Proposed Rules

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This section of the FEDERAL REGISTER contains notices to the public of the proposed issuance of rules and regulations. The purpose of these notices is to give interested persons an opportunity to participate in the rule making prior to the adoption of the final rules.

DEPARTMENT OF JUSTICE

Immigration and Naturalization Service

8 CFR Part 245

[INS No. 1353–91; AG Order No. 2047–96]

RIN 1115–AC70

Adjustment of Status to That of Person Admitted for Permanent Residence: Conditional Residents and Fiancé(e)s

AGENCY: Immigration and Naturalization Service, Justice.

ACTION: Proposed rule.

SUMMARY: This proposed rule would clarify that an alien remains ineligible for adjustment of status after termination of conditional resident status. It would also modify provisions regulating the adjustment of status of a nonimmigrant fiancé(e) to reflect the current statute and to allow adjustment of status based on a marriage occurring more than 90 days after admission. The clarification concerning adjustment of status after termination of conditional residency is necessary in view of the determination by the Board of Immigration Appeals' (the Board) finding that the current regulations do not prohibit the adjustment of status of an alien whose conditional resident status has been terminated. *Matter of Stockwell*, 20 I&N Dec. 309 (BIA 1991). This proposed rule would also ensure compliance with the existing statute and eliminate hardships to certain persons who were unable to marry until after the expiration of the alien spouse's period of admission as a nonimmigrant fiancé(e).

DATES: Written comments must be submitted on or before October 21, 1996.

ADDRESSES: Please submit written comments, in triplicate, to the Director, Policy Directives and Instructions Branch, Immigration and Naturalization Service, 425 I Street NW., Room 5307, Washington, DC 20536, Attn: Public Comment Clerk. To ensure proper handling, please reference the INS number 1353–91 on your correspondence. Comments are available for public inspection at this location by calling (202) 514–3048 to arrange an appointment.

FOR FURTHER INFORMATION CONTACT: Rita A. Arthur, Senior Immigration Examiner, Adjudications Branch, Immigration and Naturalization Service, 425 I Street, NW., Room 3214, Washington, DC 20536, telephone (202) 514–5014.

SUPPLEMENTARY INFORMATION: The Immigration Marriage Fraud Amendments of 1986 (IMFA), Pub. L. 99–639, November 10, 1986, were enacted to combat fraud perpetrated by aliens who marry only to obtain immigration benefits. The IMFA amended the Immigration and Nationality Act (the Act) by adding a new section 216, which imposes an initial 2-year period of conditional residency on a person who acquired permanent resident status based on a recent marriage. It also provides a comprehensive procedure by which a conditional resident may have these conditions removed following approval of a petition filed jointly with the citizen or lawful permanent resident spouse, or after approval of a waiver of the joint petitioning requirement. Section 216 of the Act further mandates termination of the conditional resident's status if he or she fails to comply with the requirements for removal of the conditions at the end of the 2-year period, or if it is found that the marriage was entered into for the purpose of obtaining immigration benefits or is otherwise determined to be ''improper,'' as defined in section 216(b) of the Act. Section 216 of the Act also allows an alien whose status has been terminated to ask the immigration judge to review this decision during deportation proceedings.

The IMFA also revised the Act by adding a new section 245(d). This section bars an alien who was granted permanent residence on a conditional basis under section 216 of the Act from adjusting status under section 245 of the Act. This bar prevents a conditional resident from circumventing the requirements and restrictions of section 216 of the Act by filing a new application for adjustment of status.

In *Matter of Stockwell*, 20 I&N Dec. 309 (BIA 1991), the Board of Immigration Appeals (the Board) determined that the bar to adjustment of status provided in section 245(d) of the Act no longer applies after an alien's conditional residency has been terminated. The Board based this decision, which is binding on the Immigration and Naturalization Service (the Service), on its interpretation of the Service's implementing regulations.

In its majority decision, the Board state: ''While the statutory language seems to leave open the question of whether the bar [of section 245(d) of the Act] extends to an alien whose status as a conditional permanent resident has been terminated, we agree * * * that the Service's own implementing regulation clearly applies the bar in section 245(d) only to aliens currently holding conditional permanent resident status.'' *Stockwell, supra,* slip opinion at 4–5.

