

## § 245.14

scope of review shall be limited to a determination on the alien's eligibility for adjustment of status under section 202 of Public Law 105-100. During such proceedings all parties are prohibited from raising or considering any other issues, including but not limited to issues of admissibility, deportability, removability, and eligibility for any form of relief other than adjustment of status under section 202 of Public Law 105-100. Should the alien fail to appear for such hearing, the immigration judge shall deny the application for adjustment under section 202 of Public Law 105-100.

(2) *Appeal of immigration judge decision.* Once the immigration judge issues his or her decision on the application, either the alien or the Service may appeal the decision to the Board. Such appeal must be filed pursuant to the requirements for appeals to the Board from an immigration judge decision set forth in §§ 3.3 and 3.8 of this chapter.

(3) *Rescission of the decision of an immigration judge.* The decision of an immigration judge under paragraph (n)(1) of this section denying an application for adjustment under section 202 of Public Law 105-100 for failure to appear may be rescinded only:

(i) Upon a motion to reopen filed within 180 days after the date of the denial if the alien demonstrates that the failure to appear was because of exceptional circumstances as defined in section 240(e)(1) of the Act;

(ii) Upon a motion to reopen filed at any time if the alien demonstrates that the alien did not receive notice of the hearing in person (or, if personal service was not practicable, through service by mail to the alien or to the alien's counsel of record, if any) or the alien demonstrates that the alien was in Federal or State custody and the failure to appear was through no fault of the alien; or

(iii) Upon a motion to reopen filed not later than June 19, 2001, by an alien present in the United States who became eligible for adjustment of status under section 202 of Public Law 105-100, as amended by section 1505, Public Law 106-554.

(o) *Transition period provisions for tolling the physical presence in the United States provision for certain individuals—*

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(1) *Departure without advance authorization for parole.* In the case of an otherwise eligible applicant who departed the United States on or before December 31, 1997, the physical presence in the United States provision of section 202(b)(1) of Pub. L. 105-100 is tolled as of November 19, 1997, and until July 20, 1998.

(2) *Departure with advance authorization for parole.* In the case of an alien who departed the United States after having been issued an Authorization for parole of an Alien into the United States (Form I-512), and who returns to the United States in accordance with the conditions of that document, the physical presence in the United States requirement of section 202(b)(1) of Pub. L. 105-100 is tolled while the alien is outside the United States pursuant to the issuance of the Form I-512.

(3) *Request for parole authorization from outside the United States.* In the case of an alien who is outside the United States and submits an application for parole authorization in accordance with paragraph (k)(2) of this section, and such application for parole authorization is granted by the Service, the physical presence in the United States provisions of section 202(b)(1) of Pub. L. 105-100 is tolled from the date the application is received at the Texas Service Center until the alien is paroled into the United States pursuant to the issuance of the Form I-512.

(Approved by the Office of Management and Budget under Control Number 1115-0221)

[63 FR 27829, May 21, 1998, as amended at 65 FR 15854, Mar. 24, 2000; 66 FR 29451, May 31, 2001]

## § 245.14 [Reserved]

## § 245.15 Adjustment of status of certain Haitian nationals under the Haitian Refugee Immigrant Fairness Act of 1998 (HRIFA).

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

*Abandoned* and *abandonment* mean that both parents have, or the sole or surviving parent has, or in the case of a child who has been placed into a guardianship, the child's guardian or guardians have, willfully forsaken all parental or guardianship rights, obligations, and claims to the child, as well

as all control over and possession of the child, without intending to transfer these rights to any specific person(s).

*Guardian* means a person lawfully invested (by order of a competent Federal, State, or local authority) with the power, and charged with the duty, of taking care of, including managing the property, rights, and affairs of, a child.

*Orphan* and *orphaned* refer to the involuntary detachment or severance of a child from his or her parents due to any of the following:

(1) The death or disappearance of, desertion by, or separation or loss from both parents, as those terms are defined in §204.3(b) of this chapter;

(2) The irrevocable and written release of all parental rights by the sole parent, as that term is defined in §204.3(b) of this chapter, based upon the inability of that parent to provide proper care (within the meaning of that phrase in §204.3(b) of this chapter) for the child, provided that at the time of such irrevocable release such parent is legally obligated to provide such care; or

(3) The death or disappearance, as that term is defined in §204.3(b) of this chapter, of one parent and the irrevocable and written release of all parental rights by the sole remaining parent based upon the inability of that parent to provide proper care (within the meaning of that phrase in §204.3(b) of this chapter) for the child, provided that at the time of such irrevocable release such parent is legally obligated to provide such care.

*Parent, father, or mother* means a parent, father, or mother only where the relationship exists by reason of any of the circumstances set forth in paragraphs (A) through (E) of section 101(b)(1) of the Act.

*Sole remaining parent* means a person who is the child's only parent because:

(1) The child's other parent has died; or

(2) The child's other parent has been certified by competent Haitian authorities to be presumed dead as a result of his or her disappearance, within the meaning of that term as set forth in §204.3(b) of this chapter.

(b) *Applicability of provisions of section 902 of HRIFA in general.* Section 902 of Division A of Pub. L. 105-277, the Hai-

tian Refugee Immigrant Fairness Act of 1998 (HRIFA), provides special rules for adjustment of status for certain nationals of Haiti, and without regard to section 241(a)(5) of the Act, if they meet the other requirements of HRIFA.

(1) *Principal applicants.* Section 902(b)(1) of HRIFA defines five categories of principal applicants who may apply for adjustment of status, if the alien was physically present in the United States on December 31, 1995:

(i) An alien who filed for asylum before December 31, 1995;

(ii) An alien who was paroled into the United States prior to December 31, 1995, after having been identified as having a credible fear of persecution, or paroled for emergent reasons or reasons deemed strictly in the public interest; or

(iii) An alien who at the time of arrival in the United States and on December 31, 1995, was unmarried and under 21 years of age and who:

(A) Arrived in the United States without parents in the United States and has remained, without parents, in the United States since his or her arrival;

(B) Became orphaned subsequent to arrival in the United States; or

(C) Was abandoned by parents or guardians prior to April 1, 1998, and has remained abandoned since such abandonment.

