U.S. Department of Homeland Security
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U.S. Citizenship and Immigration Services

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Interoffice Memorandum

To: Regional Directors
Service Center Directors
District Directors
National Benefits Center Director
Associate Director, National Security and Records Verification

From: Michael L. Aytes /s/
Associate Director, Domestic Operations

Date: January 12, 2007

Re: Eligibility of Arriving Aliens in Removal Proceedings to Apply for Adjustment of Status and Jurisdiction to Adjudicate Applications for Adjustment of Status

Revisions to *Adjudicator's Field Manual* (*AFM*) Chapter 23.2(b)
(AFM Update AD06-34)

1. Purpose

On May 12, 2006, the Department of Homeland Security (DHS) issued an interim rule (71 FR 27585), which allows paroled arriving aliens in removal proceedings to apply for adjustment of status to lawful permanent resident. This memorandum provides guidance on United States Citizenship and Immigration Services (USCIS) jurisdiction and eligibility considerations pertaining to arriving aliens in removal proceedings who seek to adjust status to lawful permanent resident.

2. Background

The regulations at 8 CFR 245.1(c)(8) and 1245.1(c)(8), which prohibited a paroled arriving alien in removal proceedings from adjusting status to lawful permanent resident, have been the subject of litigation in recent years and have resulted in inter-circuit conflict. The United States Courts of Appeals for the 1st, 9th, and 11th Circuits have held that the regulations, as applied to paroled aliens, are impermissible in view of the statutory language at section 245(a) of the Act, allowing for an application for discretionary adjustment of status by any alien who was ``inspected and admitted or paroled." The United States Courts of Appeals for the 5th and 8th

Circuits, on the other hand, have held that the regulations constituted a valid exercise of DHS' and the Department of Justice's (DOJ) respective discretionary authority to grant or deny adjustment of status. Given the uncertainty of controlling judicial precedent and concern for inconsistent application of adjustment of status laws, DHS and DOJ have undertaken to resolve the conflict through the above mentioned new regulation by removing the adjustment of status prohibition against arriving aliens in removal proceedings.

3. Field Guidance

The adjudicator is directed to comply with the following guidance and instructions.

A. Jurisdiction: Amendment of 8 CFR 245.2(a)(1)

In general, adjustment of status applications filed by arriving aliens who have been paroled and placed in removal proceedings will be adjudicated only by USCIS. One narrow exception exists for an alien who leaves the United States while his or her adjustment of status application is pending with USCIS, returns under a grant of advance parole, is denied adjustment of status by USCIS, and is later placed in removal proceedings. In this instance, the immigration judge would have jurisdiction to adjudicate such alien's renewed adjustment of status application.

B. Eligibility Considerations for Adjustment of Status

A paroled arriving alien in removal proceedings must satisfy all applicable eligibility requirements before being granted lawful permanent residence. The following eligibility considerations may particularly affect paroled arriving aliens in removal proceedings who apply for adjustment of status under section 245 of the Act.

A paroled arriving alien in removal proceedings, unless otherwise exempt, may be barred by section 245(c) of the Act. To illustrate, with the exception of an immediate relative or other designated immigrant, sections 245(c)(2) and (c)(8) of the Act bar any alien, including a paroled arriving alien, from adjusting status if the alien has ever been employed in the United States without authorization or has ever violated or failed to maintain lawful status under the Act, even on previous visits to the United States.[1] Section 245(c)(7) of the Act completely bars a paroled arriving alien from adjusting status on the basis of an employment-based immigrant visa petition under section 203(b) of the Act, because a parolee is not in a "lawful nonimmigrant status."[2] If a paroled arriving alien in removal proceedings is barred from applying for adjustment of status by section 245(c) of the Act, the alien may be eligible for adjustment of status under section 245(i) of the Act. The arriving alien, in this circumstance, would need to meet all of the 245(i) eligibility requirements contained in 8 CFR 245.10.

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[1] See 8 CFR 245.1(b)(4) and (b)(10).

[2] See 8 CFR 245.1(b)(9).

