

NOT DETAINED

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW

Board Of Immigration Appeals

IN THE MATTER OF

BASSEM HUNSI AHMED MANSOUR,

A027-637-356

Respondent.

Appeal from an Immigration Judge decision entered
on Oct. 20, 2010

**BRIEF OF AMICUS, AMERICAN IMMIGRATION
LAWYERS ASSOCIATION**

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INTRODUCTION

Section 245(i) of the Immigration and Nationality Act, as amended, plainly creates three pools of applicants eligible for penalty-fee adjustment. The first pool includes all individuals who are the beneficiaries of alien relative or labor certifications filed on or before January 14, 1998. The second pool includes beneficiaries of an alien relative petition or labor certification filed on or before April 30, 2001 who were physically present in the United States on December 21, 2000. The third pool are individuals accompanying or following-to-join a beneficiary in the first or second groups.

Estimated at one point to include more than 300,000 individuals, *see* Andorra Bruno, Congressional Research Service Report, *Immigration: Adjustment to Permanent Resident Status Under Section 245(i)*, (April 18, 2002) at 8, the Board's

decision in *Matter of Legapsi*, 25 I&N Dec. 328 (BIA 2010) and its unpublished decision in *Castro-Soto*, A43-905-386, 2008 WL 762755 (BIA Feb. 28, 2008) have blurred the otherwise clear terms of the statute as demonstrated by the Immigration Judge's decision here and the First Circuit's decision in *Castro-Soto v. Holder*, 596 F.3d 68 (CA1 2010).¹

In this brief, Amicus, the American Immigration Lawyers Association, explains why the Board should correct the Immigration Judge's error in this case by published opinion that sets forth a clear interpretation of § 245(i)'s statutory regime,

¹ Although the eligibility of dependents to adjust regardless of grandfathering status is not directly implicated in the Mansour case, the interpretation of § 245(i) is front and center. AILA raises the legal issue from *Matter of Legapsi* here because it is an important issue that merits clarification, even though it is only of background nature in Mr. Mansour's situation. The Board is not bound by strict "case or controversy" limitations applicable to Article III courts and may decide the legal question because it is an important and recurring one. *Matter of Garcia-Garcia*, 25 I&N Dec. 93, 94 n.2 (BIA 2009).

explains why the First Circuit was incorrect in *Castro-Soto* and overrules *Legaspi*.²

STATEMENT OF INTEREST OF AMICUS

The American Immigration Lawyers Association (“AILA”) is a national association with more than 12,000 members throughout the United States, including lawyers and law school professors who practice and teach in the field of immigration and nationality law. AILA seeks to advance the administration of law pertaining to immigration, nationality and naturalization; to cultivate the jurisprudence of the immigration laws; and to facilitate the administration of justice and elevate the standard of integrity, honor and courtesy of those

² AILA filed an amicus brief in support of Mr. Legaspi’s motion for reconsideration. The brief is available at AILA InfoNet Doc. No. 10102663 (posted Oct. 26, 2010). As AILA understands, the motion to reconsider may have become moot and might not be adjudicated.

appearing in a representative capacity in immigration and naturalization matters. AILA's members practice regularly before the Department of Homeland Security and before the Executive Office for Immigration Review, as well as before the United States District Courts, Courts of Appeal, and Supreme Court.

ARGUMENT

We address two points in this amicus brief. *First*, the Board is mistaken (as is USCIS) that grandfathered status is perishable; the Board's reasoning in the unpublished decision *Castro-Soto* is contrary to the statute. *Second*, the Board has confused what it means to be "grandfathered" for penalty-fee adjustment and how individuals who are *not* grandfathered can still adjust under § 245(i).

We address each issue in turn. We take no position on the merits of Mr. Mansour's claim.

A. Grandfathering and Penalty-Fee Adjustment.

The unfortunate choice of incorporating “grandfathering” terminology into the penalty-fee adjustment regulations has caused unnecessary analytical and interpretive errors. The regulations, while clear when read in context, may be misunderstood because of the “grandfathering” concept. To be “grandfathered” implies that old rules apply in spite of a new legal regime or a nonconforming matter is allowed to persist because it pre-dated the existence of a new norm.³ But that is not actually the situation with § 245(i) because it *is* the legal regime that *is* in effect and applicable to

³ Although commonly used in many contexts, the concept of “grandfathering” originated in the Jim Crow era with many southern states’ attempts to disenfranchise black voters. See Benno C. Schmidt Jr., *Principle and Prejudice: The Supreme Court and Race in the Progressive Era*, 82 *Colm. L. Rev.* 835, 845-847 (1982). Illiterate men were denied the franchise unless the grandfather had voted thus preserving rural, white eligibility to vote but excluding nearly all black citizens from voting. *Id.*

anyone who satisfies its terms. To speak of its expiration or its temporary nature, *e.g.*, *Castro-Soto v. Holder*, 596 F.3d 68, 73 (CA1 2010) or *Matter of Rajah*, 25 I&N Dec. 127, 134-135 (BIA 2009), introduces analytical distortions. Indeed, Mr. Mansour's case which raises the question of eligibility 10 years *after* § 245(i)'s alleged demise is itself a refutation of that line of thinking.