(2) *Dependents.* Section 902(d) of HRIFA provides for certain Haitian nationals to apply for adjustment of status as the spouse, child, or unmarried son or daughter of a principal HRIFA beneficiary, even if the individual would not otherwise be eligible for adjustment under section 902. The eligibility requirements for dependents are described further in paragraph (d) of this section.

(c) *Eligibility of principal HRIFA applicants.* A Haitian national who is described in paragraph (b)(1) of this section is eligible to apply for adjustment of status under the provisions of section 902 of HRIFA if the alien meets the following requirements:

(1) *Physical presence.* The alien is physically present in the United States at the time the application is filed;

(2) *Proper application.* The alien properly files an application for adjustment

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of status in accordance with this section, including the evidence described in paragraphs (h), (i), (j), and (k) of this section. For purposes of § 245.15 of this chapter only, an Application to Register Permanent Residence or Adjust Status (Form I-485) submitted by a principal applicant for benefits under HRIFA may be considered to have been properly filed if it:

- (i) Is received not later than March 31, 2000, at the Nebraska Service Center, the Board, or the Immigration Court having jurisdiction;
- (ii) Has been properly completed and signed by the applicant;
- (iii) Identifies the provision of HRIFA under which the applicant is seeking adjustment of status; and
- (iv) Is accompanied by either:
  - (A) The correct fee as specified in § 103.7(b)(1) of this chapter; or
  - (B) A request for a fee waiver in accordance with § 103.7(c) of this chapter, provided such fee waiver request is subsequently granted; however, if such a fee waiver request is subsequently denied and the applicant submits the require fee within 30 days of the date of any notice that the fee waiver request had been denied, the application shall be regarded as having been filed before the statutory deadline. In addition, in a case over which the Board has jurisdiction, an application received by the Board before April 1, 2000, that has been properly signed and executed shall be considered filed before the statutory deadline without payment of the fee or submission of a fee waiver request. Upon remand by the Board, the payment of the fee or a request for a fee waiver shall be made upon submission of the application to the Immigration Court in accordance with 8 CFR 240.11(f). If a request for a fee waiver is denied, the application shall be considered as having been properly filed with the Immigration Court before the statutory deadline provided that the applicant submits the required fee within 30 days of the date of any notice that the fee waiver request has been denied.

(3) *Admissibility.* The alien is not inadmissible to the United States for permanent residence under any provisions of section 212(a) of the Act, except as provided in paragraph (e) of this section; and

(4) *Continuous physical presence.* The alien has been physically present in the United States for a continuous period beginning on December 31, 1995, and ending on the date the application for adjustment is granted, except for the following periods of time:

- (i) Any period or periods of absence from the United States not exceeding 180 days in the aggregate; and
- (ii) Any periods of absence for which the applicant received an Advance Authorization for Parole (Form I-512) prior to his or her departure from the United States, provided the applicant returned to the United States in accordance with the conditions of such Advance Authorization for Parole.
- (iii) Any periods of absence from the United States occurring after October 21, 1998, and before July 12, 1999, provided the applicant departed the United States prior to December 31, 1998.

(d) *Eligibility of dependents of a principal HRIFA beneficiary.* A Haitian national who is the spouse, child, or unmarried son or daughter of a principal beneficiary eligible for adjustment of status under the provisions of HRIFA is eligible to apply for benefits as a dependent, if the dependent alien meets the following requirements:

- (1) *Physical presence.* The alien is physically present in the United States at the time the application is filed;
- (2) *Proper application.* The alien properly files an application for adjustment of status as a dependent in accordance with this section, including the evidence described in paragraphs (h) and (l) of this section;
- (3) *Admissibility.* The alien is not inadmissible to the United States for permanent residence under any provisions of section 212(a) of the Act, except as provided in paragraph (e) of this section;

(4) *Relationship.* The qualifying relationship to the principal alien must have existed at the time the principal was granted adjustment of status and must continue to exist at the time the dependent alien is granted adjustment of status. To establish the qualifying relationship to the principal alien, evidence must be submitted in accordance with § 204.2 of this chapter. Such evidence should consist of the documents

specified in § 204.2(a)(1)(i)(B), (a)(1)(iii)(B), (a)(2), (d)(2), and (d)(5) of this chapter;

(5) *Continuous physical presence.* If the alien is applying as the unmarried son or unmarried daughter of a principal HRIFA beneficiary, he or she must have been physically present in the United States for a continuous period beginning not later than December 31, 1995, and ending on the date the application for adjustment is granted, as provided in paragraphs (c)(4) and (j) of this section.

(e) *Applicability of grounds of inadmissibility contained in section 212(a)—(1) Certain grounds of inadmissibility inapplicable to HRIFA applicants.* Paragraphs (4), (5), (6)(A), (7)(A) and (9)(B) of section 212(a) of the Act are inapplicable to HRIFA principal applicants and their dependents. Accordingly, an applicant for adjustment of status under section 902 of HRIFA need not establish admissibility under those provisions in order to be able to adjust his or her status to that of permanent resident.

(2) *Availability of individual waivers.* If a HRIFA applicant is inadmissible under any of the other provisions of section 212(a) of the Act for which an immigrant waiver is available, the applicant may apply for one or more of the immigrant waivers of inadmissibility under section 212 of the Act, in accordance with § 212.7 of this chapter. In considering an application for waiver under section 212(g) of the Act by an otherwise statutorily eligible applicant for adjustment of status under HRIFA who was paroled into the United States from the U.S. Naval Base at Guantanamo Bay, for the purpose of receiving treatment of an HIV or AIDS condition, the fact that his or her arrival in the United States was the direct result of a government decision to provide such treatment should be viewed as a significant positive factor when weighing discretionary factors. In considering an application for waiver under section 212(i) of the Act by an otherwise statutorily eligible applicant for adjustment of status under HRIFA who used counterfeit documents to travel from Haiti to the United States, the adjudicator shall, when weighing discretionary factors, take into consider-

ation the general lawlessness and corruption which was widespread in Haiti at the time of the alien's departure, the difficulties in obtaining legitimate departure documents at that time, and other factors unique to Haiti at that time which may have induced the alien to commit fraud or make willful misrepresentations.