The Board also issued a dissenting opinion, which concluded that the section 245(d) bar to adjustment continues after termination of conditional residency. This opinion, while acknowledging that the regulation could be read to apply only to those aliens currently in conditional status, points out that: ''* * * the [language of section 245(d) of the Act] does not restrict its application to aliens who are admitted on a conditional basis and remain in that status. The language clearly prohibits the Attorney General from adjusting the status of any alien who has been admitted on a conditional basis under section 216.''

''The majority does not challenge the clarity of the statute. Rather, it relies on the regulation promulgated at 8 CFR § 245.1(b)(12) (1991) [subsequently redesignated as 8 CFR 245.1(c)(5) 1995]. * * *''

''[T]he regulation issued by the Immigration and Naturalization Service can be read to apply only to those aliens who are currently in conditional status. However, that is not the only reasonable construction of the regulation. The regulation does not address the eligibility for adjustment of status of those aliens whose conditional status has been terminated. Where the statute prohibits such adjustment, and the regulation does not address it, the statute should be applied. In any case the regulation should be construed in a manner that is consistent with the statute, The regulation can reasonably be construed as not having addressed

the situation of a conditional permanent resident whose status has been terminated. Moreover, it would frustrate the deterrent purpose of the statute to permit the adjustment of the status of an alien whose status as a conditional permanent resident has been terminated because of failure to comply with the requirements of section 216.''

''It may be argued that, in promulgating the regulation, the Service interpreted the statute to apply only to aliens currently in a conditional status. Since the specific question of the applicability of the statute to aliens whose status has been terminated was not addressed, such an argument is purely speculative.'' *Stockwell, supra*, slip opinion at 8–9 (Morris, dissenting).

In promulgating this regulatory provision, the Service did not intend to limit applicability of the bar in section 245(d) of the Act to aliens currently holding conditional permanent resident status. Such a stance, by allowing a conditional resident to circumvent the requirements and restrictions of section 216 of the Act by filing a new request for adjustment of status after the Service terminated conditional residency, would have been contrary to the purpose of IMFA. It would also have discounted the clear language of section 245(d) of the Act, and would have ignored the fact that Congress has provided a comprehensive procedure that permits a conditional resident to seek removal of the conditions imposed by section 216 of the Act.

However, 8 CFR 245.1(c)(5) does not explicitly state that the bar continues after termination of conditional residency. The proposed revision of 8 CFR 245.1(c)(5) would resolve the misunderstanding concerning this matter. It would supersede the Board's interpretation in *Matter of Stockwell* by amending 8 CFR 245.1(c)(5) to clarify that an alien admitted for permanent residence on a conditional basis under section 216 of the Act remains ineligible for adjustment of status under section 245 of the Act even after termination of status under section 216 of the Act. Since the regulation would be promulgated by the Attorney General under authority granted by section 103 of the Act, it would provide binding rules of decision for the Executive Office for Immigration Review, including the Board and the Immigration Courts, as well as the Service.

The proposed rule would also address the effect of termination of conditional status under section 216A of the Act on the bar to adjustment provided in section 245(f) of the Act. Sections 216A and 245(f) of the Act, added by the Immigration Act of 1990 (IMMACT), Pub. L. 101–649, November 29, 1990, relate to conditional status for certain alien entrepreneurs and contains language similar to that of sections 216 and 245(d) of the Act. To avert possible future misunderstandings, the Service proposes to amend 8 CFR 245.1(c)(5) to also clarify that section 245(f) of the Act continues to prohibit the adjustment of status under section 245 of the Act of an alien entrepreneur who has been granted permanent residence on a conditional basis after his or her status has been terminated under section 216A of the Act.

In addition to prohibiting the adjustment of status of a conditional resident under section 245(a), IMFA also amended provisions of the Act relating to the acquisition of permanent residence by persons who entered the United States as nonimmigrant fiancé(e)s of United States citizens. A review of the IMFA legislative history shows that Congress intended for these aliens, after they marry, to seek permanent resident status under the adjustment of status provision of section 245 of the Act. H. Rep. No. 906, 99th Cong. 2d Sess. at 11 (1986). Despite this intent, the actual text of section 3(c) of IMFA made these aliens ineligible for adjustment. Congress corrected this anomaly by enacting the Immigration Technical Corrections Act of 1988 (the Technical Corrections Act), Pub. L. 100–525, October 24, 1988. The amendments made by section 7(b) of the Technical Corrections Act allow an alien fiancé(e) and his or her minor children to obtain permanent residence, but only as a result of the marriage of the fiancé(e) to the citizen petitioner, and only as a conditional permanent resident under section 216 of the Act.

