportation proceedings are already permitted to apply for adjustment of status under section 245 of the Act. Additional regulatory language to that effect would, therefore, be redundant. Accordingly, the rule has not been changed in response to this recommendation. It should be noted that the Service published an interim rule on March 6, 1997, effective April 1, 1997, that implemented certain changes to the removal process resulting from the IIRIRA. See 62 FR 10312. The March 6, 1997, regulation provides for adjustment of status in certain circumstances, where appropriate, during removal proceedings.

#### **Fingerprint Checks**

One commenter noted that section 506(d) of Pub. L. 103-317 requires fingerprint checks for all applicants for adjustment of status under section 245(i) of the Act who are more than 16 years of age. The commenter suggested that this provision should be included in the regulations to avoid confusion. However, fingerprint checks are covered by 8 CFR 264.1, a regulation not covered by the present rulemaking. While this

point is well taken, the Service intends to address this matter in a separate rulemaking. Accordingly, the regulation has not been changed as a result of this comment.

#### **Pending Applications and the Chinese Student Protection Act**

A number of commenters were concerned about the impact of the first interim regulation on individuals who applied for adjustment of status under the Chinese Student Protection Act (CSPA), as well as dependents of CSPA applicants. One commenter suggested that the regulations at 8 CFR 245.1 should be amended to remind Service officers that qualifying family members who are following to join immigrants who adjusted status under the CSPA retain the priority date of a CSPA principal. As the commenter observed, however, the issue of priority dates for late-arriving dependents of CSPA principals has already been addressed at 8 CFR 245.9(m). Because statutory and regulatory provisions are already in place for late-arriving dependents of CSPA applicants, there is no need to promulgate further regulations merely to refer interested parties to existing provisions.

Several commenters observed that the provisions of section 245(i) "shall take effect on October 1, 1994." The commenters asserted that, because of this wording, the provisions of section 245(i) should apply not only to applications filed after October 1, 1994, but to any adjustment application pending on that date. They urged the Service to allow applicants for adjustment of status to file motions to reopen or reconsider under section 245(i) of the Act.

The language of section 245(i), however, clearly states that a prospective immigrant under this section "may apply" for adjustment of status. This wording is prospective and not retroactive. Because section 245(i) became effective on October 1, 1994, the plain language of the statute limits the application of section 245(i) to applications for adjustment of status filed on or after October 1, 1994. Therefore, the Service cannot apply the provisions of section 245(i) to applications filed prior to October 1, 1994, or to motions to reopen or reconsider such applications.

A number of these commenters argued that, although applicants who entered without inspection were ineligible for adjustment of status under the CSPA, the provisions of section 245(i) should apply retroactively to any CSPA application pending as of October 1, 1994. One commenter noted that,

whole most aliens with pending adjustment of status applications could simply file a new application under section 245(i). CSPA applicants cannot file a new application because of the CSPA's statutory filing deadline of June 30, 1994. Another commenter urged the Service to reopen or reconsider denied CSPA applications under section 245(i) because "[t]he INS unlawfully stopped advance paroles for Chinese nationals" who had entered without inspection. As stated previously, the provisions of section 245(i) apply only to applications filed on or after October 1, 1994. Further, had Congress intended any special consideration for CSPA applications, such provisions would have been incorporated into the statute. Accordingly, the provisions of the rule have not been changed in response to these comments.

#### **IIRIRA**

##### *Surcharge Increased by Congress*

Section 376(a) of the IIRIRA increased the amount of the additional sum for applicants seeking the benefits of section 245(i) of the Act from five times the fee required for processing of applications under this section (\$650) to \$1,000. The regulations are, therefore, amended to reflect the change in the additional fee.

The new 245(i) surcharge in the amount of \$1,000 applies to all applications properly filed with this Service on or after the end of the 90-day period beginning on the date of enactment. The section 245(i) fee increase, therefore, became effective on December 29, 1996, for applications for adjustment of status under section 245(i) of the Act which were properly filed in accordance with 8 CFR 103.2(a) on or after that date. Under new 8 CFR 245.10(f), if at any time during the pendency of the adjustment application, the application is determined to be subject to the section 245(i) surcharge, and the application is not accompanied by the required amount (i.e., base fee of \$130 plus \$1,000 surcharge), the Service will afford the alien an opportunity to amend the application in accordance with 8 CFR 245.10(d). If the alien elects to amend such an application, he or she will be credited for the \$130 base filing fee that was submitted with the initial adjustment application and, therefore, will be required to submit only the \$1,000 surcharge amount and Supplement A to Form I-485.

