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MATTER OF LEGASPI: NARROWING THE SCOPE OF 245(I) GRANDFATHERING FOR DERIVATIVE BENEFICIARIES

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§ 245(i) of the Immigration and Nationality Act, which sunset on April 30, 2001, has been a great boon for those who are not in status in the United States. It permits adjustment of status of certain aliens who are unable to adjust under § 245(a) for entering without inspection or who are disqualified under § 245(c) of the Act, which include those who have accepted unauthorized employment or are in unlawful immigration status.

Even though more than 9 long years have elapsed since April 30, 2001, § 245(i) permits certain aliens to remain "grandfathered" if they were beneficiaries of visa petitions or labor certifications filed on or before April 30, 2001 provided they were properly filed and approvable as filed. See 8 CFR § 245.10(a). Derivative beneficiaries too, as specified in § 203(d), such as spouses or minor children who could accompany the principal beneficiary, can claim the benefit of grandfathering under § 245(i).

This is how § 245(i) works. A labor certification was filed prior to April 30, 2001 on behalf of principal alien "A" who was married to spouse "B" and who had a minor child "C" at the time of the filing. All of the aliens are grandfathered under § 245(i) even till this day. This is true even though "C" is no longer a minor and "B" may no longer be married to "A." As long as the labor certification was properly filed and approvable as filed on behalf of "A" prior to April 30, 2001, it does not matter that the employer subsequently withdrew the labor certification in 2003. All of these aliens, "A," "B" and "C," if the subject of new labor certifications in 2010, may ultimately adjust status under 245(i)

notwithstanding the fact they are not lawfully present. "A", "B" and "C", however, had to have been in the United States on December 21, 2000, assuming that the labor certification was filed after January 14, 1998.

In *Matter of Legaspi*, 25 I&N Dec. 328 (BIA 2010), http://www.justice.gov/eoir/vll/intdec/vol25/3694.pdf, the Board of Immigration Appeals (BIA) narrowed the scope of § 245(i) grandfathering for derivative beneficiaries by depriving them of conferring a similar 245(i) benefit to their spouses. After *Matter of Legaspi*, spouses of derivative beneficiaries cannot grandfather by virtue of being married to an alien who is grandfathered under § 245(i). In this case, the respondent was married to Ms. Blanco who was grandfathered under § 245(i), and thus he too claimed to be similarly grandfathered under § 245(i). Ms. Blanco qualified as a derivative beneficiary by virtue of an I-130 visa petition that her grandfather filed on her father's behalf in 1987. Even though she never became a permanent resident under the 1987 petition, the BIA acknowledged that she remained a grandfathered alien under § 245(i).

The BIA rejected the respondent's claim to be an independently grandfathered alien under § 245(i) by virtue of his marriage to Ms. Blanco in 2003. He was unable to adjust status under § 245(a) because he was not in lawful status, and needed § 245(i), as a defense in removal proceedings. This part of the BIA's decision is consistent with a Memo from William R. Yates, USCIS dated March 9, 2005 (USCIS 245(i) Memo), http://bit.ly/dsyJJb, which is the government's latest interpretation on § 245(i), and states that a spouse who marries a grandfathered alien after April 30, 2001, cannot independently "grandfather" under § 245(i). On the other hand, the USCIS 245(i) Memo did acknowledge that such a spouse could still seek to adjust status under § 245(i) as a dependent of the "grandfathered" alien:

An application for labor certification is filed on behalf of principal alien "A" in 2000. At that time, principal alien "A" is unmarried. Principal alien "A" marries spouse "B" in 2002. Principal alien "A" and spouse "B" have child "C." An I-130 is filed on behalf of principal alien "A" and is ultimately approved in 2004. Principal alien "A" applies for adjustment of status. May spouse "B" and child "C" apply for adjustment of status under section 245(i) in conjunction with principal alien "A"?

If all other grandfathering requirements are met, spouse "B" and child "C" may seek to adjust status only as dependents of the principal alien "A." Principal

alien "A" is grandfathered as described in Scenario 1. Because spouse "B" marries principal alien "A" after April 30, 2001 sunset date, spouse "B" and child "C" are not grandfathered.

Until *Matter of Legaspi*, it was thought that a spouse who married any grandfathered alien after April 30, 2001, even if not independently grandfathered, could still adjust under §245(i) as a dependent of the grandfathered alien. This was assumed even if the original alien became grandfathered as a derivative beneficiary, such as Ms. Blanco. While in *Matter of Legaspi*, the respondent spouse was not seeking to adjust with Ms. Blanco *but was eligible to adjust as a following to join spouse (revised on 10/12/10)*, the BIA's opinion threatens to shut off this possibility too. The BIA argues that had Ms. Blanco been married at the time of her grandfather's petition in 1987, she would not have been qualified as a derivate beneficiary as she would not have met the definition of "child" for purposes of § 203(d).

It is this aspect of the BIA's decision in *Matter of Legaspi* that is problematic. While one can agree that a derivative beneficiary such as Ms. Blanco must have been single in order to qualify as a "child" at the time the petition was filed in 1987, Ms. Blanco continues to remain "grandfathered" under § 245(i) even after she ceases to be a child and even after she marries. Should she adjust status through a post-April 30, 2001 filed labor certification, her spouse (who may not be eligible under § 245(a)) ought to be able to adjust with her as a dependent under § 245(i). § 245(i) provides an eternal grandfathering benefit to qualified aliens, even after they ceased to be spouses and children. Once they are "grandfathered," a new spouse ought to be able to at least adjust with them as dependents under § 245(i).

Matter of Legaspi, in this sense, erroneously interprets § 245(i), which was a generous provision that sought to allow aliens who were not otherwise eligible to be able to file an adjustment application in the US. Under the BIA's logic in *Matter of Legaspi*, aliens other than derivative beneficiaries could also be affected. Anyone who got protection under § 245(i) by virtue of being single, such as an adult son or daughter of a permanent resident spouse, may not be able to have their "after acquired" spouses adjust with them as dependents under § 245(i).

It is hoped that the BIA clarifies its position in a future decision. While *Matter of Legaspi* makes clear that an "after acquired" spouse cannot independently

grandfather under § 245(i), such a spouse ought to at least be able to adjust status as a dependent.