



Barriers to Family Reunification: Loss of 245(i) and the 3/10 year bars

Issue: Under current law, immediate relatives of U.S. citizens and lawful permanent residents who entered the United States without inspection cannot adjust to permanent resident status in the United States.¹ Instead they must depart the United States and complete the immigrant visa process through a U.S. consulate abroad. However, an individual who departs the United States after accumulating 180 days or one year of unlawful presence is subsequently barred from re-entering the United States for three or ten years, respectively. Although a waiver of the three and ten year bars is available to certain individuals, the waiver requires a showing of extreme hardship which is very difficult to meet. These provisions of the law have conspired to separate many families and force others to make difficult decisions to remain in undocumented status in order to keep their family unit intact.

Law: Under former section 245(i) of the Immigration and Nationality Act (INA), adjustment of status to permanent residence was available to eligible relatives of U.S. citizens and legal permanent residents who were not in legal status. INA § 245(i) allowed applicants who entered the country without inspection to pay a \$1,000 penalty and, in return, to complete their residency applications in the United States regardless of undocumented or expired status. In 1997 Congress ended this provision and only persons who filed immigrant visa petitions (or labor certification applications) prior to April 30, 2001 may continue to take advantage of 245(i) and adjust status in the United States. Others must depart the United States be processed for an immigrant visa through the U.S. consulate abroad. Their departure triggers the three and ten-year bars.

The expiration of INA § 245(i) is compounded by INA § 212(a)(9)(B) which took effect with the passage of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA). INA § 212(a)(9)(B) creates a three year bar to admission for persons who depart the United States after accruing 180 days of unlawful presence in the United States and a ten year bar for persons who depart after accruing one year of unlawful presence. Unlawful presence began to accrue on April 1, 1997. A waiver of these bars is available under INA § 212(a)(9)(B)(v) for the spouse, son or daughter of a lawful permanent resident or U.S. citizen, if refusal to admit such person would result in extreme hardship to the citizen or permanent resident spouse or parent. No waiver is available based on the hardship a parent's absence would cause a U.S. citizen or lawful permanent resident child. Moreover, the waiver is discretionary, and no guarantee exists that those eligible will receive it.

Solution: A permanent restoration of INA § 245(i) is crucial to supporting immigrant families and promoting the goal of family reunification. In addition, the three- and ten-year bar provisions of IIRIRA should be repealed. Not only would the permanent restoration of section 245(i) promote family unity, it would also provide the USCIS with additional revenue. Section 245(i) required applicants to pay a \$1,000 penalty fee to the USCIS. This revenue would provide additional funding that USCIS could apply to application processing functions. Other legislative changes that would ameliorate the impact of these provisions would involve elimination of the word “extreme” from “extreme hardship” at INA §212(a)(9)(B)(v) and/or broadening this waiver to allow applicants to prove hardship to either themselves or a USC or LPR spouse, parent, or child.

¹ In addition, family members of U.S. citizens who are not “immediate relatives” and all family members of lawful permanent residents who entered with a visa but overstayed or worked without permission cannot adjust status in the United States.



Conclusion: INA § 245(i) did not bestow benefits upon persons who were not entitled to legal status in the United States. It facilitated the administration of these benefits and preserved the family unit by providing American family members the opportunity to complete their applications in the United States. The loss of INA 245(i), coupled with bars to admission based on unlawful presence, devastates families who are otherwise eligible for reunification under our immigration laws.