##### *Section 245(c)(6) of the Act*

Under the IIRIRA, Congress amended section 245(c)(6) of the Act by changing the reference to section 241(a)(4)(B) to

section 237(a)(4)(B) of the Act. Section 237(a)(4)(B) of the Act renders any alien who has engaged, is engaged, or at any time after admission engages in any terrorist activity, as defined in section 212(a)(3)(B)(iii) of the Act, "deportable." Under section 245(c)(6), persons who are deportable under section 237(a)(4)(B) of the Act are ineligible to adjust status under section 245(a) of the Act. This second interim regulation reflects the position of the Service that any person who is deportable under section 237(a)(4)(B) of the Act is also ineligible to adjust status under section 245(i) of the Act.

#### *New Section 245(c)(7) of the Act*

Section 375 of the IIRIRA, which took effect on September 30, 1996, amended section 245(c) of the Act by adding two new groups of aliens to the list of those who are ineligible to adjust status under section 245(a) of the Act. The first group, described in new section 245(c)(7) of the Act, consists of any alien beneficiary of an employment-based immigrant visa petition who is not in a lawful nonimmigrant status at the time she or he applies for adjustment of status. In enacting new section 245(c)(7) of the Act, Congress changed preexisting law by rendering aliens who are legally permitted to remain in the United States, such as parolees, but who are not among the classes of nonimmigrants defined in section 101(a)(15) or other provisions of the Act, ineligible to adjust status under section 245(a) of the Act on the basis of an approved employment-based immigrant petition. This second interim rule amends 8 CFR 245.1(b) to add such aliens to the group of people currently ineligible for adjustment of status. It should be noted, however, that the section 245(c)(7) bar to adjustment does not apply to aliens who were in a lawful nonimmigrant status at the time they applied for adjustment of status, subsequently departed from the United States, and then reentered this country pursuant to an approved advance parole.

#### *New Section 245(c)(8) of the Act*

Section 375 of the IIRIRA also added a new section 245(c)(8) to the Act, which renders "any alien who was employed while the alien was an unauthorized alien as defined in section 274A(h)(3) [of the Act] or who has otherwise violated the terms of a nonimmigrant visa" ineligible to adjust status pursuant to section 245(a) of the Act. With respect to the employment of an alien at a particular time, section 274A(h)(3) of the Act defines the term "unauthorized alien" as an alien who is

not either an alien lawfully admitted for permanent residence or authorized to be so employed under the Act or by the Attorney General.

Except as noted below with regard to immediate relatives and certain special immigrants, the Service interprets new section 245(c)(8) of the Act as rendering an alien ineligible to adjust status to permanent resident under section 245(a) of the Act if she or he at any time engaged in unauthorized employment or violated nonimmigrant status while physically present in the United States. This second interim rule amends 8 CFR 245.1(b) accordingly by adding any alien who has violated the terms of a nonimmigrant visa to the list of persons currently ineligible to adjust status under section 245(a) of the Act. In addition, since the statute does not state that the violation of the terms of a nonimmigrant visa or the unauthorized employment must have occurred during a particular time period, this rule similarly places no time restrictions on when such a violation must have occurred. For this reason, this rule provides that any such violation of the terms of a nonimmigrant visa or unauthorized employment, either before or after the filing of Form I-485, will render an alien ineligible to adjust status under section 245(a) of the Act. Thus, as described below, under new section 245(c)(8) of the Act, an alien seeking employment during the pendency of his or her adjustment application must fully comply with the requirements of section 274A of the Act and 8 CFR part 274a.

#### *Clarification of the Term "Otherwise Violated the Terms of a Nonimmigrant Visa" in New Section 245(c)(8) of the Act*

For purposes of section 245(c)(8) of the Act, an alien will not be deemed to have "otherwise violated the terms of a nonimmigrant visa" merely by filing an application for adjustment of status, provided that such filing was in accordance with 8 CFR 103.2(a) and occurred prior to the expiration of the alien's nonimmigrant status. Further, for purposes of section 245(c)(8) of the Act, an alien will not be deemed to have "otherwise violated the terms of a nonimmigrant visa" if: (a) The alien's failure to maintain status was through no fault of his or her own or for technical reasons, as defined in 8 CFR 245.1(d)(2); (b) the alien was granted a change of nonimmigrant status pursuant to 8 CFR 248.1(b); (c) the alien was granted an extension of nonimmigrant stay pursuant to current Operations Instructions 214.1 or any previous analogous Operations Instructions; (d)

the alien was granted an extension of nonimmigrant stay based on a timely filed extension application which the Service approved after the alien's authorized nonimmigrant period of stay expired; or (e) the alien was granted reinstatement to student status pursuant to 8 CFR 214.2(f)(16) on the basis of circumstances beyond the student's control.