(3) *Special rule for waiver of inadmissibility grounds for HRIFA applicants under section 212(a)(9)(A) and 212(a)(9)(C) of the Act.* An applicant for adjustment of status under HRIFA who is inadmissible under section 212(a)(9)(A) or 212(a)(9)(C) of the Act, may apply for a waiver of these grounds of inadmissibility while present in the United States. Such an alien must file Form I-601, Application for Waiver of Grounds of Excludability. If the application for adjustment is pending at the Nebraska Service Center, Form I-601 must be filed with the director of that office. If the application for adjustment is pending at a district office, Form I-601 must be filed with the district director having jurisdiction over the application. If the application for adjustment is pending before the immigration court, Form I-601 must be filed with the immigration judge having jurisdiction, or with the Board of Immigration Appeals if the appeal is pending before the Board.

(f) *Time for filing of applications—(1) Applications for HRIFA benefits by a principal HRIFA applicant.* The application period begins on June 11, 1999. To benefit from the provisions of section 902 of HRIFA, an alien who is applying for adjustment as a principal applicant must properly file an application for adjustment of status before April 1, 2000.

(2) *Applications by dependent aliens.* The spouse, minor child, or unmarried son or daughter of an alien who is eligible for adjustment of status as a principal beneficiary under HRIFA may file an application for adjustment of status under this section concurrently with or subsequent to the filing of the application of the principal HRIFA beneficiary. An application filed by a dependent may not be approved prior to approval of the principal's application.

(g) *Jurisdiction for filing of applications—(1) Filing of applications with the*

*Service.* The Service has jurisdiction over all applications for the benefits of section 902 of HRIFA as a principal applicant or as a dependent under this section, except for applications filed by aliens who are in pending immigration proceedings as provided in paragraph (g)(2) of this section. All applications filed with the Service for the benefits of section 902 of HRIFA must be submitted by mail to: USINS Nebraska Service Center, PO Box 87245, Lincoln, NE 68501–7245. After proper filing of the application, the Service will instruct the applicant to appear for fingerprinting as prescribed in §103.2(e) of this chapter. The Director of the Nebraska Service Center shall have jurisdiction over all applications filed with the Service for adjustment of status under section 902 of HRIFA, unless the Director refers the applicant for a personal interview at a local Service office as provided in paragraph (o)(1) of this section.

(2) *Filing of applications by aliens in pending exclusion, deportation, or removal proceedings.* An alien who is in exclusion, deportation, or removal proceedings pending before the Immigration Court or the Board, or who has a pending motion to reopen or motion to reconsider filed with the Immigration Court or the Board on or before May 12, 1999, must apply for HRIFA benefits to the Immigration Court or the Board, as provided in paragraph (p)(1) of this section, rather than to the Service. However, an alien whose proceeding has been administratively closed (see paragraph (p)(4) of this section) may only apply for HRIFA benefits with the Service as provided in paragraph (g)(1) of this section.

(3)(i) *Filing of applications with the Service by aliens who are subject to a final order of exclusion, deportation, or removal.* An alien who is subject to a final order of exclusion, deportation, or removal, and who has not been denied adjustment of status under section 902 of HRIFA by the Immigration Court or the Board, may only apply for HRIFA benefits with the Service as provided in paragraph (g)(1) of this section. This includes applications for HRIFA benefits filed by aliens who have filed a motion to reopen or motion to reconsider a final order after May 12, 1999.

(ii) An alien present in the United States who is subject to a final order of exclusion, deportation, or removal and has been denied adjustment of status under section 902 of HRIFA by the Immigration Court or the Board, or who never applied for adjustment of status with the Service, an Immigration Court, or the Board on or before March 31, 2000, and who was made eligible for HRIFA benefits under the Legal Immigration Family Equity Act of 2000 (LIFE Act) and LIFE amendments, Public Law 106–553 and Public Law 106–554, respectively, may file a motion to reopen with either the Immigration Court or the Board, whichever had jurisdiction last. As provided by the LIFE Act, motions to reopen must be filed on or before June 19, 2001.

(iii) *Stay of final order of exclusion, deportation, or removal.* The filing of an application for adjustment under section 902 of HRIFA with the Service shall not stay the execution of such final order unless the applicant has requested and been granted a stay in connection with the HRIFA application. An alien who has filed a HRIFA application with the Service may file an Application for Stay of Removal (Form I-246) in accordance with section 241(c)(2) of the Act and §241.6 of this chapter.

(iv) *Grant of stay.* Absent evidence of the applicant's statutory ineligibility for adjustment of status under section 902 of HRIFA or significant negative discretionary factors, a Form I-246 filed by a bona fide applicant for adjustment under section 902 of HRIFA shall be approved and the removal of the applicant shall be stayed until such time as the Service has adjudicated the application for adjustment in accordance with this section.

