

FEDERAL REGISTER

Vol. 67, No. 147

Rules and Regulations

DEPARTMENT OF JUSTICE (DOJ)

Immigration and Naturalization Service (INS)

8 CFR Parts 204, 245 and 299

[INS No. 2104-00]

RIN 1115-AGOO

Allowing in Certain Circumstances for the Filing of Form I-140 Visa Petition Concurrently
With a Form I-485 Application

67 FR 49561

DATE: Wednesday, July 31, 2002

ACTION: Interim rule with request for comments.

SUMMARY: The current Immigration and Naturalization Service (Service) regulations provide that an alien worker who wants to apply for permanent resident by filing the appropriate Form I-485, Application to Register Permanent Residence or Adjust Status, cannot do so until he or she obtains approval of the underlying petition, Form I-140, Immigrant Petition for Alien Worker. This procedure has resulted in an unnecessary delay for certain alien workers. This interim rule amends the Service's regulations by allowing the Form I-485 to be filed concurrently when a visa is immediately available, thereby improving the efficiency of the process as well as customer service. This interim rule also provides that, if an employment-based visa petition is pending on July 31, 2002, the alien beneficiary may obtain the benefits of concurrent filing, but only if the alien beneficiary files the Form I-485, together with the applicable fee and a copy of their Form I-797, Notice of Action, establishing previous receipt and acceptance by the Service of the underlying Form I-140 visa petition. Further, this interim rule will allow the alien worker to apply for employment authorization using Form I-765, Application for Employment Authorization, and for advance parole authorization using Form I-131, Application for Travel Document, while the Form I-485 is pending.

DATES: Effective date: This interim rule is effective July 31, 2002.

Comment date: Written comments must be submitted on or before September 30, 2002.

ADDRESSES: Please submit written comments to the Director, Policy Directives and Instructions Branch, Immigration and Naturalization Service, 425 I Street, NW., Room 4034, Washington, DC 20536. To ensure proper handling, please reference INS No. 2104-00 on your correspondence. You may also submit comments electronically to the Service at insregs@usdoj.gov. When submitting comments electronically please include the INS No. 2104-00 in the subject box. Comments are available for public inspection at the above address by calling (202) 514-3291 to arrange for an appointment. I0FOR
FURTHER INFORMATION CONTACT: Morrie Berez, Assistant Director, Business and Trade Services Branch, Immigration and Naturalization Service, 425 I Street NW., Room 3214, Washington, DC 20536, telephone (202) 353-8177.

SUPPLEMENTARY INFORMATION:

Why Is the Service Issuing This Rule?

This interim rule is necessary to improve both efficiency and customer service, and to support the Service's long-established goals for filing of petitions and applications via direct mail. Current regulations at § 204.5(n), § 245.1(g) and § 245.2(a)(2) state that an alien can only submit Form I-485 after the alien has had his or her underlying visa petition, Form I-140, approved, and when an immigrant visa is immediately available. Due to these requirements there has been a delay from the time the Form I-140 is filed with the Service until the alien worker, for whom a visa is otherwise immediately available, can properly file Form I-485 with the Service.

The most practical and efficient way to eliminate this delay is to permit concurrent filing of Form I-485 together with Form I-140 in cases in which a visa is immediately available. Concurrent filing eliminates the delay that takes place between approval of Form I-140 and the subsequent filing of Form I-485. This interim rule provides for such concurrent filing.

Does This Interim Rule Change or Amend the Substantive Eligibility Requirements for the Visa Petition or Permanent Residence Applications?

No, this interim rule does not change the current substantive requirements governing eligibility for and adjudication of the Form I-140 nor for the Form I-485.

Who Is Eligible To File Forms I-140 and I-485 Concurrently?

Forms I-140 and I-485 may be filed concurrently only when an immigrant visa number is immediately available. This interim rule does not change the existing requirement that a visa number must be immediately available before an alien can apply for permanent resident status. This interim rule simply applies to aliens who are classifiable under sections 203(b)(1), (2), and (3), of the Immigration and Nationality Act, allowing them to file the Forms I-140 and I-485 at the same time, but only when a visa is immediately available.

