U.S. Department of Justice
Immigration and Naturalization Service

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Immigration Services Division

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Washington, DC 20536

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MEMORANDUM FOR REGIONAL DIRECTORS
SERVICE CENTER DIRECTORS

FROM: William R. Yates
Deputy Executive Associate Commissioner
Immigration Services Division

SUBJECT: Procedures for concurrently filed family-based or employment-based Form I-485 when the underlying visa petition is denied.

Summary

On July 31, 2002, the Service amended the regulations at 8 CFR 245.2(1)(i) to provide for the concurrent filing of an employment-based visa petition and an application for adjustment of status when approval of the petition would make a visa immediately available to the beneficiary. *See 67 FR 49561.* The new regulations state that an alien may submit a visa petition and an application for adjustment of status at the same time if approval of the underlying visa petition would result in the immediate availability of a visa number. Previously, only immediate relatives and family-based preference cases where the immigrant visa was immediately available could concurrently file a visa petition and an adjustment application. The interim regulation expanded this provision to include employment-based preference categories.

This memorandum instructs Service adjudicators to deny the adjustment application (Form I-485) where the concurrently filed underlying petition (family-based or employment-based) is denied. In these cases, Service adjudicators should also deny the related applications for employment authorization (Form I-765) and advance parole (Form I-131). If the decision to deny the visa petition is later overturned upon appeal, the Service may motion to reopen any related Forms I-485, I-765, and I-131 at that time.

Regulations

The July 31, 2002 interim regulations amending 8 CFR 245.2(a) read as follows (relevant part underlined):

> (i) Under section 245. (A) An immigrant visa must be immediately available in order for an alien to properly file an adjustment application under section 245 of the Act. See § 245.1(g)(1) to determine whether an immigrant visa is immediately available.
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> (B) If, at the time of filing, approval of a visa petition filed for classification under section 201(b)(2)(A)(i), section 203(a) or section 203(b)(1), (2) or (3) of the Act would make a visa immediately available to the alien beneficiary, the alien beneficiary's adjustment application will be considered properly filed whether submitted concurrently with or subsequent to the visa petition, provided that it meets the filing requirements contained in parts 103 and 245. For any other classification, the alien beneficiary may file the adjustment application only after the Service has approved the visa petition.
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> (C) A visa petition and an adjustment application are concurrently filed only if:
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> (1) The visa petitioner and adjustment applicant each file their respective form at the same time, bundled together within a single mailer or delivery packet, with the proper filing fees on the same day and at the same Service office, or;
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> (2) The visa petitioner filed the visa petition, for which a visa number has become immediately available, on, before or after July 31, 2002, and the adjustment applicant files the adjustment application, together with the proper filing fee and a copy of the Form I-797, Notice of Action, establishing the receipt and acceptance by the Service of the underlying Form I-140 visa petition, at the same Service office at which the visa petitioner filed the visa petition, or;
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> (3) The visa petitioner filed the visa petition, for which a visa number has become immediately available, on, before, or after July 31, 2002, and the adjustment applicant files the adjustment application, together with proof of payment of the filing fee with the Service and a copy of the Form I-797 Notice of Action establishing the receipt and acceptance by the Service of the underlying I-140 visa petition, with the Immigration Court or the Board of Immigration Appeals when jurisdiction lies under Section 8 C.F.R. Section 245.2(a)(1).

Policy Guidance

In addition to expanding concurrent filing to include employment-based preference categories, the amended section 245.2(a)(1)(i) also provides that when a qualifying visa petition and an application for adjustment of status are concurrently filed, the application for adjustment of status is considered properly filed as long as it meets the other criteria of 8 CFR 103 and 245.

Previous regulations precluded proper filing of a preference category-based adjustment application unless the underlying visa petition has been approved and has a current priority date. Since the regulations now permit the concurrent filing of an application for adjustment of status and an underlying visa petition that has a current priority date, such an application for adjustment is now considered properly filed. However, if the visa petition is subsequently denied, the Service cannot consider the adjustment application as having been improperly filed as it did under previous regulations. Therefore, Service adjudicators should also deny the concurrently filed Form I-485 when the underlying visa petition is denied because the applicant has lost the claim to adjustment of status. In conjunction with the denial of the underlying petition

and the Form I-485 adjustment application, Service adjudicators should also deny any application for employment authorization (Form I-765) or advance parole (Form I-131) that is based on the application for adjustment of status. If the decision to deny the visa petition is later overturned upon appeal, the Service may motion to reopen and reconsider the associated Forms I-485, I-765, and I-131 at that time.

Questions

Service personnel with operational questions about this memorandum should go through appropriate supervisory channels to contact the HQ Immigration Services Division (Danielle Lee for Service Centers/Kathy Dominguez for District Offices). For policy questions, contact the HQ Office of Adjudications (Morrie Berez for employment-based petitions/Michael Valverde for general adjustment of status issues).