(h) *Application and supporting documents.* Each applicant for adjustment of status must file an Application to Register Permanent Residence or Adjust Status (Form I-485). An applicant should complete Part 2 of Form I-485 by checking box “h—other” and writing “HRIFA—Principal” or “HRIFA—Dependent” next to that block. Each application must be accompanied by:

(1) *Application fee.* The fee for Form I-485 prescribed in §103.7(b)(1) of this chapter;

(2) *Fingerprinting fee.* If the applicant is 14 years of age or older, the fee for fingerprinting prescribed in §103.7(b)(1) of this chapter;

(3) *Identifying information.* (i) A copy of the applicant's birth certificate or other record of birth as provided in paragraph (m) of this section;

(ii) A completed Biographic Information Sheet (Form G-325A), if the applicant is between 14 and 79 years of age;

(iii) A report of medical examination, as specified in §245.5 of this chapter; and

(iv) Two photographs, as described in the instructions to Form I-485;

(4) *Arrival-Departure Record.* A copy of the Form I-94, Arrival-Departure Record, issued at the time of the applicant's arrival in the United States, if the alien was inspected and admitted or paroled;

(5) *Police clearances.* If the applicant is 14 years old or older, a police clearance from each municipality where the alien has resided for 6 months or longer since arriving in the United States. If there are multiple local law enforcement agencies (e.g., city police and county sheriff) with jurisdiction over the alien's residence, the applicant may obtain a clearance from either agency. If the applicant resides or resided in a State where the State police maintain a compilation of all local arrests and convictions, a statewide clearance is sufficient. If the applicant presents a letter from the local police agencies involved, or other evidence, to the effect that the applicant attempted to obtain such clearance but was unable to do so because of local or State policy, the director or immigration judge having jurisdiction over the application may waive the local police clearance. Furthermore, if such local police agency has provided the Service or the Immigration Court with a blanket statement that issuance of such police clearance is against local or State policy, the director or immigration judge having jurisdiction over the case may waive the local police clearance requirement regardless of whether the applicant individually submits a letter from that local police agency;

(6) *Proof of Haitian nationality.* If the applicant acquired Haitian nationality other than through birth in Haiti, a

copy of the certificate of naturalization or certificate of citizenship issued by the Haitian government; and

(7) *Additional supporting evidence.* Additional supporting evidence pertaining to the applicant as provided in paragraphs (i) through (l) of this section.

(i) *Evidence of presence in the United States on December 31, 1995.* An alien seeking HRIFA benefits as a principal applicant must provide with the application evidence establishing the alien's presence in the United States on December 31, 1995. Such evidence may consist of the evidence listed in §245.22.

(j) *Evidence of continuity of presence in the United States since December 31, 1995.* An alien seeking HRIFA benefits as a principal applicant, or as the unmarried son or daughter of a principal applicant, must provide with the application evidence establishing continuity of the alien's physical presence in the United States since December 31, 1995. (This requirement does not apply to a dependent seeking HRIFA benefits as the spouse or minor child of a principal applicant.)

(1) *Evidence establishing presence.* Evidence establishing the continuity of the alien's physical presence in the United States since December 31, 1995, may consist of any documentation issued by any governmental or non-governmental authority, provided such evidence bears the name of the applicant, was dated at the time it was issued, and bears the signature, seal, or other authenticating instrument of the authorized representative of the issuing authority, if the document would normally contain such authenticating instrument.

(2) *Examples.* Documentation establishing continuity of physical presence may include, but is not limited to:

(i) School records;

(ii) Rental receipts;

(iii) Utility bill receipts;

(iv) Any other dated receipts;

(v) Personal checks written by the applicant bearing a dated bank cancellation stamp;

(vi) Employment records, including pay stubs;

(vii) Credit card statements showing the dates of purchase, payment, or other transaction;

(viii) Certified copies of records maintained by organizations chartered by the Federal or State government, such as public utilities, accredited private and religious schools, and banks;

(ix) If the applicant establishes that a family unit was in existence and cohabiting in the United States, documents evidencing presence of another member of that same family unit; and

(x) For applicants who have had ongoing correspondence or other interaction with the Service, a list of the types and dates of such correspondence or other contact that the applicant knows to be contained or reflected in Service records.

(3) *Evidence relating to absences from the United States since December 31, 1995.* If the alien is applying as a principal applicant, or as the unmarried son or daughter of a principal applicant, and has departed from and returned to the United States since December 31, 1995, the alien must provide with the application an attachment on a plain piece of paper showing:

(i) The date of the applicant's last arrival in the United States before December 31, 1995;

(ii) The date of each departure (if any) from the United States since that arrival;

(iii) The reason for each departure; and

(iv) The date, manner, and place of each return to the United States.

(k) *Evidence establishing the alien's eligibility under section 902(b) of HRIFA.* An alien seeking HRIFA benefits as a principal applicant must provide with the application evidence establishing that the alien satisfies one of the eligibility standards described in paragraph (b)(1) of this section.

(l) *Applicant for asylum.* If the alien is a principal applicant who filed for asylum before December 31, 1995, the applicant must provide with the application either:

(i) A photocopy of the first page of the Application for Asylum and Withholding of Removal (Form I-589); or

(ii) If the alien is not in possession of a photocopy of the first page of the Form I-589, a statement to that effect giving the date of filing and the location of the Service office or Immigration Court at which it was filed;

(2) *Parolee.* If the alien is a principal applicant who was paroled into the United States prior to December 31, 1995, after having been identified as having a credible fear of persecution, or paroled for emergent reasons or reasons deemed strictly in the public interest, the applicant must provide with the application either:

(i) A photocopy of the Arrival-Departure Record (Form I-94) issued when he or she was granted parole; or

(ii) If the alien is not in possession of the original Form I-94, a statement to that effect giving the date of parole and the location of the Service port-of-entry at which parole was authorized.

(3) *Child without parents.* If the alien is a principal applicant who arrived in the United States as a child without parents in the United States, the applicant must provide with the application:

(i) Evidence, showing the date, location, and manner of his or her arrival in the United States, such as:

(A) A photocopy of the Form I-94 issued at the time of the alien's arrival in the United States;

(B) A copy of the airline or vessel records showing transportation to the United States;

(C) Other similar documentation; or

(D) If none of the documents in paragraphs (k)(3)(i)(A)-(C) of this section are available, a statement from the applicant, accompanied by whatever evidence the applicant is able to submit in support of that statement; and

(ii) Evidence establishing the absence of the child's parents, which may include either:

(A) Evidence showing the deaths of, or disappearance or desertion by, the applicant's parents; or

(B) Evidence showing that the applicant's parents did not live in the United States with the applicant. Such evidence may include, but is not limited to, documentation or affidavits showing that the applicant's parents have been continuously employed outside the United States, are deceased, disappeared, or abandoned the applicant prior to the applicant's arrival, or were otherwise engaged in activities showing that they were not in the United States, or (if they have been in the United States) that the applicant

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and his or her parents did not reside together.

