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1458 Howard Street
San Francisco, CA 94103

Washington, D.C.

600 14th Street, NW
Suite 502
Washington, D.C. 20005

San Antonio

500 Sixth Street
Suite 204
San Antonio, TX 78215

Austin

6633 East Hwy 290
Suite 102
Austin, TX 78723

ilrc@ilrc.org

www.ilrc.org



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ILRC comments submitted to policyfeedback@uscis.dhs.gov prior to March 2, 2023: **USCIS PM Changes - Clarifying one-year physical presence requirement for asylee adjustment**
<https://www.uscis.gov/sites/default/files/document/policy-manual-updates/20230202-RefugeeAsyleeAOSPhysicalPresence.pdf>

Dear USCIS,

On February 2, 2023, USCIS announced the changes specified above to the Policy Manual guidance on the one-year physical presence requirement for asylee/refugee adjustment. Overall we commend USCIS on these changes which we believe will increase fair and consistent adjudications for asylees and refugees seeking adjustment.

Background on ILRC

The ILRC is a national non-profit organization that provides legal trainings, educational materials, and advocacy to advance immigrant rights. The ILRC's mission is to work with and educate immigrants, community organizations, and the legal sector to continue to build a democratic society that values diversity and the rights of all people. Since its inception in 1979, the ILRC has provided technical assistance on hundreds of thousands of immigration law issues, trained thousands of advocates, and pro bono attorneys annually on immigration law, distributed thousands of practitioner guides, provided expertise to immigrant-led advocacy efforts across the country, and supported hundreds of immigration legal non-profit organizations in building their capacity. The ILRC has produced legal trainings, practice advisories, and other materials pertaining to immigration law and processes.

As the lead organization for the New Americans Campaign, the ILRC receives and re-grants substantial philanthropic dollars to local immigration legal services providers across the United States who help lawful permanent residents (LPRs) apply for naturalization.

The ILRC is a leader in asylum, VAWA, U, and T immigration relief as well, coordinating taskforces and producing trusted legal resources including webinars, trainings, and manuals such as Essentials of Asylum, The VAWA Manual: Immigration Relief for Abused Immigrants, The U Visa: Obtaining Status for Immigrant Victims of Crime and T Visas: A Critical Option for Survivors of Human Trafficking.

Our experience with non-profit legal services providers and applicants for these immigration benefits inform our comments on these changes.

The new guidance makes several helpful clarifications:

1. Asylees and Refugees seeking adjustment are lawfully admitted if they accrue one year of physical presence at the time of adjudication of the adjustment of status application. They are not required to have one year of physical presence at the time they file for adjustment.

This is a welcome change. Current processing time for asylee and refugee adjustment is three years at the two USCIS service centers that adjudicate them. If applicants apply shortly after their asylee/refugee approval, they will still have much more than a year of physical presence by the time USCIS adjudicates their adjustment.¹

Should processing times speed up to less than a year, USCIS and those advising applicants in the field will need to advise applicants that the one year must be met by the time of adjudication, thus it may become necessary to wait longer before applying for adjustment. We hope that should adjudications speed up, the agency will develop a policy of holding affected adjustment applications until one year has passed.

We also suggest that the language in this section be more explicit. Currently it implies that the asylee can apply for adjustment immediately after approval of asylum, as long as the physical presence is met by the time of adjudication, but it doesn't clearly state that the I-485 may be filed immediately after asylum approval. This could cause problems of rejections at lockboxes where applications are received.

The Policy Manual states, "Asylees may adjust status to a lawful permanent resident after being physically present in the United States for at least 1 year at the time of adjudication of the adjustment of status application."² A clarifying sentence would add, for example, "An application for adjustment may be filed immediately after approval of asylum as long as the physical presence is met by the time of adjudication. USCIS offices may hold applications in abeyance to allow the physical presence requirement to be met, if necessary." Similar language could be added to the refugee section of the Policy Manual to make clear that a refugee can file an application for adjustment as soon as they arrive in the United States, as long as the physical presence requirement is met by the time of adjudication.

