U.S. Citizenship and Immigration Services

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Adjustment of Status for Certain Aliens from Vietnam, Cambodia, and Laos in the United States [67 FR 78667] [FR 67-02]

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DEPARTMENT OF JUSTICE

Immigration and Naturalization Service

8 CFR Parts 103 and 245

[INS No. 2124-01; AG Order No. 2642-2002]

RIN 1115-AG14
Adjustment of Status for Certain Aliens from Vietnam, Cambodia, and Laos in the United States

AGENCY: Immigration and Naturalization Service, Justice.

ACTION: Final rule.

SUMMARY: This rule finalizes the Department of Justice regulations implementing section 586 of Public Law 106-429, which provides for the adjustment of status for certain aliens from Vietnam, Cambodia, and Laos. Eligible applicants must have been physically present in the United States both prior to and on October 1, 1997, and inspected and paroled into the United States before October 1, 1997, either from Vietnam under the Orderly Departure Program, from a refugee camp in East Asia, or from a displaced persons cam p administered by the United Nations in Thailand. This rule establishes eligibility, evidence, and application and adjudication procedures. Starting January 27, 2003, aliens who believe they are eligible may

apply for permanent residence under section 586. This rule also adds a new section in the regulations that lists the types of evidence an alien may use to demonstrate his or her physical presence in the United States on a specific date.

DATES: This final rule is effective January 27, 2003.

FOR FURTHER INFORMATION CONTACT: Michael Valverde, Residence and Status Branch, Immigration and Naturalization Service, 425 I Street, NW, Room 3214, Washington, DC 20536, Telephone (202) 514-4754.

SUPPLEMENTARY INFORMATION:

What Is Section 568 of Public Law 106-429?

On November 6, 2000, the President signed Public Law 106-429, the Foreign Operations Appropriations Act of 2001. Section 586 of Public Law 106-429, 8 U.S.C. 1255 note, provides for adjustment of status to that of lawful permanent resident for 5,000 eligible natives or citizens of Vietnam, Cambodia, and Laos.

Who Is Eligible for Adjustment of Status to That of Lawful Permanent Resident Under Section 586 of Public Law 106-429?

This final rule establishes the eligibility requirements for adjustment of status under section 586 of Public Law 106-429. To be eligible, an alien must demonstrate that he or she:

(1) Is a citizen or native of Vietnam, Cambodia, or Laos;

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

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

(4) Was paroled into the United States:

(a) From Vietnam under the auspices of the Orderly Departure Program;

(b) From a refugee camp in East Asia; or

(c) From a displaced persons camp administered by the United Nations High Commissioner for Refugees in Thailand;

(5) Applied for adjustment of status under section 586 of Public Law 106-429 during the period beginning on January 27, 2003 and ending on January 25, 2006, and paid all appropriate fees; and

(6) Is otherwise eligible to receive an immigrant visa and otherwise admissible to the United States for permanent residence except for those grounds of inadmissibility that do not apply or that are waived.

What Does This Final Rule Do?

The preamble to this final rule discusses issues raised in the public comment letters submitted regarding the proposed regulation, published at 67 FR 45402 (July 9, 2002). This rule makes several changes to the regulation in response to those comments, as discussed below. Finally, this rule provides instructions for aliens seeking to apply for adjustment of status under section 586 and marks the start and end dates for the three-year application period.

Public Comment

The proposed regulation set forth a 60-day period, from July 9, 2002, until September 9, 2002, for any interested member of the public to submit comments on the proposed regulation. The Department of Justice ("Department") received seven letters, raising a total of 23 distinct issues. These comments are discussed below and are generally divided into three sections: comments concerning eligibility and evidence for adjustment of status under section 586, comments regarding the physical presence section, and c omments regarding standards for granting a waiver under section 212(h) of the Immigration and Nationality Act ("Act") (8 U.S.C. 1182(h)).
Comments Regarding the Regulations Pertaining to Section 586 of Public Law 106-429

The 5,000 Limit on Adjustments of Status Under Section 586

Commenters raised two issues about the 5,000 limit on adjustments under section 586. First, two commenters requested that the Department acknowledge the stated intention of Congress to consider raising the total number of adjustments provided for in section 586. Second, one commenter went further to state that the Department should retain applications received after the 5,000-adjustment limit has been reached, pending the Congressional action to raise the limit.