(4) *Orphaned child.* If the alien is a principal applicant who is or was a child who became orphaned subsequent to arrival in the United States, the applicant must provide with the application:

(i) Evidence, showing the date, location, and manner of his or her arrival in the United States, such as:

(A) A photocopy of the Form I-94 issued at the time of the alien's arrival in the United States;

(B) A copy of the airline or vessel records showing transportation to the United States;

(C) Other similar documentation; or

(D) If none of the documents in paragraphs (k)(4)(i)(A)-(C) of this section are available, a statement from the applicant, accompanied by whatever evidence the applicant is able to submit in support of that statement; and

(ii) Either:

(A) The death certificates of both parents (or in the case of a child having only one parent, the death certificate of the sole parent) showing that the death or deaths occurred after the date of the applicant's arrival in the United States;

(B) Evidence from a State, local, or other court or governmental authority having jurisdiction and authority to make decisions in matters of child welfare establishing the disappearance of, the separation or loss from, or desertion by, both parents (or, in the case of a child born out of wedlock who has not been legitimated, the sole parent); or

(C) Evidence of:

(i) Either:

(i) The child having only a sole parent, as that term is defined in §204.3(b) of this chapter;

(ii) The death of one parent; or

(iii) Certification by competent Haitian authorities that one parent is presumed dead as a result of his or her disappearance, within the meaning of that term as set forth in §204.3(b) of this chapter; and

(2) A copy of a written statement executed by the sole parent, or the sole remaining parent, irrevocably releasing all parental rights based upon the

inability of that parent to provide proper care for the child.

(5) *Abandoned child.* If the alien is a principal applicant who was abandoned by parents or guardians prior to April 1, 1998, and has remained abandoned since such abandonment, the applicant must provide with the application:

(i) Evidence, showing the date, location, and manner of his or her arrival in the United States, such as:

(A) A photocopy of the Form I-94 issued at the time of the alien's arrival in the United States;

(B) A copy of the airline or vessel records showing transportation to the United States;

(C) Other similar documentation; or

(D) If none of the documents in paragraphs (k)(5)(i)(A)-(C) of this section are available, a statement from the applicant, accompanied by whatever evidence the applicant is able to submit in support of that statement; and

(ii) Either:

(A) Evidence from a State, local, or other court or governmental authority having jurisdiction and authority to make decisions in matters of child welfare establishing such abandonment; or

(B) Evidence to establish that the applicant would have been considered to be abandoned according to the laws of the State where he or she resides, or where he or she resided at the time of the abandonment, had the issue been presented to the proper authorities.

(1) *Evidence relating to applications by dependents under section 902(d) of HRIFA*—(1) *Evidence of spousal relationship.* If the alien is applying as the spouse of a principal HRIFA beneficiary, the applicant must provide with the application a copy of their certificate of marriage and copies of documents showing the legal termination of all other marriages by the applicant or the other beneficiary.

(2) *Evidence of parent-child relationship.* If the applicant is applying as the child, unmarried son, or unmarried daughter of a principal HRIFA beneficiary, and the principal beneficiary is not the applicant's biological mother, the applicant must provide with the application evidence to demonstrate the parent-child relationship between the principal beneficiary and the applicant. Such evidence may include copies

of the applicant's parent's marriage certificate and documents showing the legal termination of all other marriages, an adoption decree, or other relevant evidence.

(m) *Secondary evidence.* Except as otherwise provided in this paragraph, if the primary evidence required in this section is unavailable, church or school records, or other secondary evidence pertinent to the facts in issue, may be submitted. If such documents are unavailable, affidavits may be submitted. The applicant may submit as many types of secondary evidence as necessary to establish birth, marriage, or other relevant events. Documentary evidence establishing that primary evidence is unavailable must accompany secondary evidence of birth or marriage in the home country. The unavailability of such documents may be shown by submission of a copy of the written request for a copy of such documents which was sent to the official keeper of the records. In adjudicating the application for adjustment of status under section 902 of HRIFA, the Service or immigration judge shall determine the weight to be given such secondary evidence. Secondary evidence may not be submitted in lieu of the documentation specified in paragraphs (i) or (j) of this section. However, subject to verification by the Service, if the documentation specified in this paragraph or in paragraphs (h)(3)(i), (i), (j), (l)(1), and (l)(2) of this section is already contained in the Service's file relating to the applicant, the applicant may submit an affidavit to that effect in lieu of the actual documentation.

(n) *Authorization to be employed in the United States while the application is pending—(1) Application for employment authorization.* An applicant for adjustment of status under section 902 of HRIFA who wishes to obtain initial or continued employment authorization during the pendency of the adjustment application must file an Application for Employment Authorization (Form I-765) with the Service, including the fee as set forth in §103.7(b)(1) of this chapter. The applicant may submit Form I-765 either concurrently with or subsequent to the filing of the application for HRIFA benefits on Form I-485.

(2) *Adjudication and issuance.* Employment authorization may not be issued to an applicant for adjustment of status under section 902 of HRIFA until the adjustment application has been pending for 180 days, unless the Director of the Nebraska Service Center verifies that Service records contain evidence that the applicant meets the criteria set forth in section 902(b) or 902(d) of HRIFA, and determines that there is no indication that the applicant is clearly ineligible for adjustment of status under section 902 of HRIFA, in which case the Director may approve the application for employment authorization, and issue the resulting document, immediately upon such verification. If the Service fails to adjudicate the application for employment authorization upon expiration of the 180-day waiting period, or within 90 days of the filing of application for employment authorization, whichever comes later, the alien shall be eligible for interim employment authorization in accordance with §274a.13(d) of this chapter. Nothing in this section shall preclude an applicant for adjustment of status under HRIFA from being granted an initial employment authorization or an extension of employment authorization under any other provision of law or regulation for which the alien may be eligible.