There are numerous instances of immigration benefits available only to a limited set of individuals – that is, after all, the essential nature of the immigration selection system. That does not mean that those programs are temporary. Section 245(i) contains no temporal limitation on applying for relief like other provisions on the Act. *Cf. e.g.*, § 245A (providing limited 43-month window for seeking IRCA benefits). For example, the NACARA Program, codified as § 309(f) of the Illegal Immigration Reform

and Immigrant Responsibility Act of 1996, added by Title 2 of Pub. L. No. 105-100, § 203(b), 111 Stat. 2160, 2193 (1997) (as amended), provides permanent residence benefits to a limited set of individuals who satisfy certain time-based qualifications such as having entered the United States by a particular time and filed asylum applications before a particular date. Notably, we never speak of the NACARA Program as sunseting or being temporary and for good reason. Section 203(b) is not temporary: it will last on the books until Congress repeals it. Likewise, § 245(i) is not temporary. It is positive legislation that is with us for the long haul. It is analytically irrelevant that the prerequisites for penalty-fee adjustment eligibility may include a time-based filing.

We make this point because it frames the proper way of viewing and interpreting § 245(i).

Understanding that there is nothing temporary about § 245(i) is critical to avoiding the interpretive traps into which the Board and the Immigration Judge have been snagged.

This perceived (though statutorily incorrect) “temporary” characteristic of § 245(i) has infected its proper interpretation. *E.g.*, *Castro-Soto*, 596 F.3d at 73; *Castro-Soto*, 2008 WL 762755 at *2; Memorandum from William R. Yates, Assoc. Dir. For Operations, *Clarification of Certain Eligibility Requirements Pertaining to an Application to Adjust Status under Section 245(i) of the Immigration and Nationality Act* (Mar. 9, 2005) at 6. Under these authorities, the view is that qualifying visa petitions that establish eligibility are perishable commodities and may be extinguished. This is incorrect. Section 245(i) grandfathered status has no shelf life; it does not expire, extinguish, or get used up. It is not

perishable in the sense that a grandfathered applicant gets to adjust only once. Just as an individual described in § 245(a) remains eligible for adjustment forever after because he or she has been inspected and admitted or paroled, so too does an applicant described in § 245(i) *forever* remain eligible for its terms – events subsequent do not alter § 245(i) grandfathered eligibility, such as multiple filings or subsequent adjustments.⁴

We have identified a few sources for this theory of perishability – none of which is persuasive in convincing AILA that the statutory language means anything other than what it says. In the unpublished single member decision in *Castro-Soto*,

⁴ AILA has criticized this perishable view of § 245(i) before. See AILA Comment on INS 245(i) Regulations (May 25, 2001), AILA InfoNet Doc. No. 01081734 (posted Aug. 17, 2001) (stating that INS is mistaken in denying use of previously used visa petitions to grandfather beneficiaries under § 245(i)); Clarice Liao & Bernie Wolfsdorf, *How the USCIS Stole the Holidays – A Practice Advisory on 245(i) Grandfathering*, AILA InfoNet Doc. No. 03122917 (posted Dec. 29, 2003) (same).

Board Member Pauley explained that “we conclude that the respondent’s use of the first visa petition to gain conditional lawful permanent resident status fully extinguished the first petition, such that the priority date is no longer available for grandfathering purposes.” Member Pauley’s analysis cannot be correct because the statute’s language plainly defines “beneficiary” without regard to a priority date. The existence of a priority date is really beside the point in determining who is grandfathered. Indeed, a grandfathered individual need not ever have been accorded a priority date because the petition that creates the grandfathering status need not ever have been approved. *Matter of Jara Riero*, 24 I&N Dec. 267, 269 (BIA 2007) (“The denial of the visa petition, although significant, is not determinative of whether the visa petition was meritorious in fact” so as to accord grandfathering

status.) An example will make this clear. Assume that a permanent resident petitions for his spouse prior to January 14, 1998 but he forgets to include the photographs generally required for a spousal petition, and USCIS thus denies the petition. The petition was approvable when filed because it was meritorious in fact. *Matter of Jara-Riero*, 24 I&N Dec. at 268-69. However, because it was denied, no priority date is accorded to the beneficiary-spouse. The beneficiary-spouse is a grandfathered alien no matter that there is no priority date and her status carries with her.