In response to the first issue, the Department acknowledges that the legislative history contains references to Congress's intention to consider expanding the 5,000-adjustment cap, if necessary, to accommodate otherwise eligible aliens, through future legislation. See H.R. Conf. Rep. 106-997, at 106 (2000). Indeed, throughout the legislative process and subsequent rulemaking process, non-governmental organizations involved with the potentially eligible groups have stated that the total number of aliens who would be eligible for adjustment of status under section 586 far exceeds 5,000.

Notwithstanding the possibility that Congress might change the law in the future, however, the Department is responsible for implementing the law as currently written. This means the Department will track the total number of adjustments and stop adjudicating applications after the 5,000 limit has been reached. At that time, the Department will also notify Congress and the public that the limit has been reached. If the limit is raised or removed through future legislation, the Department will process applica tions accordingly.

In response to the second issue, the Department does not plan to keep those applications submitted after the 5,000 limit has been reached. The expense of submitting an application to adjust status under this provision is significant, currently $305, including fingerprint fees. If employment authorization and advance parole applications are also submitted, that figure grows to $535. The Department believes that it is not in the applicants' interests for the Department to retain such large sums of their money for an indefinite period of time based on the possibility of future legislation. Rather, it is better to return such applications and the accompanying fees and allow the same applicants the opportunity to apply again if the limit is expanded.

However, for purposes of processing applications if the 5,000 limit is expanded or eliminated, the Department will keep chronological records of those applicants who submitted timely applications but did not obtain a space within the 5,000 limit. In addition to keeping such records, the Department will issue a dated notice to the applicant along with the returned application. Aliens are encouraged to retain their application package and this notice in case in the 5,000 limit is expanded or eliminated.

Nevertheless, 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 Department will use its discretion to decide whether or not to keep such applications and the related fees. This final rule adds a new 8 CFR 245.21(m)(4) to reflect this policy.

The Processing Prioritization of Applicants Who Do Not Need A Waiver of Criminal Grounds of Inadmissibility Under Section 212(h) of the Act

The Department received three comments that the processing scheme set forth in the proposed rule should be changed. The commenters stated that applicants who have applied for a waiver of a criminal ground of inadmissibility should be given the same processing priority as those who do not require such a waiver.

The Department does not agree with these comments. These regulations provide some priority to those applicants who do not require a waiver of the criminal, fraud, immigration violator, citizenship ineligibility, or illegal voting grounds of inadmissibility, over those who do. See 8 CFR 245.21(m)(3). For purposes of receiving a number in the queue, applications for waivers on other grounds of inadmissibility will be considered as if they were applications for adjustment not requiring waivers. For instance, a pplicants for a waiver of a ground of inadmissibility on health-related grounds (section 212(a)(1) of the Act, 8 U.S.C. 1182(a)(1)) will receive a number in the queue as if they were not applying for a waiver. Essentially, the first group--those applicants who do not require a waiver of the criminal, fraud, immigration violator, citizenship ineligibility, or illegal voting grounds of inadmissibility--will be assigned a number chronologically by date of application relative to the 5,000 limit. The second gro up will be assigned a number chronologically by date of the waiver approval.

The Department anticipates that an adjudication involving the waiver will take longer than an adjudication not involving a waiver, and therefore, the Department does not want to slow down the adjudication process by giving out numbers to aliens who are not yet eligible to receive adjustment of status. It is correct that those applicants requiring a waiver will face a disadvantage. In the proposed rule, the Department stated that in setting forth this processing hierarchy the Department was of the view that those aliens who have not engaged in the aforementioned activities, and thereby rendered themselves inadmissible, should be treated more favorably than those who have engaged in such behavior. The Department continues to be of this view, and as such, will not be amending the regulations to reflect these three comments.

Eligibility of Persons Who Are Currently in Immigration Proceedings

The Department received two comments stating that immigration judges should have the authority to consider applications for adjustment of status under section 586 during immigration proceedings.