(o) *Adjudication of HRIFA applications filed with the Service—(1) Referral for interview.* Except as provided in paragraphs (o)(2) and (o)(3) of this section, all aliens filing applications for adjustment of status with the Service under this section must be personally interviewed by an immigration officer at a local office of the Service. If the Director of the Nebraska Service Center determines that an interview of the applicant is necessary, the Director shall forward the case to the appropriate local Service office for interview and adjudication.

(2) *Approval without interview.* Upon examination of the application, including all other evidence submitted in support of the application, all relevant Service records and all other relevant law enforcement indices, the Director may approve the application without an interview if the Director determines that:

(i) The alien's claim to eligibility for adjustment of status under section 902 of HRIFA is verified through existing Service records; and

(ii) The alien is clearly eligible for adjustment of status.

(3) *Denial without interview.* If, upon examination of the application, all supporting documentation, all relevant Service records, and all other relevant law enforcement indices, the Director determines that the alien is clearly ineligible for adjustment of status under HRIFA and that an interview of the applicant is not necessary, the Director may deny the application.

(p) *Adjudication of HRIFA applications filed in pending exclusion, deportation, or removal proceedings—(1) Proceedings pending before an Immigration Court.* Except as provided in paragraph (p)(4) of this section, the Immigration Court shall have sole jurisdiction over an application for adjustment of status under this section filed by an alien who is in exclusion, deportation, or removal proceedings pending before an immigration judge or the Board, or who has a pending motion to reopen or motion to reconsider filed with an immigration judge or the Board on or before May 12, 1999. The immigration judge having jurisdiction over the exclusion, deportation, or removal proceedings shall have jurisdiction to accept and adjudicate any application for adjustment of status under section 902 of HRIFA during the course of such proceedings. All applications for adjustment of status under section 902 of HRIFA filed with an Immigration Court shall be subject to the requirements of §§ 3.11 and 3.31 of this chapter.

(2) *Motion to reopen or motion to reconsider.* If an alien who has a pending motion to reopen or motion to reconsider timely filed with an immigration judge on or before May 12, 1999, files an application for adjustment of status under section 902 of HRIFA, the immigration judge shall reopen the alien's proceedings for consideration of the adjustment application, unless the alien is clearly ineligible for adjustment of status under section 902 of HRIFA.

(3) *Proceedings pending before the Board.* Except as provided in paragraph (d)(4) of this section, in the case of an alien who either has a pending appeal

with the Board or has a pending motion to reopen or motion to reconsider timely filed with the Board on or before May 12, 1999, the Board shall remand, or reopen and remand, the proceedings to the Immigration Court for the sole purpose of adjudicating an application for adjustment of status under section 902 of HRIFA, unless the alien is clearly ineligible for adjustment of status under section 902 of HRIFA. If the immigration judge denies, or the alien fails to file, the application for adjustment of status under section 902 of HRIFA, the immigration judge shall certify the decision to the Board for consideration in conjunction with the applicant's previously pending appeal or motion.

(4) *Administrative closure of exclusion, deportation, or removal proceedings.* (i) An alien who is in exclusion, deportation, or removal proceedings, or who has a pending motion to reopen or a motion to reconsider such proceedings filed on or before May 12, 1999, may request that the proceedings be administratively closed, or that the motion be indefinitely continued, in order to allow the alien to file such application with the Service as prescribed in paragraph (g) of this section. If the alien appears to be eligible to file an application for adjustment of status under this section, the Immigration Court or the Board (whichever has jurisdiction) shall, with the concurrence of the Service, administratively close the proceedings or continue indefinitely the motion.

(ii) In the case of an otherwise-eligible alien whose exclusion, deportation, or removal proceedings have been administratively closed for reasons not specified in this section, the alien may only apply before the Service for adjustment of status under this section.

(q) *Approval of HRIFA applications—(1) Applications approved by the Service.* If the Service approves the application for adjustment of status under the provisions of section 902 of HRIFA, the director shall record the alien's lawful admission for permanent residence as of the date of such approval and notify the applicant accordingly. The director shall also advise the alien regarding the delivery of his or her Permanent Resident Card and of the process for

obtaining temporary evidence of alien registration. If the alien had previously been issued a final order of exclusion, deportation, or removal, such order shall be deemed canceled as of the date of the director's approval of the application for adjustment of status. If the alien had been in exclusion, deportation, or removal proceedings that were administratively closed, such proceedings shall be deemed terminated as of the date of approval of the application for adjustment of status by the director.

(2) *Applications approved by an immigration judge or the Board.* If an immigration judge or (upon appeal) the Board grants an application for adjustment under the provisions of section 902 of HRIFA, the date of the alien's lawful admission for permanent residence shall be the date of such grant.

(r) *Review of decisions by the Service denying HRIFA applications—(1)(i) Denial notification.* If the Service denies the application for adjustment of status under the provisions of section 902 of HRIFA, the director shall notify the applicant of the decision and of any right to renew the application in proceedings before the Immigration Court.

(ii) An alien made eligible for adjustment of status under HRIFA by the LIFE Act amendments and whose case has not been referred to EOIR under paragraphs (r)(2) or (r)(3) of this section, may file a motion to reopen with the Service.

(2) *Renewal of application for HRIFA benefits in removal, deportation, or exclusion proceedings.* An alien who is not the subject of a final order of removal, deportation, or exclusion may renew his or her application for adjustment under section 902 of HRIFA during the course of such removal, deportation, or exclusion proceedings.

(i) *Initiation of removal proceedings.* In the case of an alien who is not maintaining valid nonimmigrant status and who had not previously been placed in exclusion, deportation, or removal proceedings, the director shall initiate removal proceedings in accordance with § 239.1 of this chapter.

