U.S. Department of Justice
Immigration and Naturalization Service

HQ 70/23.1-P
HQ 70/6.1.3-P

Office of the Executive Associate Commissioner

425 I Street NW
Washington, DC 20536

AD 00-02

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MEMORANDUM FOR ALL REGIONAL DIRECTORS

FROM: Michael A. Pearson
Executive Associate Commissioner
Office of Field Operations

SUBJECT: Transferring Section 245 Adjustment Applications to New or Subsequent Family or Employment-Based Immigrant Visa Petitions.

This memorandum addresses issues relating to the *Adjudicator's Field Manual*, Chapter 23.2. Chapter 23.2 provides guidance on general adjustment of status issues. This memorandum addresses instances where transferring a section 245 adjustment application (I-485) to a new or subsequent family (I-130) or employment-based immigrant visa petition (I-140) are acceptable. This policy conforms to the practice outlined in Operating Instruction (OI) 245.4(a)(6). Note that OI 245.4(a)(6) is rescinded upon publication of this memorandum, and the Adjudicator's Field Manual is updated at chapter 23.2.

In Chapter 23 of the Adjudicator's Field Manual, a new section 23.2(k) is added to read as follows:

23.2 General Adjustment of Status Issues.

(k) Transferring adjustment applications to new family or employment-based immigrant visa petitions. (1) Background. In November 1991, the Service published regulations implementing the revised petitioning process for employment-based preference immigrants. This action was needed for the Service to be in compliance with the 1990 Immigration Act. See Service regulations at 8 CFR § 204.5(e). These regulations allow for priority date retention for employment-based aliens under the INA § 203(b)(1), (2), and (3) for whom a subsequent employment-based petition is filed, provided that the prior petition was not revoked or denied, and provided that the visa category is current. This principle is also applicable to family-based petitions in situations where a visa number is readily available.

(2) Guidelines. When an adjudications officer is presented with a second family or employment-based visa petition filed after the submission of an adjustment application, the question is: Can the adjustment application, based on an approved immigrant petition (either I-130 or I-140) with a current priority date, be transferred to a subsequent immigrant petition that is approved with a current priority date? In many instances, the answer is yes since the alien continues to be eligible for the immigrant visa, provided the priority date is current at the time the I-485 is transferred. This does not constitute an unfair "bumping up" in the line of petitions to be adjudicated. Exceptions are found in cases involving automatic revocations of employment-based petitions (See 8 CFR § 205.1(a)), fraud, or the denial of the first petition. Officers will also note that a section 245 applicant is not precluded from substituting any other immigration eligibility that may be available such as a special immigrant classification. However, a priority date may not be transferred to another preference category.

While the intent to work for the petitioning employer is a requirement for approval of the I-485, there is no legal requirement that the beneficiary of an approved employment-based visa petition work for the sponsoring employer before receiving permanent residence status. In addition, the transferring of the I-485 adjustment can be in both the Service's and the alien's interest. If the transfer request is credible and justified, the alien is not gaining a benefit that he or she is not eligible for, especially when no change in the visa category is involved. In such cases, by allowing the transfer of adjustment cases to an eligible family or employment-based petition the Service is saving itself time and work.

As with the majority of Service adjudications, requests for transferring section 245 adjustments must be decided on a case-by-case basis to insure that the beneficiary is eligible for the requested transfer. Officers may request additional evidence should questions arise about any aspect of the requested transfer.

Transferring a second approved I-140 to a pending adjustment application is generally available to the beneficiary until the I-485 is finally adjudicated. The decision is final when approved or denied (Form I-291) unless a motion to reopen is granted by the Service. If the I-485 is denied, the beneficiary may file a motion to reopen or reconsider pursuant to 8 CFR 103.5. Such a motion must be filed within 30 days of the date of the denial of the I-485.

CC: HQOPS
CC: HQPDI: Please amend the AFM in the next INSERTS release.