

## Department of Homeland Security

## § 245.21

or parole into the United States after December 31, 1991;

(3) Documentation including, but not limited to, those listed at §245.15(j)(2) to establish physical presence in the United States for at least 1 year after being granted asylum;

(4) If the applicant is the spouse of a principal alien applying for adjustment, he or she must submit a marriage certificate, if available, or other evidence to demonstrate the marriage; and

(5) If the applicant is the child of a principal alien applying for adjustment of status, he or she must submit a birth certificate, if available, or other evidence to demonstrate the relationship.

(f) *Employment authorization.* Applicants who want to obtain employment authorization based on a pending application for adjustment of status under Public Law 106-378 may submit Form I-765, Application for Employment Authorization, along with the application fee listed in §103.7(b)(1) of this chapter. If the Service approves the application for employment authorization, the applicant will be issued an employment authorization document.

(g) *Travel while an application to adjust status is pending.* Applicants who wish to travel abroad and re-enter the United States while an application for adjustment of status is pending without being considered to have abandoned that application must obtain advance parole prior to departing the United States. To obtain advance parole, applicants must file Form I-131, Application for a Travel Document, along with the application fee listed in §103.7(b)(1) of this chapter. If the Service approves Form I-131, the alien will be issued Form I-512, Authorization for the Parole of an Alien into the United States.

(h) *Approval and date of admission as a lawful permanent resident.* When the Service approves an application to adjust status to that of lawful permanent resident based on Public Law 106-378, the applicant will be notified in writing of the Service's decision. In addition, the record of the alien's admission as a lawful permanent resident will be recorded as of the date 1 year before the approval of the application.

(i) *Number of adjustments under Public Law 106-378.* No more than 2,000 aliens may have their status adjusted to that of lawful permanent resident under Public Law 106-378.

(j) *Notice of Denial—(1) General.* When the Service denies an application to adjust status to that of lawful permanent resident based on Public Law 106-378, the applicant will be notified of the decision and the reason for the denial in writing.

(2) *Cases involving requests to change the basis of a pending Form I-485.* If an applicant who requested that a pending Form I-485, be considered under Public Law 106-378, is found to be ineligible under Public Law 106-378, but he or she appears eligible for adjustment under the original section of the Act under which the Form I-485 was filed, the Service will provide the applicant with notice of this fact. Processing the Form I-485 under the original provision of law will resume as appropriate.

(k) *Administrative review.* An alien whose application for adjustment of status under Public Law 106-378 is denied by the Service may not appeal the decision. However, the denial will be without prejudice to the alien's right to renew the application in proceedings under 8 CFR part 240 provided that the 2,000 statutory limit on such adjustments has not yet been reached.

[66 FR 27448, May 17, 2001]

### **§ 245.21 Adjustment of status of certain nationals of Vietnam, Cambodia, and Laos (section 586 of Public Law 106-429).**

(a) *Eligibility.* The Service may adjust the status to that of a lawful permanent resident, a native or citizen of Vietnam, Cambodia, or Laos who:

(1) Was inspected and paroled into the United States before October 1, 1997;

(2) Was paroled into the United States from Vietnam under the auspices of the Orderly Departure Program (ODP), a refugee camp in East Asia, or a displaced person camp administered by the United Nations High Commissioner for Refugees (UNHCR) in Thailand;

(3) Was physically present in the United States prior to and on October 1, 1997;

(4) Files an application for adjustment of status in accordance with paragraph (b) of this section during the 3-year application period; and

(5) Is otherwise eligible to receive an immigrant visa and is otherwise admissible as an immigrant to the United States except as provided in paragraphs (e) and (f) of this section.

(b) *Applying for benefits under section 586 of Public Law 106-429*—(1) *Application period.* The application period lasts from January 27, 2003 until January 25, 2006. The Service will accept applications received after the end of the application period, but only if the 5,000 limit on adjustments has not been reached prior to the end of the three-year application period, and the application bears an official postmark dated on or before the final day of the application period. Postmarks will be evaluated in the following manner:

(i) If the postmark is illegible or missing, the Service will consider the application to be timely filed if it is received on or before 3 business days after the end of the application period.

(ii) In all instances, the burden of proof is on the applicant to establish timely filing of an application.