(ii) *Recalendaring or reinstatement of prior proceedings.* In the case of an alien whose previously initiated exclusion, deportation, or removal proceeding had

been administratively closed or continued indefinitely under paragraph (p)(4) of this section, the director shall make a request for recalendaring or reinstatement to the Immigration Court that had administratively closed the proceeding, or the Board, as appropriate, when the application has been denied. The Immigration Court or the Board will then recalendar or reinstate the prior exclusion, deportation, or removal proceeding.

(iii) *Filing of renewed application.* A principal alien may file a renewed application for HRIFA benefits with the Immigration Court either before or after March 31, 2000, if he or she had filed his or her initial application for such benefits with the Service on or before March 31, 2000. A dependent of a principal applicant may file such renewed application with the Immigration Court either before or after March 31, 2000, regardless of when he or she filed his or her initial application for HRIFA benefits with the Service.

(3) *Aliens with final orders.* In the case of an alien who is the subject of an outstanding final order of exclusion, deportation, or removal, the Service shall refer the decision to deny the application by filing a Notice of Certification (Form I-290C) with the Immigration Court that issued the final order for consideration in accordance with paragraph (s) of this section.

(4)(i) An alien whose case has been referred to the Immigration Court under paragraphs (r)(2) or (r)(3) of this section, or who filed an appeal with the Board after his or her application for adjustment of status under section 902 of HRIFA was denied, and whose proceedings are pending, and who is now eligible for adjustment of status under HRIFA as amended by section 1505(b) of the LIFE Act and its amendments, may renew the application for adjustment of status with either the Immigration Court or the Board, whichever has jurisdiction. The application will be adjudicated in accordance with section 1505(b) of the LIFE Act and its amendments.

(ii) An alien present in the United States who is subject to a final order of exclusion, deportation or removal after his or her HRIFA adjustment application was denied by an Immigration

Court or the Board, but who was made eligible for HRIFA adjustment as a result of section 1505(b) of the LIFE Act and its amendments, may file a motion to reopen with either the Immigration Court or the Board, whichever had jurisdiction last. Such motion to reopen must be filed on or before June 19, 2001.

(s) *Action on decisions referred to the Immigration Court by a Notice of Certification (Form I-290C)—(1) General.* Upon the referral by a Notice of Certification (Form I-290C) of a decision to deny the application, in accordance with paragraph (r)(3) of this section, the immigration judge shall conduct a hearing, under the authority contained in § 3.10 of this chapter, to determine whether the alien is eligible for adjustment of status under section 902 of HRIFA. Such hearing shall be conducted under the same rules of procedure as proceedings conducted under part 240 of this chapter, except the scope of review shall be limited to a determination of the alien's eligibility for adjustment of status under section 902 of HRIFA. During such proceedings, all parties are prohibited from raising or considering any unrelated issues, including, but not limited to, issues of admissibility, deportability, removability, and eligibility for any remedy other than adjustment of status under section 902 of HRIFA. Should the alien fail to appear for such hearing, the immigration judge shall deny the application for adjustment under section 902 of HRIFA.

(2) *Stay pending review.* When the Service refers a decision to the Immigration Court on a Notice of Certification (Form I-290C) in accordance with paragraph (r)(3) of this section, the referral shall not stay the execution of the final order. Execution of such final order shall proceed unless a stay of execution is specifically granted by the immigration judge, the Board, or an authorized Service officer.

(3) *Appeal of Immigration Court decision.* Once the immigration judge issues his or her decision on the application, either the alien or the Service may appeal the decision to the Board. Such appeal must be filed pursuant to the requirements for appeals to the Board from an Immigration Court decision set forth in §§ 3.3 and 3.8 of this chapter.

(4) *Rescission or reopening of the decision of an Immigration Court.* The decision of an Immigration Court under paragraph (s)(1) of this section denying an application for adjustment under section 902 of HRIFA for failure to appear may be rescinded or reopened only:

(i) Upon a motion to reopen filed within 180 days after the date of the denial if the alien demonstrates that the failure to appear was because of exceptional circumstances as defined in section 240(e)(1) of the Act;

(ii) Upon a motion to reopen filed at any time if the alien demonstrates that he or she did not receive notice of the hearing in person (or, if personal service was not practicable, through service by mail to the alien or to the alien's counsel of record, if any) or the alien demonstrates that he or she was in Federal or State custody and the failure to appear was through no fault of the alien; or

(iii) Upon a motion to reopen filed not later than June 19, 2001, by an alien present in the United States who became eligible for adjustment of status under HRIFA, as amended by section 1505, of Public Law 106-554.

(t) *Parole authorization for purposes of travel—(1) Travel from and return to the United States while the application for adjustment of status is pending.* If an applicant for benefits under section 902 of HRIFA desires to travel outside, and return to, the United States while the application for adjustment of status is pending, he or she must file a request for advance parole authorization on an Application for Travel Document (Form I-131), with fee as set forth in § 103.7(b)(1) of this chapter and in accordance with the instructions on the form. If the alien is either in deportation or removal proceedings, or subject to a final order of deportation or removal, the Form I-131 must be submitted to the Director, Office of International Affairs; otherwise the Form I-131 must be submitted to the Director of the Nebraska Service Center, who shall have jurisdiction over such applications. Unless the applicant files an advance parole request prior to departing from the United States, and the Service approves such request, his or

her application for adjustment of status under section 902 of HRIFA is deemed to be abandoned as of the moment of his or her departure. Parole may only be authorized pursuant to the authority contained in, and the standards prescribed in, section 212(d)(5) of the Act.

(2) *Parole authorization for the purpose of filing an application for adjustment of status under section 902 of HRIFA.* (i) An otherwise eligible applicant who is outside the United States and wishes to come to the United States in order to apply for benefits under section 902 of HRIFA may request parole authorization for such purpose by filing an Application for Travel Document (Form I-131) with the Nebraska Service Center, at P.O. Box 87245, Lincoln, NE 68501-7245. Such application must be supported by a photocopy of the Form I-485 that the alien will file once he or she has been paroled into the United States. The applicant must include photocopies of all the supporting documentation listed in paragraph (h) of this section, except the filing fee, the medical report, the fingerprint card, and the local police clearances.