It is unfortunate that the United States Court of Appeals for the First Circuit has magnified Member Pauley's error into law for an entire circuit. *Castro-Soto v. Holder*, 596 F.3d 68 (CA1 2010). They did so on the mistaken notion that the Board's unpublished decision was deserving of

administrative deference. *Id.* at 72. That holding is out of step with administrative law jurisprudence in that the Board only earns deference from Article III courts when the Board acts in a lawmaking capacity by published opinion. *Marmolejo-Campos v. Holder*, 558 F.3d 903, 909 (CA9 2009) (en banc). In the decision under review by the First Circuit in *Castro-Soto* the Board did not offer an interpretation of the statute or regulation because the Board only proffers interpretations through published opinion. An unpublished Board opinion does not make law. Accordingly, AILA finds the First Circuit's decision unpersuasive. The Board would not be bound by it even for cases arising in the First Circuit.

The second source is the commentary to the interim regulation. See INS & EOIR, *Adjustment of Status To That Person Admitted for Permanent Residence; Temporary Removal of Certain*

Restrictions of Eligibility, 66 Fed. Reg. 16383 (Mar. 26, 2001).⁵ In the supplementary information, the agency explains that a “visa petition does not serve to grandfather the alien beneficiary if that alien has previously obtained lawful permanent resident status on the basis of that visa petition.” *Id.* at 16384. Supplementary information, however, is not a regulation and has no binding effect. *Matter of T-M-H- & S-W-C-*, 25 I&N Dec. 193, 193 (BIA 2010). USCIS in a 2005 memorandum has picked up on this phrase in the supplementary information and elaborated somewhat on its purpose. In his memorandum to the field adjudicators, then-Associate Director William R. Yates “clarifie[d] issues pertaining to a ‘derivative’ of a grandfathered alien, when an application for labor certification

⁵ The awkward phrasing of “to that person” is the official title of the regulation.

serves to grandfather an alien, and multiple filings for adjustment of status under section 245(i).”⁶ On page 6 of the memorandum, Mr. Yates states:

A grandfathered alien is eligible to file an application to adjust status under section 245(i) as long as the alien meets the requirements of 8 CFR 245.10 and has *not* adjusted under section 245(i). USCIS no longer considers an alien “grandfathered” once the alien is granted adjustment of status under section 245(i), because the alien has acquired the only intended benefit of grandfathering: LPR status.

For the reasons explained below, the commentary and USCIS memorandum are unpersuasive.⁷

While § 245(i)’s intended result is to deliver LPR status is true enough, that is not a reason to ignore the language of the statute. Section

⁶ The memorandum is available at AILA InfoNet Doc. No. 05031468 (posted March 14, 2005).

⁷ AILA recognizes that Board Member Adkins-Blanch was involved in the drafting of the regulation and supplementary information while he was general counsel for EOIR.

245(i)(1)(B) does not contain any temporal aspect that would have grandfathered status lapse. Congress did not tie grandfathered status to a priority date or visa number. The regulation merely parrots the statute and offers nothing different (and nor could it given the plain nature of § 245(i)).⁸ When read in context of § 245 as a whole, it is evident that the status of being “grandfathered” carries forward past an individual’s adjustment and acquisition of permanent residence. No one has ever suggested that a § 245(a) applicant who adjusts cannot later adjust again under § 245(a) merely because he obtained the intended benefit of LPR

⁸ Under the Board’s decision in *Matter of Koljenovic*, 25 I&N Dec. 219 (BIA 2010), it would seem that an individual who adjusted under § 245(i) was “admitted” to the United States and, under certain circumstances not present here, could subsequently seek adjustment under § 245(a) as having been inspected and admitted.

status.⁹ Section 245(a)'s description of eligibility contains no temporal restriction. There simply is no good reason to read the statute in any way other than the way in which it was written. Mr. Yates's memorandum adds additional requirements to the statute (and regulation); accordingly, it is an unconvincing explanation of the penalty-fee adjustment program.

B. The Board Should Correct Its Error in *Matter of Legaspi*

The Board should correct the error in its decision in *Matter of Legaspi*, 25 I&N Dec. 328 (BIA 2010). In *Legaspi*, the Board simply misread the statutory language. As explained in our brief filed in

⁹ The Board's decision in *Matter of Villareal-Zuniga*, 23 I&N Dec. 886 (2006) has no bearing on the adjudication of the issues presented here. The *Villareal-Zuniga* decision was about using a once-used visa petition to accord a new visa number. The reasoning and rationale are inapposite to determining grandfathered status.