#### *Clarification of the Term "Unauthorized Alien" in New Section 245(c)(8) of the Act*

For purposes of section 245(c)(8) of the Act, an alien will not be deemed to be an "authorized alien" as defined in section 274A(h)(3) of the Act while his or her properly filed Form I-485 application is pending final adjudication, if the alien has otherwise obtained permission from the Service to engage in employment, or if the alien: (a) Has not previously engaged in unauthorized employment at any time; (b) was authorized, at the time of filing the adjustment application, to be employed by his or her current employer pursuant to a nonimmigrant classification permitting such employment; and (c) would otherwise have been authorized to continue employment had he or she not filed the application for adjustment of status. In all other cases, including those in which the alien's previously granted employment authorization expires during the pendency of the adjustment application, the adjustment applicant must await issuance of an employment authorization document ("EAD") from the Service before he or she may lawfully engage in employment. For this reason, adjustment applicants are strongly urged to file a Form I-765 application on the basis of 8 CFR 274a.12(c)(9) concurrently or as soon as possible after filing the Form I-485 to avoid a lapse of employment authorization. Further, in all cases, if the district director or service center director denies the alien's application for adjustment of status, any employment authorization granted to the alien on the basis of the adjustment application will be subject to termination pursuant to 8 CFR 274a.14(b). Finally, as this second interim rule is limited to defining who is an "unauthorized alien" for purposes of new section 245(c)(8) of the Act, an alien who meets the above requirements must, like all other adjustment applicants, obtain advance parole in order to travel outside of the United States during the pendency of his or her adjustment application.

*Immediate Relatives and Certain Special Immigrants Are Exempt From the Bar to Adjustment Under Section 245(c)(8) of the Act*

By its terms, new section 245(c)(8) of the Act applies to "any alien" and does not exempt any individual or group of individuals from the bar to adjustment under section 245(a) of the Act. This provision, however, must be harmonized with section 245(c)(2) of the Act, which also addresses unauthorized employment and failure to maintain lawful status, but which exempts from its bar to adjustment immediate relatives, as defined in section 201(b) of the Act, or special immigrants, as defined in section 101(a)(27) (H), (I), (J), or (K) of the Act. Despite the reference to "all aliens" in new section 245(c)(8) of the Act, it is the position of the Service that the language of this new section does not supersede the more specific language of section 245(c)(2) of the Act. See 2B Sutherland Stat. Const. section 51.02 at p. 121 (where a conflict exists the more specific statute controls over the more general one). Under this second interim rule, therefore, immediate relatives as defined in section 201(b) or special immigrants described in section 101(a)(27) (H), (I), (J), or (K) of the Act who have at any time engaged in unauthorized employment or otherwise violated the terms of a nonimmigrant status continue to be eligible to adjust status under section 245(a) of the Act because of the explicit language to this effect in section 245(c)(2) of the Act. As is currently the case, such individuals are not required to pay the additional sum required for filing an adjustment application pursuant to section 245(i) of the Act. See 8 CFR 245.1(b). These persons are still required, however, to pay the base filing fee required of other adjustment applicants under section 245(a) of the Act. See 8 CFR part 103.7(b)(1).

*Effect of New Ground of Inadmissibility 212(a)(6) on Section 245(i) of the Act*

The IIRIRA added several new grounds of inadmissibility, including a new section 212(a)(6) of the Act, which became effective on April 1, 1997. Under new section 212(a)(6)(A) of the Act, with certain exceptions specified therein, aliens who are "present in the United States without being admitted or paroled," will be inadmissible to the United States. All inadmissibility grounds are subject, however, to the general language in the first clause of section 212(a) of the Act: "[e]xcept as otherwise provided in this Act." For the following reasons, it is the position of the Service that, despite the enactment