It would be helpful to state this outright because it will affect the receipting of applications, and it will prevent I-485 rejections in cases where the asylee/refugee has less than a year physical presence upon filing of the I-485.

2. Asylee and refugee adjustment applicants who have held the immigration status of exchange visitor (J-1 or J-2 nonimmigrants) and who are subject to the 2-year foreign residence requirement under INA § 212(e) are not required to comply with or obtain a waiver of such requirement in order to adjust status under INA § 209.

Asylee and refugee adjustment applicants who formerly had a J visa with a foreign residence requirement are not required by law to have an INA § 212(e) waiver.³ However, practitioners have reported to ILRC that adjudicators and even supervisors have sometimes been unaware of that, resulting in erroneous denials of adjustment. Thus, this clarification in the Policy Manual will improve adjudications.

¹ USCIS, *Processing times*, I-485 for asylees, I-485 for refugees, <https://egov.uscis.gov/processing-times/> (February 2023).

² 7 USCIS-PM M.2(A).

³ INA § 101(a)(15)(j).

3. Waivers of applicable inadmissibility grounds may be waived by adjudicators without submission of an I-602

The revised guidance makes clear that USCIS adjudicators may waive inadmissibility grounds for refugee and asylee adjustment applicants without requiring submission of an I-602 where the record contains sufficient information to assess eligibility without such a waiver. In addition, the officer's approval of the adjustment also serves as an approval of the applicable grounds of inadmissibility.⁴ This procedure is also explicitly allowed in the asylee adjustment process.⁵

This is also a welcome clarification, because field experience varied on when USCIS officers would request submission of an I-602 waiver or not, even when sufficient evidence was in the file to adjudicate a waiver.

However, we note that some of the language in the corresponding sections of the Policy Manual are confusing, as in the section on unlawful presence:

"While departures from the United States may trigger an unlawful presence bar, an officer may consider a waiver for unlawful presence either through submission of a waiver application (Form I-602), or in conjunction with the adjustment of status application, in instances in which a waiver application is not requested."⁶

This language is confusing because it seems to favor the requirement of an I-602 waiver, or at least it is not clear that one is not necessary. **A statement here that clarifies "Unlawful presence may be waived without requirement of an I-602 waiver if sufficient evidence exists in the record to support adjudication," would be helpful.**

Also, the waiver instructions section of the Policy Manual adjudicators allow denial of an adjustment application based on a discretionary waiver denial, with or without an I-602.⁷ There is no mention of a Request for Evidence (RFE) being required, which would allow applicants an opportunity to respond to a potential waiver denial. Instead, the guidance states that applicants can renew their waiver request before the Immigration Court. Since there is no appeal of a denial of adjustment, a court proceeding would be the only forum an applicant would have.

We recommend that the waiver instructions in 7 USCIS-PM M.5(C) include a requirement that adjudicators issue an RFE before denying a waiver, whether with or without an I-602. This requirement would improve due process for applicants and efficiency in adjudications.

There are currently more than two million cases pending scheduling in Immigration courts and waiting times for hearings take years.⁸ If a potential waiver denial can be successfully responded to by an applicant, it makes sense to allow that to happen before the adjustment is finally adjudicated at the USCIS level, not after.

⁴ 7 USCIS PM L.3(D).

⁵ 7 USCIS-PM M.5(C).

⁶ 7 USCIS-PM M.3(B)(2).

⁷ 7 USCIS-PM M.5(C)

⁸ TRAC Immigration, *Immigration Court Backlog Tool* https://trac.syr.edu/phptools/immigration/court_backlog/ (February 2023).

We also recommend that the Policy Manual specify that once an inadmissibility ground is waived at the time of adjustment of an asylee or refugee, whether with or without an I-602, that ground should not be revisited as a bar at the time of naturalization.

This clarification would aid administrative efficiency and clarify the process for applicants, as well.

Thank you for your consideration of our comments.

Peggy Gleason, Senior Staff Attorney, Immigrant Legal Resource Center