If a Form I-140 Visa Petition Previously Filed for an Alien Worker Is Still Pending With the Service on or After the Date This Rule Is Published, and a Visa Number Is Immediately Available, Can the Alien File Form I-485?

Yes, upon issuance of this rule, an alien whose Form I-140 visa petition is pending with the Service may file Form I-485, together with associated forms and fees, with the Service office at which the visa petition was filed. When filing Form I-485, the alien will be required to attach a copy of the Form I-797, Notice of Action, establishing previous receipt and acceptance by the Service of the underlying Form I-140 visa petition. When an immigrant visa is immediately available, Form I-485 may be filed either concurrently with the Form I-140 or anytime thereafter.

If a Visa Number Was Not Immediately Available at the Time a Form I-140 Visa Petition Was Filed, and Then a Visa Number Becomes Available, Can the Alien File Form I-485?

Yes, upon issuance of this rule, if a visa number becomes immediately available since filing of the underlying Form I-140, the alien may then file [*49562] Form I-485, together with associated forms and appropriate fees, with the Service office at which the visa petition was filed. When filing Form I-485, the alien will be required to attach a copy of the Form I-797, Notice of Action, establishing previous receipt and acceptance by the Service of the underlying Form I-140 visa petition.

If the Alien Is in Deportation or Removal Proceedings, Does the Alien File the Form I-485 Under This Section With the Service or With the Immigration Court or Board of Immigration Appeals (Board)?

For aliens in deportation or removal proceedings, 8 CFR 245.2(a)(2) establishes "applications shall be made and considered only in those proceedings." If the alien is before the Immigration Court, the Form I-485, associated documents and proof of payment of the fees must be filed with the Immigration Court. If the alien has an appeal pending before the Board, the Form I-485, associated documents and proof of payment of the fees must be filed with the Board. The fees must first be paid to, and receipt obtained from, the Service.

If the Alien Files the Form I-485 and Associated Documents With the Immigration Court or the Board After Paying the Proper Fees to the Service, Does Such a Filing Stop or Stay Deportation or Removal Proceedings?

No. The filing of an adjustment action where the underlying visa petition is not current does not by itself stop or stay (suspend) the proceedings. The Board will only accept the filing of the Form I-485 for placement into the Record of Proceedings (ROP). This filing is not a motion to reopen, motion to reconsider, or any other motion beyond a request to include the adjustment application in the file. Furthermore, accepting the application and placing it in the ROP is not a reopening or reconsidering of the case, nor any other action pertaining to the case. If the underlying petition for the alien is approved and a visa is or becomes immediately available, the alien must affirmatively move the Immigration Court or the Board of Immigration Appeals to consider the application for adjudication, or remand the application to the Service for adjudication if the Service concurs in the remand.

Besides Eliminating the Delay for Filing Form I-485, How Else Will These Regulatory Amendments Benefit Aliens?

These amendments will allow the Service to issue Employment Authorization Documentation (EAD) and advance parole authorization (which allows the alien to travel outside of the United States temporarily while his or her Form I-485 is pending with the Service) to certain alien workers within substantially less time than at present. In being able to apply for employment authorization and advance parole, the alien may avoid the adverse consequences of accrual of unlawful presence. To achieve the desired efficiency improvement in the Service's processing, only aliens who have filed a Form I-140 for which a visa number is immediately available and Form I-485 will qualify for these benefits. Therefore, as a result of this interim rule, an eligible beneficiary of a Form I-140 visa petition for whom a visa is immediately available will no longer need to wait for approval of the underlying Form I-140 before eligible to apply for these benefits.

How Does This Interim Rule Affect the September 6, 2000, Interim Rule Relating to National Interest Job Offer Waivers for Physicians?

