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June 16, 2023

Avideh Moussavian  
Chief, Office of Policy and Strategy, USCIS  
Department of Homeland Security  
20 Massachusetts Ave NW  
Washington, DC 20529

Dear Ms. Moussavian,

We are writing to thank you for USCIS's recent additions to the USCIS Policy Manual and share further suggestions that USCIS can immediately implement to further increase access to immigration benefits and reduce backlogs.

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 the immigration law and processes.

The ILRC also leads the New Americans Campaign, a national non-partisan effort that brings together private philanthropic funders, leading national immigration and service organizations, and over two hundred local services providers across more than 20 different regions to help prospective Americans apply for U.S. citizenship. Through our extensive networks with service providers, immigration practitioners, and naturalization applicants, we have developed a profound understanding of the barriers faced by low-income individuals seeking to obtain immigration benefits.

We believe that having a good policy manual provides clarity to advocates advising community members, decreases fear of the unknown in applying for benefits, increases efficiency by producing better prepared applications and applicants, and helps provide uniform adjudications so that applications receive consistent treatment.

In keeping with these goals and values, we commend USCIS for the following changes already made to the Policy Manual:

1. **Improving N-648 guidance and I-693 flexibilities.** In particular, we thank USCIS for removing the language directing adjudicators to assess the effect of the disability on the applicant's

daily life and the severity of the disability. We also approve of the deletion of questions which required the medical professional to show that they were the regularly treating physician of the applicant. Additionally, the inclusion of telehealth guidance is a welcome change given the increased use of tele-medicine during the COVID-19 pandemic.

2. **Making permanent the waiver of the 60-day requirement for civil surgeon signatures for Form I-693** announced on March 31, 2023. The requirement that the civil surgeon sign the form no more than 60 days from the date of the application posed a barrier for many applicants and resulted in Requests for Evidence and a general slowing of application processes. By removing this barrier, USCIS recognizes the difficulties applicants experience in obtaining medical exams and has taken a positive step to ensure that the agency is collecting information required for adjudication without unduly burdening applicants.
3. **Unlawful presence guidance**, issued June 24, 2022, clarifying that the INA § 212(a)(9)(B) unlawful presence bars can run inside the United States. This interpretation is in line with the plain language of the statute, longstanding practice, and public policy considerations. This guidance will also provide clarity to adjudicators and resolve inconsistencies in adjudications, while helping to ensure eligible applicants can gain lawful status.
4. **TPS travel and rescission of *Matter of Z-R-Z-C***, announced July 1, 2022. We applaud the rescission of *Matter of Z-R-Z-C*, a decision which was contrary to the plain language of the Miscellaneous and Technical Immigration and Naturalization Amendments of 1991 (MTINA), reversed prior practice, and had adverse effects on numerous TPS holders and their family members. We further appreciate the agency's travel policy for TPS beneficiaries to address this situation going forward and ensure that TPS holders who return lawfully are considered "inspected and admitted" in compliance with the MTINA.
5. **Re-inserting *mens rea* for false claims for good moral character**. ILRC applauds USCIS's revision of 12 USCIS-PM F.5 to re-insert a "knowing" requirement for false claim for purposes of being an "unlawful act" for good moral character for naturalization. This guidance is a welcome return to the agency's previous interpretation and will restore access to naturalization for individuals who are otherwise eligible.
6. **U BFD process**. The bona fide determination process, announced on June 14, 2021, is a welcome step to address the effect of the long backlog on U petitioners and their family members and provide protection from deportation and work authorization to bona fide petitioners while their applications are pending.
7. **SIJS deferred action**. The process, announced March 7, 2022, to offer approved SIJS petitioners deferred action is a welcome change to provide protection to this vulnerable population while waiting for a visa to be available.
8. **Withdrawing harmful and overbroad guidance on discretion** in Volume 10, Part A, Chapter 5, that laid out many discretionary factors that could be used to deny employment authorization.
9. **Increasing EAD validity**, announced February 7, 2022. The decision to extend the validity period from one year to two years for certain EAD categories will provide longer periods of economic stability for asylees, refugees, individuals granted withholding of removal, and VAWA self-petitioners. Additionally, grants of employment authorization matching the period of parole or deferred action will be similarly beneficial for parole and deferred action recipients and will reduce unnecessary filing and confusion. By relieving the burden of applying every year, this policy will lead to a decrease in the numbers of applications received and will be a step forward in reducing the I-765 backlogs, and reducing the processing times more generally.
10. **VAWA self-petition guidance**, announced February 10, 2022. We applaud the application of recent court decisions regarding good moral character and the continued eligibility of stepparents and stepchildren to access VAWA relief. We were also pleased to see that the updated interpretation of shared residence includes those who have resided with their abuser at some point in the past. By updating interpretations and applying positive case law nationwide, USCIS has demonstrated a commitment to increasing accessibility to VAWA benefits and reducing barriers to immigration benefits for survivors of domestic violence. These changes are also a positive step forward in ensuring consistency between the courts and USCIS policy and practice and toward ensuring that vulnerable individuals are not barred unnecessarily from accessing relief.