The Service published a final rule implementing IMFA on August 10, 1988, in the Federal Register at 53 FR 30011–30023. A few months later, Congress enacted the Technical Corrections Act. The Service proposes in this rule to amend 8 CFR 245.1(c)(6) to align its wording more closely with the language of the statute as amended by the Technical Corrections Act. The proposed revision would explicitly state that these aliens are subject to the conditions imposed by section 216 of the Act and clarify the applicability of paragraph (c)(6) to the alien's minor children as well as to the principal alien.

The proposal would also bar adjustment of an alien who was admitted under section 101(a)(15)(K) of the Act unless the alien would become a conditional permanent resident within 24 months of the date of the marriage. This restriction is necessary because section 245(d) of the Act prohibits the adjustment of status of an alien fiancé(e) or child of a fiancé(e) admitted under section 101(a)(15)(K) of the Act *except* to that of an alien lawfully admitted to the United States for permanent residence on a conditional basis under section 216 of the Act. Section 216 of the Act provides permanent residence on a conditional basis only for an alien who becomes a permanent resident within 24 months of the date of the qualifying marriage.

The proposed rule would also modify the provisions of 8 CFR 245.1(c)(6) relating to a marriage taking place more than 90 days after the alien fiancé(e)'s admission to the United States. As currently written, paragraph (c)(6) appears to bar adjustment if the alien fiancé(e) and the citizen petitioner do not marry within 90 days of the alien's entry. The provisions of paragraph (c)(6) were based on those of section 101(a)(15)(K) of the Act, which require the alien and the citizen petitioner to intend to marry within 90 days of entry in order to qualify the alien for entry as a nonimmigrant fiancé(e). Also, section 214(d) of the Act renders the alien deportable if the couple does not marry within 3 months of entry. Section 245(d) of the Act does not, however, impose a time frame during which the marriage must take place.

The proposed rule would continue to bar adjustment if the couple fails to marry. However, prospective spouses are sometimes forced by circumstances outside their control to delay marriage until after expiration of the 90-day period of admission as a fiancé(e). To prevent hardship to these individuals, the proposal would allow an alien who was admitted under section 101(a)(15)(K) of the Act as a fiancé(e) or a child of a fiancé(e) to seek adjustment of status based on the delayed marriage between the citizen petitioner and the fiancé(e).

The nonimmigrant fiancé(e) or child of a fiancé(e) would be allowed to apply for adjustment of status as an immediate relative of a citizen on the basis of an approved Form I–130, Petition for Alien Relative, filed by the citizen petitioner who had originally filed the fiancé(e) visa petition. A nonimmigrant fiancé(e) seeking adjustment based on a delayed marriage, like a nonimmigrant fiancé(e) seeking adjustment based on a timely marriage, would become ineligible for adjustment of status if more than 24 months elapsed between the date of the marriage and the approval of the application for adjustment of status.

Regulatory Flexibility Act

The Attorney General, in accordance with the Regulatory Flexibility Act (5 U.S.C. 605(b)), has reviewed this regulation and, by approving it, certifies that the rule would not have a significant economic impact on a substantial number of small entities because of the following factors: The rule would address the grant of immigration benefits to certain individuals based on a marriage. It would also clarify restrictions placed on future acquisition of certain immigration benefits by individuals whose conditional permanent resident status has been terminated. It would not have a significant economic effect, nor would it affect small entities.

Executive Order 12866

This rule is not considered by the Department of Justice to be a ''significant regulatory action'' under Executive Order 12866, section 3(f), Regulatory Planning and Review, and the Office of Management and Budget has waived its review process under section 6(a)(3)(A).

Executive Order 12612

The regulations proposed herein would not have substantial direct effects on the States, on the relationship between the National Government and the States, or on the distribution of power and responsibilities among the various levels of government. Therefore, in accordance with Executive Order 12612, it is determined that this rule does not have sufficient federalism implications to warrant the preparation of a Federalism Assessment.

Paperwork Reduction Act

The information collection requirement contained in this rule has been cleared by the Office of Management and Budget under the provisions of the Paperwork Reduction Act. The clearance number for this collection is contained in 8 CFR 299.5, Display of control numbers.