(2) *Application.* An alien must be physically present in the United States to apply for adjustment of status under section 586 of Public Law 106-429. An applicant must submit Form I-485, Application to Register Permanent Residence or Adjust Status, along with the appropriate application fee contained in §103.7(b)(1) of this chapter. Applicants who are 14 through 79 years of age must also submit the fingerprinting service fee provided for in §103.7(b)(1) of this chapter. Each application filed must be accompanied by evidence establishing eligibility as provided in paragraph (g) of this section; two photographs as described in the Form I-485 instructions; a completed Biographic Information Sheet (Form G-325A) if the applicant is between 14 and 79 years of age; a report of medical examination (Form I-693 and vaccination supplement) specified in §245.5; and, if needed, an application for waiver of inadmissibility. Under Part 2, question h of Form I-485, applicants must write “INDOCHINESE PAROLEE P.L. 106-429”. Applications must be

sent to: INS Nebraska Service Center, P.O. Box 87485, Lincoln NE 68501-7485.

(c) *Applications from aliens in immigration proceedings.* An alien in pending immigration proceedings who believes he or she is eligible for adjustment of status under section 586 of Public Law 106-429 must apply directly to the Service in accordance with paragraph (b) of this section. An immigration judge or the Board of Immigration Appeals may not adjudicate applications for adjustment of status under this section. An alien who is currently in immigration proceedings who alleges eligibility for adjustment of status under section 586 of Public Law 106-429 may contact Service counsel after filing an application to request the consent of the Service to the filing of a joint motion for administrative closure. Unless the Service consents to such a motion, the immigration judge or the Board may not defer or dismiss the proceeding in connection with section 586 of Public Law 106-429.

(d) *Applications from aliens with final orders of removal, deportation, or exclusion.* An alien with a final order of removal, deportation, or exclusion who believes he or she is eligible for adjustment of status under section 586 of Public Law 106-429 must apply directly to the Service in accordance with paragraph (b) of this section.

(1) An application under this section does not automatically stay the order of removal, deportation, or exclusion. An alien who is eligible for adjustment of status under section 586 of Public Law 106-429 may request that the district director with jurisdiction over the alien grant a stay of removal during the pendency of the application. The regulations governing such a request are found at 8 CFR 241.6.

(2) The Service in general will exercise its discretion not to grant a stay of removal, deportation, or exclusion with respect to an alien who is inadmissible on any of the grounds specified in paragraph (m)(3) of this section, unless there is substantial reason to believe that the Service will grant the necessary waivers of inadmissibility.

(3) An immigration judge or the Board may not grant a motion to reopen or stay in connection with an application under this section.

(4) If the Service approves the application, the approval will constitute the automatic re-opening of the alien's immigration proceedings, vacating of the final order of removal, deportation, or exclusion, and termination of the re-opened proceedings.

(e) *Grounds of inadmissibility that do not apply.* In making a determination of whether an applicant is otherwise eligible for admission to the United States for lawful permanent residence under the provisions of section 586 of Public Law 106-429, the grounds of inadmissibility under sections 212(a)(4), (a)(5), (a)(7)(A), and (a)(9) of the Act shall not apply.

(f) *Waiver of grounds of inadmissibility.* In connection with an application for adjustment of status under this section, the alien may apply for a waiver of the grounds of inadmissibility under sections 212(a)(1), (a)(6)(B), (a)(6)(C), (a)(6)(F), (a)(8)(A), (a)(10)(B), and (a)(10)(D) of the Act as provided in section 586(c) of Public Law 106-429, if the alien demonstrates that a waiver is necessary to prevent extreme hardship to the alien, or to the alien's spouse, parent, son or daughter who is a U.S. citizen or an alien lawfully admitted for permanent residence. In addition, the alien may apply for any other waiver of inadmissibility under section 212 of the Act, if eligible. In order to obtain a waiver for any of these grounds, an applicant must submit Form I-601, Application for Waiver of Grounds of Excludability, with the application for adjustment.

(g) *Evidence.* Applicants must submit evidence that demonstrates they are eligible for adjustment of status under section 586 of Public Law 106-429. Such evidence shall include the following:

(1) A birth certificate or other record of birth;

(2) Documentation to establish that the applicant was physically present in the United States on October 1, 1997, under the standards set forth in § 245.22 of this chapter.

(3) A copy of the applicant's Arrival-Departure Record (Form I-94) or other evidence that the alien was inspected or paroled into the United States prior to October 1, 1997, from one of the three programs listed in paragraph (a)(2) of this section. Subject to verification,

documentation pertaining to paragraph (a)(2) of this section is already contained in Service files and the applicant may submit an affidavit to that effect in lieu of actual documentation.

(h) *Employment authorization.* Applicants who want to obtain employment authorization based on a pending application for adjustment of status under this section may submit Form I-765, Application for Employment Authorization, along with the application fee listed in 8 CFR 103.7(b)(1). If the Service approves the application for employment authorization, the applicant will be issued an employment authorization document.