On September 6, 2000, the Service published in the Federal Register at 64 FR 53889 an interim rule relating to national interest job offer waivers for physicians. Under 8 CFR 245.18(f) of that interim rule, when a physician files for adjustment of status the Service is required to give a physician notice of specific requirements relating to the adjustment

of the physician's status. This interim rule concerning concurrent filing of Forms I-140 and I-485 requires one conforming amendment to 8 CFR 245.18(f). If the physician filed the Form I-485 concurrently with the Form I-140, the Service will give the required notice upon approval of the Form I-140, rather than upon receipt of the Form I-485. If the physician waits to subsequently file the Form I-485 while the previously filed Form I-140 is still pending, then the Service will give the required notice upon approval of the Form I-140. If the physician files the Form I-485 after the Form I-140 is approved, then the Service will give the required notice upon receipt of the Form I-485.

Good Cause Exception

The Service's implementation of this rule as an interim rule, with provision for post-promulgation public comment, is based upon the "good cause" exception found at 5 U.S.C. 553(b)(B) and (d)(1). This rule relieves the current restriction that bars the filing of an application for permanent residence (Form I-485) until after the underlying visa petition (Form I-140) has been approved. This rule is intended to provide efficiency and fairness to applicants. It is therefore impractical, unnecessary, and contrary to the public interest to publish this rule with the prior notice and comment period normally required under 5 U.S.C. 553(b).

PART 204--IMMIGRANT PETITIONS

1. The authority citation for part 204 continues to read as follows:

Authority: 8 U.S.C. 1101, 1103, 1151, 1153, 1154, 1182, 1186a, 1255, 1641; 8 CFR part 2.

2. Section 204.5 is amended by revising paragraph (n)(1) to read as follows:

§ 204.5 -- Petitions for employment-based immigrants.

* * * * *

(n) * * *

(1) Approval. An approved employment-based petition will be forwarded to the National Visa Center of the Department of State if the beneficiary resides outside of the United States. If the Form I-140 petition indicates that the alien has filed or will file an application for adjustment to permanent residence in the United States (Form I-485) the approved visa petition (Form I-140), will be retained by the Service for consideration with the application for permanent residence (Form I-485). If a visa is available, and Form I-485 has not been filed, the alien will be instructed on the Form I-797, Notice of Action, (mailed out upon approval of the Form I-140 petition) to file the Form I-485.

PART 245--ADJUSTMENT OF STATUS TO THAT OF PERSON ADMITTED FOR PERMANENT RESIDENCE

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

Authority: 8 U.S.C. 1101, 1103, 1182, 1255; sec. 202, Pub. L. 105-100, 111 Stat. 2160, 2193; sec. 902, Pub. L. 105-277, 112 Stat. 2681; 8 CFR part 2.

4. Section 245.1 is amended by revising the third sentence in paragraph (g)(1) to read as follows:

§ 245.1 -- Eligibility.

* * * * *

(g) * * *

(1) * * * An immigrant visa is considered available for accepting and processing the application Form I-485 is the preference category applicant has a priority date on the waiting list which is earlier than the date shown in the Bulletin (or the Bulletin shows that numbers for visa applicants in his or her category are current). * * *

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5. Section 245.2 is amended by revising paragraph (a)(2)(i), to read as follows:

§ 245. -- Application.

(a) * * *

(2) * * *

(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.

(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.

(C) A visa petition and an adjustment application are concurrently filed only if:

(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;

(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;

(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 Form I-140 visa petition, with the Immigration Court or the Board of Immigration Appeals when jurisdiction lies under paragraph (a)(1) of this section.

* * * * *

6. Section 245.18 is amended by revising paragraph (f) introductory text to read as follows:

§ 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?

* * * * *

(f) Will the Service provide information to the physician about evidence and supplemental filings? The Service shall provide the physician with the information and the projected timetables for completing the adjustment process, as described in this paragraph. If the physician either files the Form I-485 concurrently with or waits to subsequently file the Form I-485 while the previously filed Form I-140 is still pending, then the Service will given this information upon approval of the Form I-140. If the physician does not file the adjustment application until after approval of the Form I-140

visa petition, the Service shall provide this information upon receipt of the Form I-485 adjustment application.

* * * * * [*49564]

PART 299--IMMIGRATION FORMS

7. The authority citation for part 299 continues to read as follows:

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

8. Section 299.1 is amended in the table by revising the entry for Form I-140, to read as follows:

Dated: July 5, 2002.

James W. Ziglar,

Commissioner, Immigration and Naturalization Service.

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