List of Subjects in 8 CFR Part 245

Aliens, Immigration, Reporting and recordkeeping requirements.

Accordingly, part 145 of chapter I of title 8 of the Code of Federal Regulations is proposed to be amended as follows:

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

1. The authority citation for part 145 continues to read as follows:

Authority: 8 U.S.C. 1101, 1103, 1182, 1255, and 8 CFR part 2.

§ 245.1 [Amended]

2. In § 245.1 paragraph (c)(3) is amended by removing the word ''and'' at the end of the paragraph.

3. In § 245.1, paragraph (c)(4) is amended by removing the ''.'' at the end of the paragraph and replacing it with a ''; ''.

4. In § 245.1, paragraph (c)(7) is amended by removing the ''.'' at the end of the paragraph, and replacing it with a ''; and''.

5. In § 245.1, paragraphs (c)(5) and (c)(6) are revised to read as follows:

§ 245.1 Eligibility.

* * * * *

(c) * * *

(5) Any alien who has been lawfully admitted for permanent residence on a conditional basis under section 216 or 216A of the Act, regardless of any other quota or nonquota immigrant visa classification for which the alien may otherwise be eligible, and regardless of whether the alien's conditional status has been terminated pursuant to sections 216 or 216A of the Act;

(6) Any alien admitted to the United States as a nonimmigrant alien fiancé(e) under section 101(a)(15)(K) of the act, unless:

(i) The alien is seeking to adjust status under section 245(a) of the Act to that of an alien lawfully admitted to the United states for permanent residence on a conditional basis under section 216 of the Act;

(ii) The alien is seeking adjustment based on the marriage (or, in the case of a minor child, the marriage of the alien parent) to the United States citizen whose approved petition pursuant to § 214.2(k) of this chapter was the basis for issuance of the alien's nonimmigrant visa under section 101(a)(15)(K) of the Act;

(iii) The alien is seeking to adjust status within 24 months of the date of the marriage; and

(iv) The marriage was solemnized:

(A) Within 90 days of the entry of the alien fiance1(e) into the United States; or

(B) More than 90 days after the entry of the alien fiancé(e) into the United States if the alien spouse or child applies for and is otherwise eligible for adjustment of status as an immediate relative on the basis of an approved Form I–130, Petition for Alien Relative, filed by the citizen whose approved petition pursuant to § 214.2(k) of this chapter was the basis for issuance of the alien's nonimmigrant visa under section 101(a)(15)(K) of the Act;

* * * * *

Dated: August 13, 1996.

Janet Reno,

Attorney General.

[FR Doc. 96–21196 Filed 8–19–96; 8:45 am]

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ENVIRONMENTAL PROTECTION AGENCY

40 CFR Parts 51 and 52

[AD–FRL–5557–6]

RIN 2060–AE11

Prevention of Significant Deterioration (PSD) and Nonattainment New Source Review (NSR)

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice of public meetings.

SUMMARY: Notice is hereby given of a change in the date of the public hearing regarding EPA's proposed rulemaking, known as the NSR Reform Rulemaking, published on July 23, 1996 at 61 FR 38249. That rulemaking proposes to revise regulations for the approval and promulgation of implementation plans and the requirements for preparation, adoption, and submittal of implementation plans governing the NSR programs mandated by parts C and D of title I of the Clean Air Act. The date of the hearing is being changed from September 23 to September 16, 1996. This notice also announces a meeting on the day following the public hearing of the NSR Reform Subcommittee (Subcommittee) (58 FR 36407) of the Clean Air Act Federal Advisory Committee (55 FR, No. 217, 46993), which will also be open to the public. The Subcommittee's purpose is to provide independent advice and counsel to the EPA on policy and technical issues associated with reforming the NSR rules. Today's announcement does not change the October 21, 1996 deadline for receiving written public comments on the proposed rulemaking.

DATES: *Public Hearing.* The public hearing has been rescheduled for September 16, 1996 from 10:00 a.m. to 4:30 p.m. The hearing may be canceled if no requests to speak have been received 15 days prior to this rescheduled hearing date.

Subcommittee Meeting. A meeting of the Subcommittee is scheduled for September 17, 1996 from 8:30 a.m. to 4:00 p.m.

ADDRESSES: *Public Hearing.* The public hearing will be held at the Sheraton Imperial Hotel & Convention Center,