(ii) If the Director of the Nebraska Service Center is satisfied that the alien will be eligible for adjustment of status once the alien has been paroled into the United States and files the application, he or she may issue an Authorization for Parole of an Alien into the United States (Form I-512) to allow the alien to travel to, and be paroled into, the United States for a period of 60 days.

(iii) The applicant shall have 60 days from the date of parole to file the application for adjustment of status. If the alien files the application for adjustment of status within that 60-day period, the Service may re-parole the alien for such time as is necessary for adjudication of the application. Failure to file such application for adjustment of status within 60 days shall result in the alien being returned to the custody of the Service and being examined as an arriving alien applying for admission. Such examination will be conducted in accordance with the provisions of section 235(b)(1) of the Act if the alien is inadmissible under section 212(a)(6)(C) or 212(a)(7) of the Act, or

section 240 of the Act if the alien is inadmissible under any other grounds.

(iv) Parole may only be authorized pursuant to the authority contained in, and the standards prescribed in, section 212(d)(5) of the Act. The authority of the Director of the Nebraska Service Center to authorize parole from outside the United States under this provision shall expire on March 31, 2000.

(3) *Effect of departure on an outstanding warrant of exclusion, deportation, or removal.* If an alien who is the subject of an outstanding final order of exclusion, deportation, or removal departs from the United States, with or without an advance parole authorization, such final order shall be executed by the alien's departure. The execution of such final order shall not preclude the applicant from filing an Application for Permission to Reapply for Admission Into the United States After Deportation or Removal (Form I-212) in accordance with §212.2 of this chapter.

(u) *Tolling the physical presence in the United States provision for certain individuals—(1) Departure with advance authorization for parole.* In the case of an alien who departed the United States after having been issued an Authorization for Parole of an Alien into the United States (Form I-512), and who returns to the United States in accordance with the conditions of that document, the physical presence in the United States requirement of section 902(b)(1) of HRIFA is tolled while the alien is outside the United States pursuant to the issuance of the Form I-512.

(2) *Request for parole authorization from outside the United States.* In the case of an alien who is outside the United States and submits an application for parole authorization in accordance with paragraph (t)(2) of this section, and such application for parole authorization is granted by the Service, the physical presence requirement contained in section 902(b)(1) of HRIFA is tolled from the date the application is received at the Nebraska Service Center until the alien is paroled into the United States pursuant to the issuance of the Form I-512.

(3) *Departure without advance authorization for parole.* In the case of an otherwise-eligible applicant who departed

the United States on or before December 31, 1998, the physical presence in the United States provision of section 902(b)(1) of HRIFA is tolled as of October 21, 1998, and until July 12, 1999.

(v) *Judicial review of HRIFA adjustment of status determinations.* Pursuant to the provisions of section 902(f) of HRIFA, there shall be no judicial appeal or review of any administrative determination as to whether the status of an alien should be adjusted under the provisions of section 902 of HRIFA.

[64 FR 25767, May 12, 1999, as amended at 65 FR 15844, Mar. 24, 2000; 66 FR 29452, May 1, 2001; 67 FR 78673, Dec. 26, 2002]

**§ 245.18 How can physicians (with approved Forms I-140) that are serving in medically underserved areas or at a Veterans Affairs facility adjust status?**

(a) *Which physicians are eligible for this benefit?* Any alien physician who has been granted a national interest waiver under § 204.12 of this chapter may submit Form I-485 during the 6-year period following Service approval of a second preference employment-based immigrant visa petition.

(b) *Do alien physicians have special time-related requirements for adjustment?*

(1) Alien physicians who have been granted a national interest waiver under § 204.12 of this chapter must meet all the adjustment of status requirements of this part.

(2) The Service shall not approve an adjustment application filed by an alien physician who obtained a waiver under section 203(b)(2)(B)(ii) of the Act until the alien physician has completed the period of required service established in § 204.12 of this chapter.

(c) *Are the filing procedures and documentary requirements different for these particular alien physicians?* Alien physicians submitting adjustment applications upon approval of an immigrant petition are required to follow the procedures outlined within this part with the following modifications.

(1) Delayed fingerprinting. Fingerprinting, as noted in the Form I-485 instructions, will not be scheduled at the time of filing. Fingerprinting will be scheduled upon the physician's completion of the required years of service.

(2) Delayed medical examination. The required medical examination, as specified in § 245.5, shall not be submitted with Form I-485. The medical examination report shall be submitted with the documentary evidence noting the physician's completion of the required years of service.

(d) *Are alien physicians eligible for Form I-766, Employment Authorization Document?*

(1) Once the Service has approved an alien physician's Form I-140 with a national interest waiver based upon full-time clinical practice in an underserved area or at a Veterans Affairs facility, the alien physician should apply for adjustment of status to that of lawful permanent resident on Form I-485, accompanied by an application for an Employment Authorization Document (EAD), Form I-765, as specified in § 274a.12(c)(9) of this chapter.

(2) Since section 203(b)(2)(B)(ii) of the Act requires the alien physician to complete the required employment before the Service can approve the alien physician's adjustment application, an alien physician who was in lawful non-immigrant status when he or she filed the adjustment application is not required to maintain a nonimmigrant status while the adjustment application remains pending. Even if the alien physician's nonimmigrant status expires, the alien physician shall not be considered to be unlawfully present, so long as the alien physician is practicing medicine in accordance with § 204.5(k)(4)(iii) of this chapter.

(e) *When does the Service begin counting the physician's 5-year or 3-year medical practice requirement?* Except as provided in this paragraph, the 6-year period during which a physician must provide the required 5 years of service begins on the date of the notice approving the Form I-140 and the national interest waiver. Alien physicians who have a 3-year medical practice requirement must complete their service within the 4-year period beginning on that date.

(1) If the physician does not already have employment authorization and so must obtain employment authorization before the physician can begin working, then the period begins on the date