Furthermore, if a paroled arriving alien in removal proceedings is seeking to adjust status based upon a marriage that occurred on or after November 10, 1986, and while the alien was in exclusion, deportation, or removal proceedings, or judicial proceedings, the alien must submit clear and convincing evidence of the bona fides of the marriage. Otherwise, the alien is ineligible to adjust status in accordance with 8 CFR 245.1(c)(8).[3]

Finally, not all aliens who are subject to a final removal order are inadmissible to the United States. An alien may be eligible for a waiver or consent to reapply notwithstanding the removal order. The removal order, itself, does not make the alien inadmissible until it is executed.

4. Adjudicator's Field Manual (AFM) Update

The *Adjudicator's Field Manual* is updated accordingly.

☞ 1. Section (b) of subchapter 23.2, "General Adjustment of Status Issues," is revised as follows:

(b) Jurisdiction. Generally, the U.S. Citizenship and Immigration Services (USCIS) District Director having jurisdiction over an alien's place of residence in the U.S. has jurisdiction over any application for adjustment of status unless the immigration judge has jurisdiction to adjudicate the application under **8 CFR 1245.2(a)(1)**.

In the case of any alien, other than an arriving alien, who has been placed in deportation proceedings or in removal proceedings, the immigration judge hearing the proceeding has exclusive jurisdiction to adjudicate any application for adjustment of status the alien may file. USCIS may adjudicate an adjustment of status application filed by an alien, other than an arriving alien, who is in removal proceedings only if the immigration judge terminates the removal proceedings.

In the case of an arriving alien who is placed in removal proceedings, USCIS has jurisdiction to adjudicate any application for adjustment of status filed by the arriving alien. An immigration judge does not have jurisdiction over an arriving alien's adjustment application unless:

- The alien properly filed the application for adjustment of status with USCIS while the arriving alien was in the United States;
- The alien departed from and returned to the United States pursuant to the terms of a grant of advance parole to pursue the previously filed application for adjustment of status;
- The application for adjustment of status was denied by USCIS; and

[3] See section 245(e) of the Act.

- The Department of Homeland Security (DHS) placed the arriving alien in removal proceedings either upon the arriving alien's return to the United States pursuant to the grant of advance parole or after USCIS denied the application.

USCIS district offices will also generally complete and conduct closing actions on adjustment of status applications that have been decided by the immigration judge, such as issuance of the Form I-551, Permanent Resident Card, or other temporary evidence of LPR status.

Some precedent decisions which relate to issues of jurisdiction are:

- ***Matter of Manneh***, 16 I. & N. Dec. 272 (BIA, 1977). An immigration judge does not have the authority to entertain an application for adjustment of status under section 245 of the Immigration and Nationality Act in exclusion proceedings.

  NOTE: This case is now superseded by 8 CFR 245.2(a)(1) and 1245.2(a)(1), but the principle remains the same: Except as provided in these current regulations, the immigration judge lacks jurisdiction of an arriving alien's adjustment of status application.

- ***Matter of Palmieri***, 10 I. & N. Dec. 187 (BIA, 1963). A section 245 application cannot be adjudicated *nunc pro tunc* as of a time when a visa number was available.

- ***Matter of Hernandez-Puente***, 20 I. & N. Dec. 335 (BIA, 1991). The Service has no authority to grant an application for adjustment of status *nunc pro tunc* ("now for then") under section 245 of the Act.

☞ 2. The *AFM* **Transmittal Memoranda** button is revised by adding a new entry, in numerical order, to read:

AD 06-34 [January 12, 2007]	**Subchapter 23.2**	This memorandum revises **Subchapter 23.2(b)** of the *Adjudicator's Field Manual* (*AFM*).

5. Use

This memorandum is intended solely for the training and guidance of USCIS personnel in performing their duties relative to the adjudication of applications for adjustment of status. It is not intended to, does not, and may not be relied upon to create any right or benefit, substantive or procedural, enforceable at law of by any individual or other party in removal proceedings, in litigation with the United States, or in any other form or manner.

6. Contact Information

Questions regarding this memorandum and USCIS policy regarding paroled arriving aliens in removal proceedings and adjustment of status may be directed to Mark Phillips, USCIS Domestic Operations Directorate, through appropriate supervisory channels.