(i) *Travel while an application to adjust status is pending.* An alien may travel abroad while an application to adjust status is pending. Applicants must obtain advance parole in order to avoid the abandonment of their application to adjust status. An applicant may obtain advance parole by filing Form I-131, Application for a Travel Document, along with the application fee listed in 8 CFR 103.7(b)(1). If the Service approves Form I-131, the alien will be issued Form I-512, Authorization for the Parole of an Alien into the United States. Aliens granted advance parole will still be subject to inspection at a port-of-entry.

(j) *Approval and date of admission as a lawful permanent resident.* When the Service approves an application to adjust status to that of lawful permanent resident based on section 586 of Public Law 106-429, the applicant will be notified in writing of the Service's decision. In addition, the record of the alien's admission as a lawful permanent resident will be recorded as of the date of the alien's inspection and parole into the United States, as described in paragraph (a)(1) of this section.

(k) *Notice of denial.* When the Service denies an application to adjust status to that of lawful permanent resident based on section 586 of Public Law 106-429, the applicant will be notified of the decision in writing.

(l) *Administrative review.* An alien whose application for adjustment of status under section 586 of Public Law 106-429 is denied by the Service may appeal the decision to the Administrative

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Appeals Office in accordance with 8 CFR 103.3(a)(2).

(m) *Number of adjustments permitted under this section*—(1) *Limit*. No more than 5,000 aliens may have their status adjusted to that of a lawful permanent resident under section 586 of Public Law 106–429.

(2) *Counting procedures*. Each alien granted adjustment of status under this section will count towards the 5,000 limit. The Service will assign a tracking number, ascending chronologically by filing date, to all applications properly filed in accordance with paragraphs (b) and (g) of this section. Except as described in paragraph (m)(3) of this section, the Service will adjudicate applications in that order until it reaches 5,000 approvals under this part. Applications initially denied but pending on administrative appeal will retain their place in the queue by virtue of their tracking number, pending the Service’s adjudication of the appeal.

(3) *Applications submitted with a request for the waiver of a ground of inadmissibility*. In the discretion of the Service, applications that do not require adjudication of a waiver of inadmissibility under section 212(a)(2), (a)(6)(B), (a)(6)(F), (a)(8)(A), or (a)(10)(D) of the Act may be approved and assigned numbers within the 5,000 limit before those applications that do require a waiver of inadmissibility under any of those provisions. Applications requiring a waiver of any of those provisions will be assigned a tracking number chronologically by the date of approval of the necessary waivers rather than the date of filing of the application.

(4) *Procedures when the 5,000 limit is reached*. The Service will track the total number of adjustments and stop processing applications after the 5,000 limit has been reached. When the limit is reached, the Service will return any additional applications to applicants with a dated notice encouraging applicants to retain their application package and the notice in the event the 5,000 limit is expanded or eliminated and the alien wishes to apply again. The Service will keep an identifying chronological record of the application for purposes of processing applications

under this section if the 5,000 limit subsequently is expanded or eliminated. If at the time the 5,000 limit is reached, it appears that Congress is about to pass legislation to expand or eliminate the cap, the Service retains the discretion to retain such applications and the related fees.

[67 FR 78673, Dec. 26, 2002]

### § 245.22 Evidence to demonstrate an alien’s physical presence in the United States on a specific date.

(a) *Evidence*. Generally, an alien who is required to demonstrate his or her physical presence in the United States on a specific date in connection with an application to adjust status to that of an alien lawfully admitted for permanent residence should submit evidence according to this section. In cases where a more specific regulation relating to a particular adjustment of status provision has been issued in the 8 CFR, such regulation is controlling to the extent that it conflicts with this section.

(b) *The number of documents*. If no one document establishes the alien’s physical presence on the required date, he or she may submit several documents establishing his or her physical presence in the United States prior to and after that date.

(c) *Service-issued documentation*. To demonstrate physical presence on a specific date, the alien may submit Service-issued documentation. Examples of acceptable Service documentation include, but are not limited to, photocopies of:

(1) Form I-94, Arrival-Departure Record, issued upon the alien’s arrival in the United States;

(2) Form I-862, Notice to Appear, issued by the Service on or before the required date;

(3) Form I-122, Notice to Applicant for Admission Detained for Hearing before Immigration Judge, issued by the Service on or prior to the required date, placing the applicant in exclusion proceedings under section 236 of the Act (as in effect prior to April 1, 1997);

(4) Form I-221, Order to Show Cause, issued by the Service on or prior to the required date, placing the applicant in deportation proceedings under section 242 or 242A (redesignated as section 238)