of this new ground of inadmissibility, aliens who are physically present in the United States after having entered without inspection will continue to be eligible to apply for adjustment of status under section 245(i) of the Act through the September 30, 1997, sunset date for section 245(i). In making this determination, we note, as a preliminary matter, that the first clause of section 212(a) of the Act, unlike certain other sections of the Act, contains no requirement that another section of the Act *specifically* provide that an entrant without inspection is exempt from the new ground of inadmissibility. By contrast, in enacting other sections of the Act, when Congress has intended such specificity, it has expressly imposed this requirement. See *e.g.*, section 101(a)(38) of the Act ("except as otherwise specifically herein provided \* \* \*"); section 245A(h)(1) of the Act ("[u]nless specifically provided by this section or other law"). In the absence of such a specificity requirement in the first clause of section 212(a) of the Act, the rules of statutory construction permit us to conclude, if otherwise warranted, that Congress intended otherwise eligible applicants who had entered without inspection to be "admissible" for the limited purpose of adjusting status under section 245(i) of the Act, even in the absence of specific language in section 245(i) referring to section 212(a)(6)(A) of the Act.

The Service finds ample additional evidence of Congress' intent to permit entrants without inspection to continue to apply for adjustment of status under section 245(i) of the Act after April 1, 1997. First, under the plain language of section 245(i)(1)(A) of the Act, aliens who are physically present in the United States who entered without inspection are specifically permitted to apply for adjustment of status. Section 245(i)(2)(A), of the Act, however, requires that such aliens be "admissible" to the United States. To deem such entrants without inspection "inadmissible" would render section 245(i)(1)(A) of the Act effectively superfluous, since it would preclude nearly all entrants without inspection from ever obtaining approval of such applications. On a similar note, since an applicant for adjustment of status is assimilated to the position of an applicant for admission, such a person must be "admissible" both at the time of application and at the time of being granted adjustment of status. See 8 CFR 245.10(a)(3) (alien "may apply" for adjustment under section 245(i) if not excludable); section 245(i)(2)(A) of the Act (alien must be "admissible" at time

of adjustment). Since section 245(i)(1)(A) of the Act expressly permits entrants without inspection to apply for adjustment of status, Congress, in effect, has deemed such persons "admissible" for the single purpose of filing an adjustment application under section 245(i) of the Act. The Service does not believe that Congress, having thus invited such applications, intended to create the futile situation in which most entrants without inspection would be admissible solely for the purpose of filing an adjustment application, but would be precluded from ever being able to adjust status based on the same application. Finally, as a further indication of Congress' intent to preserve the status quo with respect to entrants without inspection, we note that Congress, in enacting the IIRIRA, amended other portions of section 245(i) of the Act but left standing 245(i)(1)(A) of the Act, which specifically authorizes those who entered without inspection to apply for adjustment under the terms of that subsection. See section 376 (a) and (b) of the IIRIRA.

*General Effect of New Section 212(a)(9) of the Act on Adjustment of Status*

This second interim regulation specifically provided that new section 212(a)(9) of the Act will not be a bar to adjustment of status for an alien who has not yet departed from the United States. This interpretation conforms to the plain language of the statute which requires that an alien must depart from the United States in order to become inadmissible under section 212(a)(9) of the Act. Such a person, however, if otherwise within the purview of section 212(a)(9) of the Act (for example, by virtue of having accumulated the specified periods of unlawful presence), will be deemed inadmissible under that section of the Act for purposes of adjustment of status if he or she has departed from the United States and subsequently reentered the United States by any means.

*Effect of New Section 212(a)(9)(B) of the Act on Adjustment of Status*

With certain exceptions, effective April 1, 1997, under new section 212(a)(9)(B) of the Act, any alien, with the exception of a lawful resident, who has been "unlawfully present" in this country (e.g., present beyond the period of stay authorized by the Attorney General or present without being admitted or paroled) for a period of more than 180 days but less than 1 year, has voluntarily departed from the United States, and again seeks admission to this country within 3 years from the date of departure, will be

inadmissible to the United States. Similarly, an alien who has been unlawfully present in the United States for 1 year or more, departs from the United States, and again seeks admission to this country within 10 years of the date of such departure or removal, will be deemed inadmissible. In addition to the specific exceptions set forth under new section 212(a)(9)(B) of the Act, no period prior to April 1, 1997, may be counted toward the period of "unlawful presence." See section 301(b)(3) of the IIRIRA. Thus, the earliest possible date an alien could be deemed to be inadmissible under section 212(a)(9)(B) of the Act would be September 28, 1997. As noted above, otherwise admissible persons who have been "unlawfully present" for any period of time while in this country are generally ineligible to adjust their status under section 245(a) of the Act. Under section 245(i) of the Act, however, such persons, if admissible, are eligible to apply for adjustments of status upon payment, in most cases, of a substantial surcharge fee. The Service intends to address the issues relating to section 212(a)(9) of the Act in a separate proposed rulemaking.