The Department believes that the adjudication of applications for adjustment of status under section 586 is best administered by the Immigration and Naturalization Service (“Service”) in one central location. Moreover, maintaining control of the 5,000 limit on adjustments is most efficiently accomplished by centralizing filing and adjudication. Because verification of an applicant's claim to eligibility under section 586 will most likely require significant research by the Service, the Department believes t hat centralizing the application and adjudication at one Service office will provide the most efficient service to applicants. As such, the Department will not amend the regulations to reflect these comments.

Additionally, one commenter objected to the requirement that the Service concur before an immigration judge or the Board of Immigration Appeals (“BIA”) administratively closes the proceedings. The commenter argued that an eligible alien could be prevented from obtaining benefits under section 586 if the Service failed to join in the motion. The commenter stated that eliminating the Service consent requirement is necessary to ensure that meritorious cases will not be denied consideration where the Service do es not concur with the motions to close cases. The Department disagrees with these comments. Administrative closure of a case is used to remove temporarily a case from an immigration judge's calendar or from the BIA's docket. As a general matter, “[a] case may not be administratively closed if opposed by either of the parties.” Matter of Gutierrez-Lopez, 21 I. & N. Dec. 479, 480 (BIA 1996). Efficiency of the immigration court system is increased by requiring parties to agree to close a case administratively . The Service, which will adjudicate applications for adjustment of status under this regulation, will likely concur in administrative closure if it believes the alien is eligible for the relief sought. If the alien has other issues to resolve before an

immigration judge, having the case go forward allows those issues to be resolved at the same time the Service adjudicates the alien's application to adjust status under section 586. Completing concurrently as many processes as possible adds to efficiency of the immigration court system.

The Department does not believe that the regulations will prevent any alien's application for adjustment of status under section 586 from being considered. The regulations provide that an alien in immigration proceedings may apply directly to the Service for adjustment of status independent of his or her proceedings. The Service may adjudicate such an application without resolution of the proceedings. Moreover, the Department points to the distinction between the administrative proceedings resulting in an o rder of removal of an alien and the actual removal of the alien. In the unlikely scenario where the Service does not concur with the alien's motion for administrative closure, even though the alien appears eligible for adjustment under section 586, and where the alien is ultimately issued a removal order, the Service has discretion to withhold the removal of the alien until the adjustment application is resolved. The alien would have to make such a request to the district director after the order is issued. The Department notes that the granting of adjustment under section 586 is tantamount to reopening and vacating any order of removal issued. This final regulation will not be amended in response to these comments.

Eligibility of Persons Who Are Derivative Family Members

One commenter requested that the final rule be amended to allow for the adjustment of derivative family members.

The Department cannot accommodate the commenter's request. The proposed regulations do not include a provision for the adjustment of derivative family members of eligible aliens because the statutory language of section 586 does not include such a provision. Rather, every alien has to be eligible on his or her own behalf. The Department notes that the Act does provide a process, albeit a lengthier one, for dependent family members of lawful permanent residents to obtain permanent resident status. Once his o r her adjustment of status application is approved, the new lawful permanent resident can submit Form I-130, Petition for Alien Relative, for a dependent spouse and unmarried children.

Eligibility of Persons Who Traveled After October 1, 1997

The Department received two comments requesting that the final rule be clarified regarding travel by eligible aliens that took place after October 1, 1997. In short, the commenters requested that the final rule state that otherwise eligible aliens who left the United States after initially entering prior to October 1, 1997, via one of the three qualifying programs, are not rendered ineligible by virtue of that subsequent travel.

The Department agrees with the commenters that travel subsequent to October 1, 1997, does not render an alien ineligible for adjustment of status under section 586. The commenters expressed the concern that, because such aliens will have a Form I-94, Arrival/Departure Document, that is dated after October 1, 1997, the adjustment application will be denied because they will not have proof of entry prior to October 1, 1997. The Department understands that such aliens could have traveled and re-entered the Uni ted States via parole or another lawful manner of entry. In these instances, although the alien may no longer possess the documentation of the original entry, evidence of the initial entry may be available in Department records, and therefore could be verified during adjudication. This final rule, at 8 CFR 245.21(g)(3), provides for such an alien to submit an affidavit, in lieu of the initial Form I-94, establishing that he or she entered prior to October 1, 1997, via one of the three qualifying programs.

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