Matter of Legaspi, any applicant described by § 245(i) is a beneficiary such that § 245(i) status attaches to and travels with each of the individuals separately. Grandfathered aliens include *both* the “principal alien” (the named beneficiary of a petition) and the spouse or child of the principal alien (if the relationship is in existence when the petition is filed). *See* § 245(i)(1)(B); 8 C.F.R. § 1245.10(a)(1).

The Board’s error is plainly stated on the face of its opinion in *Legaspi*. The statute defines eligible individuals as anyone “who is the beneficiary (including a spouse or child of a principal alien, if eligible to receive a visa under section 203(d))”. *See* § 245(i)(1)(B). The Board gives the statutory language a makeover replacing “including” with “and”. *Legaspi*, 25 I&N Dec. at 328-329. The Board then proceeded to analyze the statute as if the statute actually used the word “and”. But the statute says “including” and

“including” is what the Board should have interpreted.

It matters a great deal because “including” is not the same as “and”. Instead of distinguishing between the named alien and the dependents, which the Board did, the statute provides that the dependents *are* “beneficiaries” and, therefore, dependents *are* grandfathered aliens, just the same as the “principal alien.” By using the word “including,” Congress intended to provide equal grandfathering protection to both the named beneficiary (the principal alien) and his or her spouse and children in existence when the qualifying petition is filed. By equating “principal alien” and “grandfathered alien,” the Board eliminated an entire category of eligible individuals from § 245(i) eligibility.

It is not clear *why* the Board engaged in this statutory makeover, but having introduced the error, the Board's decision then perpetuates it by extending (erroneously) its holding to limit § 245(i) only to individuals with grandfathered status. In *Legaspi*, the Board got hung up on the uncontested and unremarkable fact that Mr. Legaspi himself was not grandfathered. But that is, of course, the wrong question to ask because section 245(i) is not limited only to individuals with grandfathered status. Spouses and children of grandfathered aliens are eligible to adjust status under § 245(i) if they are accompanying or following-to-join the grandfathered alien. Only the lead applicant – in Mr. Legaspi's case, his wife – needs be grandfathered. She was; he was following-to-join her; therefore, he was eligible to adjust under § 245(i).

AILA is not the only one who thinks this. Indeed, USCIS thinks so, too. See Yates Memorandum at 4.¹⁰ Although the Board cited with approval the Yates Memorandum, *Legaspi*, 25 I&N Dec. at 329 n2, it misses its import. The Yates Memorandum proffers a series of hypotheticals to demonstrate how they view § 245(i) in operation. For example:

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

¹⁰ The Board’s reliance on *Landin-Molina v. Holder*, 580 F.3d 913, 918 (CA9 2009) was misplaced. In *Landin-Molina*, the alien sought adjustment even though he was not a grandfathered alien *or* accompanying or following to join a grandfathered alien. 580 F.3d at 918. Indeed, *Landin-Molina* acknowledges that an individual who is accompanying or following to join a grandfathered alien may seek adjustment under § 245(i). *Id.*

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.

Yates Memorandum at 4 (emphasis in original).

Consistent with the statutory language, the USCIS has since 1999 treated spouses and children of grandfathered aliens as being grandfathered. *See* Memorandum of Robert L. Bach, Executive Assoc. Commissioner, *Accepting Applications for Adjustment of Status Under Section 245(i) of the Immigration and Nationality Act*, (June 10, 1999) (“Bach Memorandum”).¹¹ Significantly, on page 4 of the

¹¹ This memo is available at AILA Infonet Doc. No. 99061940 (posted June 19, 1999).

Bach Memorandum, the former-INS explained that the

[m]any aliens with pending, grandfathered petitions or labor certification applications will marry or have children after the qualifying petition or application was filed but before adjustment of status. These 'after acquired' children and spouses are allowed to adjust under 245(i) as long as they acquire the status of a spouse or child before the principal alien ultimately adjusts status.

Bach Memorandum at 4. In liaison work with the then-INS, the Bach Memorandum was also included in a list of issues resolved by AILA and the INS General Counsel. *See* Letter of Bo Cooper, INS General Counsel, Items 8-9 of the INS General Counsel-AILA Liaison Meetings (December 10, 1999), AILA InfoNet Doc. No. 99122271 (posted Dec. 22, 1999).

Conclusion

The Board should disapprove of the decision in the unpublished decision *Castro-Soto*, explain why

the First Circuit was incorrect in the published decision in *Castro-Soto*, and correct its error in *Matter of Legaspi* by published opinion.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, STEPHEN W MANNING, certify that on April 11, 2011, I served a true and correct copy of the attached brief on Benjamin Casper, Attorney at Law, 1059 South Robert Street, Suite 100, West Saint Paul, MN 55118 and Barry Chait, Esq., Chief Counsel, Dept of Homeland Security, 2901 Metro Drive, Suite 100, Bloomington MN 55425 by first class regular mail.

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