#### *Good Cause Exception*

The Service's implementation of this rule as a second interim rule, with provisions for post-promulgation public comments, is based upon the "good cause" exceptions found at 5 U.S.C. 553 (b)(3)(B), (d)(3). See *Animal Legal Defense Fund v. Quigg*, 932 F.2d 920 (Fed. Cir. 1991). The immediate implementation of this second interim rule without prior notice and comment is necessary to implement statutory changes which have already gone into effect. Consequently, there is insufficient time to provide pre-publication notice and comment. The Service will fully consider all comments submitted during the comment period. The Service notes that this second interim rule continues to allow certain persons who were previously ineligible for adjustment of status to obtain lawful permanent residence without having to incur the high costs of travel abroad.

#### **Regulatory Flexibility Act**

The Commissioner of the Immigration and Naturalization Service, in accordance with the Regulatory Flexibility Act (5 U.S.C. 605(b)), has reviewed this regulation and, by approving it, certifies that this rule will not have a significant adverse economic impact on a substantial number of small entities. By temporarily removing certain restrictions on eligibility for adjustment of status in accordance with

the statute, the rule will eliminate inconvenience to a number of individuals currently in the United States who otherwise would be required to incur significant monetary expenses by traveling abroad to apply for an immigrant visa at a United States consulate or embassy. This second interim rule will have no effect on small entities.

#### **Unfunded Mandates Reform Act of 1995**

This rule will not result in the expenditure by State, local and tribal governments, in the aggregate, or by the private sector, of \$100 million or more in any 1 year, and it will not significantly or uniquely affect small governments. Therefore, no actions were deemed necessary under the provisions of the Unfunded Mandates Reform Act of 1995.

#### **Small Business Regulatory Enforcement Fairness Act of 1996**

This rule is not a major rule as defined by section 804 of the Small Business Regulatory Enforcement Act of 1996. This rule will not result in an annual effect on the economy of \$100 million or more; a major increase in costs or prices; or significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based companies to compete with foreign-based companies in domestic and export markets.

#### **Executive Order 12866**

This rule is not considered by the Department of Justice, Immigration and Naturalization Service to be a "significant regulatory action" under Executive Order 12866, section 3(f), Regulatory Planning and Review, and the Office of Management and Budget has waived its review process under section 6(a)(3)(A).

#### **Executive Order 12612**

The regulations adopted herein will not have substantial direct effects on the States, on the relationship between the National Government and the States, or on the distribution of power and responsibilities among the various levels of government. Therefore, in accordance with Executive Order 12612, it is determined that this rule does not have sufficient federalism implications to warrant the preparation of a Federalism Assessment.

#### **Executive Order 12988 Civil Justice Reform**

This interim rule meets the applicable standards set forth in sections 3(a) and 3(b)(2) of E.O. 12988.

#### **Paperwork Reduction Act**

This interim rule does not impose any new reporting or recordkeeping requirements. The information collection requirements contained in this rule were previously approved for use by the Office of Management and Budget (OMB). The OMB control numbers for these collections are contained in 8 CFR 299.5, Display of control numbers.

#### **List of Subjects**

##### *8 CFR Part 103*

Administrative practice and procedure, Authority delegations (Government agencies), Fees, Forms, Freedom of Information, Privacy, Reporting and recordkeeping, Surety bonds.

##### *8 CFR Part 245*

Aliens, Immigration, Reporting and recordkeeping requirements.

##### *8 CFR Part 274a*

Aliens, Immigration, employment authorization and employee requirements.

Accordingly, chapter I of title 8 of the Code of Federal Regulations is amended as follows:

#### **PART 103—POWERS AND DUTIES OF SERVICE OFFICERS; AVAILABILITY OF SERVICE RECORDS**

1. The authority citation for part 103 continues to read as follows:

**Authority:** 5 U.S.C. 552, 552a; 8 U.S.C. 1101, 1103, 1201, 1252 note, 1252b, 1304, 1356; 31 U.S.C. 9701; E.O. 12356, 47 FR 14874, 15557, 3 CFR, 1982 Comp., p. 166; 8 CFR part 2.

