# Recommendation 71-5

## Procedures of the Immigration and Naturalization Service in Respect to Change-of-Status Applications

(Adopted December 6, 1971)

Section 245 of the Immigration and Nationality Act, 8 U.S.C. § 1255 (1970), provides that an alien who meets all requirements for admission as an immigrant may have his status adjusted "by the Attorney General, in his discretion and under such regulations as he may prescribe, to that of an alien lawfully admitted for permanent residence."

The Immigration and Naturalization Service last year passed upon about 45,000 requests for such change-of-status. An extensive study of change-of-status actions, conducted with the cooperation of the Service, has produced a number of suggestions for the improvement of this process. Some of them have already been implemented by the Service.[1] Other suggestions in the consultant's report that underlies this recommendation merit consideration by the Service,[2] but are not recommended for Conference action.

[1] The principal suggestions in the report of the consultant which have in substantial part been implemented by the Immigration and Naturalization Service are: *(a)* Clarify to examiners that an application which cannot be granted because of visa unavailability should be rejected rather than denied. *(b)* Impress upon interviewing examiners the need to (i) assist the alien by pointing out to him any ground for relief which he may have overlooked, and (ii) attach no prejudice to the alien's appearance at the interview with counsel. *(c)* The form advising of adverse action by the examiner should point out the avenues of available relief rather than stating "There is no appeal from this order." *(d)* When sec. 245 applications are initially filed with the special inquiry officer conducting a deportation proceeding they should be referred to an examiner for adjudication.

[2] The principal suggestions in the consultant's report which merit consideration by the Service although not incorporated in the Conference recommendation are: *(a)* The application form for an extension of stay should (i) warn that a false statement may be grounds for a sec. 245 denial, and (ii) inquire as to membership only in proscribed organizations and not as to "all" organizations or groups of which the alien has at any time been a member. *(b)* Experience indicates that the routine inquiries to the CIA, numbering over 45,000 a year, do not warrant the cost and possible delay which they entail. *(c)* The cumulative oral oath at the interview should be eliminated. *(d)* An interview or interrogation which may lead to a criminal prosecution should be conducted only after arrangements for the presence of counsel have been made for any alien who requests counsel. *(e)* The applicant should be advised when he invokes the privilege of silence that this may lead to the denial of his application, and the reason for such a denial should be explained in the decision. *(f)* There should be written standards as to the availability of temporary departure during the pendency of a sec. 245 application. *(g)* Enforcement should be tightened and expedited by serving a deportation order to show cause with the adverse examiner's decision. *(h)* The special inquiry officers conducting deportation hearings should complete the docket forms more carefully, especially in respect to whether a renewed sec. 245 application has been filed. *(i)*

The recommendation which follows should be adopted by the Immigration and Naturalization Service in carrying out its functions under section 245. The Service should, moreover, consider the applicability of the recommendation and of the additional suggestions in the consultant's report to functions other than those under section 245.

## Recommendation

### A. Rules and Standards of Decision

Examiners who decide cases under section 245 usually obtain little guidance from the statute, rules, standards, or precedents. The lack or inadequacy of such guidance often results in unequal justice and invites pressures upon Members of Congress to intervene in individual cases. A large proportion of the decisions under section 245 can and should be controlled by regulations which establish the rules and standards for decision. These regulations should crystallize the existing body of precedents, staff instructions and established traditions of decision into a form which should in the ordinary case both control discretion and provide a publicly available body of the governing law. In drafting these regulations, the Service should seek to restrict unnecessary or unwarranted discretion in reaching individual decisions and should also seek to ensure that decisions are reached on grounds that have a direct relationship to the purposes of section 245.

### B. Reasoned Decisions and Precedents

When neither rules nor standards provide effective guidance for the exercise of discretion, reasoned decisions and precedents may do so. The Service has made some effort to ensure that the reasons for its actions under section 245 be formulated and be publicly available, but more needs to be done in the following respects:

1. *Examiner decisions*.—Examiner opinions which deny relief are now written and made publicly available. Opinions granting relief should also be written and made publicly available when they *(a)* involve difficult or novel questions, *(b)* represent a favorable exercise of discretion despite the presence of a permissible ground for denying relief, or *(c)* involve an

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Nonimmigrant status should not be revoked, and "voluntary departure" extended, as a routine step in waiver and private bill cases.

inquiry or request initiated by a Member of Congress or other official of the Federal Government.

2. *Decisions of Special Inquiry Officers.*—The Service is in the course of requiring that all opinions of special inquiry officers which reverse the decision of an examiner be transcribed and made publicly available, instead of being held in the taped record of the deportation proceeding. The same should be done for other opinions of special inquiry officers which in the judgment of the officer have precedential value. When there is a transcribed opinion relating to a case in which there was an examiner's opinion, the Service should make that fact apparent to a reader in order to prevent his inadvertent reliance upon a reversed decision; for example, the two related opinions could be filed next to each other in the public reading room files.

3. *Decisions relating to deferred enforcement.*—Service decisions which defer convening a deportation hearing or enforcing a deportation order should similarly be written and made publicly available when they *(a)* involve difficult or novel questions, *(b)* represent a favorable exercise of discretion despite the presence of a permissible ground for denying relief, or *(c)* involve an inquiry or request initiated by a Member of Congress or other official of the Federal Government.

4. *Decisions as precedents.*—The examiners and special inquiry officers in decisions under section 245 ordinarily give significant precedential value only to the decisions of the Board of Immigration Appeals. Section 245 decisions should be reached upon the basis also of precedents established by the examiners and the special inquiry officers themselves.

**C. Publication**

1. *Manuals and instructions.*—The Service, which has indicated its intent to make its *Operations Instructions* publicly available, should also make its handbooks and administrative manuals publicly available, except as portions may be exempt under the Freedom of Information Act.

2. *Reports of decisions.*—The printed reports of the Service should include all decisions of examiners and special inquiry officers which in the judgment of the Service have sufficient precedential value to warrant nationwide circulation.

3. *Periodic revision.*—The Service should periodically review and update its published regulations, decisional precedents and such of its information booklets and leaflets as identify the grounds for exercising discretion. The revised regulations should define to the extent

practicable the contemporary rules, standards and policies that the Service considers proper and upon which it instructs adjudicators to rely.

4. *Notice of opportunities for administrative review.*—The Service, which no longer advises that there is "no appeal" from an adverse examiner's decision, should publish a simply worded pamphlet describing, with relevant citations to statutory provisions and regulations, the available opportunities for administrative review of an adverse examiner's decision under section 245 and the ways by which enforcement of an order of deportation may be deferred.

**D. Deferred Enforcement**

1. *Administrative procedures.*—The statutory provision for suspension of deportation has been supplemented by several administrative procedures which defer enforcement. If the Service finds it feasible, these administrative procedures for deferring enforcement should be united, under a single descriptive category such as "deferred enforcement." In any case the rules, standards and precedents which govern or guide decision to defer deportation should be published in regulations; and authority to defer enforcement should be delegated to the district directors.

2. *Private bills.*—The Service now defers enforcement when a private bill is introduced for the relief of an alien and a committee of the Congress asks for a status report. The deferral continues so long as the bill (or successor bills introduced in subsequent Congresses) has not been disposed of. The Administrative Conference and the Service should discuss with the appropriate committees of the Congress whether, as seems plainly desirable, deportation should be deferred only until the expiration of the Congress succeeding the Congress in which the bill was introduced.

**Citations:**

__ FR _____ (2012)

2 ACUS 32

**Note:** This recommendation was not published previously in the Federal Register.