##### **§ 103.7 [Amended]**

2. In § 103.7(b)(1), the entry for "Supplement A to Form I-485" is amended by revising the fee of "\$650.00" to read: "\$1,000".

3. In § 103.7, paragraph (c)(1) is amended in the last sentence by removing the phrase "except as directed in section 245(i) of the Act".

#### **PART 245—ADJUSTMENT OF STATUS TO THAT OF PERSON ADMITTED FOR PERMANENT RESIDENCE**

4. The authority citation for part 245 continues to read as follows:

**Authority:** 8 U.S.C. 1101, 1103, 1182, 1255; 8 CFR part 2.

5. Section 245.1 is amended by:
- a. Removing “.” at the end of paragraph (b)(7), and replacing it with a “;”;
  - b. Removing the “.” at the end of paragraph (b)(8), and replacing it with a “;”; and by adding paragraphs (b)(9) and (b)(10), to read as follows:

**§ 245.1 Eligibility.**

\* \* \* \* \*

(b) \* \* \*

(9) Any alien who seeks adjustment of status pursuant to an employment-based immigrant visa petition under section 203(b) of the Act and who is not maintaining a lawful nonimmigrant status at the time he or she files an application for adjustment of status; and

(10) Any alien who was ever employed in the United States without the authorization of the Service or who has otherwise at any time violated the terms of his or her admission to the United States as a nonimmigrant, except an alien who is an immediate relative as defined in section 201(b) of the Act or a special immigrant as defined in section 101(a)(27)(H), (I), (J), or (K) of the Act. For purposes of this paragraph, an alien who meets the requirements of § 274a.12(c)(9) of this chapter shall not be deemed to have engaged in unauthorized employment during the pendency of his or her adjustment application.

\* \* \* \* \*

6. Section 245.10 is amended by:
- a. Revising paragraph (a)(6);
  - b. Revising paragraph (b) introductory text;
  - c. Revising paragraph (b)(3);
  - d. Revising paragraphs (c), (d) and (e); and by
  - e. Adding new paragraphs (f) and (g), to read as follows:

**§ 245.10 Adjustment of status upon payment of additional sum under Public Law 103-317.**

(a) \* \* \*

(6) Pays an additional sum of \$1,000, unless payment of the additional sum is not required under section 245(i) of the Act; and

\* \* \* \* \*

(b) *Payment of additional sum.* An adjustment applicant filing under the provisions of section 245(i) of the Act must pay the standard adjustment application filing fee as specified in § 103.7(b)(1) of this chapter. Each application submitted to the Service under the provisions of section 245(i) of the Act on or after October 1, 1994, and before December 29, 1996, must be submitted with an additional sum of \$650. Each application submitted to the Service under the provisions of section

245(i) of the Act on or after December 29, 1996, must be submitted with an additional sum of \$1,000. If a determination is made by an officer of the Service on or after December 29, 1996, that an applicant is subject to section 245(i) of the Act, and the Form I-485 is not accompanied by Supplement A to Form I-485 and, if required by section 245(i), the additional sum of \$1,000, the applicant will be afforded the opportunity to amend the application by submitting Supplement A, the additional sum of \$1,000, if required, and any other required documentation. However, an applicant filing under the provisions of section 245(i) of the Act is not required to pay the additional sum if, at the time the application for adjustment of status is filed, the alien is:

\* \* \* \* \*

(3) The child of a legalized alien, is unmarried and less than 21 years of age, qualifies for and has filed Form I-817, and submits a copy of his or her receipt of approval notice for filing Form I-817. Such an alien must pay the additional sum if he or she has reached the age of 21 years at the time of filing for adjustment of status. Such an alien must meet all other conditions for adjustment of status contained in the Act and in this chapter.

(c) *Application period.* The Service may not approve an application for adjustment of status pursuant to section 245(i) of the Act if such application was filed either before October 1, 1994, or after September 30, 1997. If an alien attempts to file an adjustment of status application under the provisions of section 245(i) after September 30, 1997, the Service will accept the application and base filing fee, as set forth in § 103.7(b)(1) of this chapter, return the additional sum of \$1,000 to the alien, and adjudicate the application pursuant to section 245(a) of the Act. If the alien, in such a case, is not eligible for adjustment of status, the Service will issue a written notice advising the alien of the denial of the application for adjustment of status.

(d) *Adjustment application filed on or after October 1, 1994, and before October 1, 1997, without Supplement A to Form I-485 and additional sum.* An adjustment of status applicant will be allowed the opportunity to amend an adjustment of status application filed in accordance with § 103.2 of this chapter on or after October 1, 1994, and before October 1, 1997, in order to request consideration under the provisions of section 245(i) of the Act, if it appears that the alien is not otherwise ineligible for adjustment of status. The Service

shall notify the applicant in writing of the Service's intent to deny the adjustment of status application, and any other requests for benefits which derive from the adjustment application, unless supplement A to Form I-485 and any required additional sum is filed within 30 days of the date of the notice.

(e) *Applications for Adjustment of Status filed before October 1, 1994.* The provisions of section 245(i) of the Act shall not apply to an application for adjustment of status that was filed before October 1, 1994. The provisions of section 245(i) of the Act also shall not apply to a motion to reopen or reconsider an application for adjustment of status if the application for adjustment of status was filed before October 1, 1994. An applicant whose pre-October 1, 1994, application for adjustment of status has been denied may file a new application for adjustment of status pursuant to section 245(i) of the Act on or after October 1, 1994, and before October 1, 1997, provided that such new application is accompanied by: the required fee; Supplement A to Form I-485; and additional sum required by section 245(i) of the Act; and all other required initial and additional evidence.

(f) *Completion of processing of pending applications.* An application for adjustment of status filed subsequent to September 30, 1994, and prior to October 1, 1997, shall be adjudicated to completion by an officer of the Service, regardless of whether the final decision is made after September 30, 1997. The provisions of paragraph (d) of this section regarding amended applications shall apply to all such applications. The Service may consider a motion to reopen or reconsider an application for adjustment of status on the basis of section 245(i) of the Act only if:

(1) The application for adjustment of status was filed on or after October 1, 1994, and before October 1, 1997, and

(2) Prior to October 1, 1997, the applicant submitted Supplement A to Form I-485, any additional sum required by section 245(i), and any other required documentation.

(g) *Aliens deportable under section 237(a)(4)(B) of the Act are ineligible to adjust status.* Section 237(a)(4)(B) of the Act renders any alien who has engaged, is engaged, or at any time after admission engages in any terrorist activity, as defined in section 212(a)(3)(B)(iii) of the Act, deportable. Under section 245(c)(6) of the Act, persons who are deportable under section 237(a)(4)(B) of the Act are ineligible to adjust status under section 245(a) of the Act. Any person who is deportable under section 237(a)(4)(B) of



the Act is also ineligible to adjust status under section 245(i) of the Act.

**PART 274a—CONTROL OF EMPLOYMENT OF ALIENS**

7. The authority citation for part 274a continues to read as follows:

**Authority:** 8 U.S.C. 1101, 1103, 1324a, and 8 CFR part 2.

8. Section 274a.12 is amended by:

a. Removing the “;” at the end of paragraph (c)(9) and replacing it with a “.”; and by

b. Adding two new sentences at the end of the paragraph (c)(9), to read as follows:

**§ 274a.12 Classes of aliens authorized to accept employment.**

\* \* \* \* \*

(c) \* \* \*

(9) \* \* \* For purposes of section 245(c)(8) of the Act, an alien will not be deemed to be an “unauthorized alien” as defined in section 274A(h)(3) of the Act while his or her properly filed Form I-485 application is pending final adjudication, if the alien has otherwise obtained permission from the Service pursuant to 8 CFR 274a.12 to engage in employment, or if the alien had been granted employment authorization prior to the filing of the adjustment application and such authorization does not expire during the pendency of the adjustment application. Upon meeting these conditions, the adjustment applicant need not file an application for employment authorization to continue employment during the period described in the preceding sentence;

\* \* \* \* \*

Dated: June 15, 1997.

**Doris Meissner,**

*Commissioner, Immigration and Naturalization Service.*

[FR Doc. 97-19242 Filed 7-22-97; 8:45 am]

BILLING CODE 4410-10-M

**DEPARTMENT OF TRANSPORTATION**

**Federal Aviation Administration**

**14 CFR Part 39**

[Docket No. 96-ANE-13; Amendment 39-10084; AD 97-15-10]

RIN 2120-AA64

**Airworthiness Directives; AlliedSignal Inc. TPE331 Series Turboprop Engines**

**AGENCY:** Federal Aviation Administration, DOT.

**ACTION:** Final rule.

**SUMMARY:** This amendment adopts a new airworthiness directive (AD),

applicable to AlliedSignal Inc. (formerly Garrett Engine Division and Garrett Turbine Engine Company) TPE331 series turboprop engines equipped with Woodward fuel controls, that requires revising the applicable Emergency Procedures or Abnormal Procedures Section of the applicable Federal Aviation Administration (FAA)-approved Airplane Flight Manual (AFM) or Pilot’s Operating Handbook (POH) to include a paragraph relating to a non-responsive power lever. In addition, this AD requires replacing or reworking orifice fittings and restrictors, which would constitute terminating action to the requirement to revise the applicable AFM. This amendment is prompted by reports of occasional icing of the inlet Pt2 sensor, which can produce an erroneous (high) pressure signal to the fuel control, causing little or no response to power lever movement. The actions specified by this AD are intended to prevent a non-responsive power lever and lack of control of engine power.

**DATES:** Effective September 22, 1997.

The incorporation by reference of certain publications listed in the regulations is approved by the Director of the Federal Register as of September 22, 1997.

**ADDRESSES:** The service information referenced in this AD may be obtained from AlliedSignal Aerospace, Attn: Data Distribution, M/S 64-3/2101-201, P.O. Box 29003, Phoenix, AZ 85038-9003; telephone (602) 365-2493, fax (602) 365-5577. This information may be examined at the Federal Aviation Administration (FAA), New England Region, Office of the Assistant Chief Counsel, 12 New England Executive Park, Burlington, MA; or at the Office of the Federal Register, 800 North Capitol Street, NW., suite 700, Washington, DC.

**FOR FURTHER INFORMATION CONTACT:** Joseph Costa, Aerospace Engineer, Los Angeles Aircraft Certification Office, FAA, Transport Airplane Directorate, 3960 Paramount Blvd., Lakewood, CA 90712-4137; telephone (562) 627-5246; fax (562) 627-5210.

**SUPPLEMENTARY INFORMATION:** A proposal to amend part 39 of the Federal Aviation Regulations (14 CFR part 39) to include an airworthiness directive (AD) that is applicable to AlliedSignal Inc. TPE331 series turboprop engines equipped with Woodward fuel controls was published in the **Federal Register** on October 3, 1996 (61 FR 51618). That action proposed to require revising the Abnormal Procedures or Emergency Procedures Section of the applicable Federal Aviation Administration (FAA)-approved Airplane Flight Manual

(AFM) or Pilot’s Operating Handbook (POH) to include a paragraph relating to a non-responsive power lever. In addition, the notice proposed requiring replacing orifice fittings and reworking restrictors, which would constitute terminating action to the requirement to revise the applicable AFM or POH.

Interested persons have been afforded an opportunity to participate in the making of this amendment. Due consideration has been given to the single comment received.

The commenter states that the Ayres S2R series aircraft should be removed from the AD applicability. The commenter states that the Ayres aircraft models are certified for Visual Flight Rules (VFR) operations at 12,000 feet or below, and are not normally operated in the altitude and temperature environment described in the AD. In addition, the engine has no anti-ice capability installed in this airplane. Also, the commenter is not aware of any reports of “no response to power lever movement” regarding this airplane. The FAA does not concur. First, the AD will apply to all TPE331-3, -5, -6, -10, -11, and -12 engines equipped with Woodward fuel controls, regardless of what aircraft those engines are installed on. The list of aircraft is provided for informational purposes only and is not an exclusive listing of aircraft on which operators might find the affected engines. In addition, the FAA is aware that some aircraft may be configured without anti-ice capability, and, therefore, no action would be required under paragraph (a), which addresses engines installed on aircraft with engine inlet ice protection. However, the FAA considers engines without engine anti-ice capability within the scope of the unsafe condition described in this AD and therefore, must be modified in accordance with paragraph (b) or (c) of the AD.

Also, the FAA has considered that no reports were submitted regarding “no response to power lever movement” for the Ayres series aircraft and that the maximum operating altitude for these aircraft is 12,000 feet. Even though ice blockage of the PT2 sensor and pressure signal increase is an infrequent phenomena and may be influenced by engine installation, flight operation, and environmental factors, the FAA has decided to implement the engine orifice fitting and restrictor modifications based on engine design similarity and the possibility that the sensor can ice up at lower altitudes in clear air given the right combination of temperature, relative humidity and airspeed. Therefore, the Ayres series aircraft will remain in the AD applicability.