11. **Interview waivers for certain conditional permanent residents**, announced April 7, 2022. Such a change will not only increase efficiency and contribute to backlog reduction but will also help to restore public trust with USCIS.
12. **Green card extensions for naturalization applicants**. We applaud USCIS for allowing a 24-month extension of green cards upon the filing of a naturalization application. In the past, naturalization-eligible lawful permanent residents (LPR) whose green card was expiring within six months of the naturalization application would often have to choose between renewing their green card or applying to naturalize, as the combined fees and simultaneous administrative processes posed a burden. This change eliminates the need to choose, which should encourage eligible LPRs to file for naturalization.
13. **Inclusive gender markers**, announced on March 31, 2023. Allowing applicants to choose and change their gender marker without requiring additional evidence will help reduce the barriers applicants face in obtaining benefits and identity documents that match their gender.
14. **Filing deadline clarifications**, announced March 29, 2023, for paper-based applications. While many applications are available online, many applicants still file by paper either because the application or petition is not yet available for online filing, or the filing requires a fee waiver application which is not yet available for online filing. For many applicants – particularly pro se applicants – having clarification on how the agency will treat submissions where the deadline is a weekend or holiday will reduce anxiety and missed deadlines.
15. **Public charge guidance**. ILRC applauds the new public charge guidance, particularly: recognition that most applicants subject to a public charge test are ineligible for benefits that would hurt them in a public charge assessment; clarification that disability alone does not mean a person is likely to become a public charge; recognition that many disabilities do not impact a person’s health or ability to support themselves; inclusion of income from unauthorized employment in household income calculation; guidance on consideration of receipt of benefits; clarification that earned benefits and student loans, scholarships, and grants do not count as public charge; identification of extenuating circumstances that might warrant consideration in the totality of the circumstances; and hypothetical totality of the circumstances scenarios to provide examples.
16. **Refugee/asylee physical presence**. ILRC commends the new guidance affirming: 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; asylee and refugee adjustment applicants who have held the immigration status of exchange visitor 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; and waivers of applicable inadmissibility grounds may be waived by adjudicators without submission of Form I-602.
17. **Launch of “History” tab**. ILRC welcomes USCIS’s move toward a more transparent process of updating the USCIS Policy Manual going forward by launching a “History” tab for changes issued on or after June 11, 2021. This addition allows for increased communication with the agency and better stakeholder engagement regarding all of the changes, including possible negative consequences.

Additionally, we recommend USCIS make the following changes to the USCIS Policy Manual in order to further increase access to benefits. These suggestions include our ongoing recommendations from prior letters as well as new ones. We are available to answer any questions and respectfully request a meeting to discuss further.

Sincerely,



Alison Kamhi  
Legal Program Director  
Immigrant Legal Resource Center

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## 1. USCIS Should Amend Good Moral Character Guidance to Comport with statutory Requirements and Streamline Adjudications.

First, USCIS should incorporate a “totality of the circumstances” standard in 12 USCIS-PM F for assessing good moral character for naturalization applications not barred by INA §§ 101(f)(1)-(9). Applicants must establish good moral character in order to show eligibility for naturalization. Applicants who are not barred by INA §§ 101(f)(1)-(9) may still be denied naturalization as a matter of discretion, pursuant to INA § 101(f). We ask USCIS to adopt the “totality of the circumstances” approach outlined by Board of Immigration Appeals (BIA) cases and the Ninth Circuit to streamline this discretionary analysis to avoid inefficient and inconsistent adjudications.<sup>1</sup>

USCIS should instruct adjudicators to weigh the positive factors against the negative factors in an applicant’s case and only to deny good moral character as a matter of discretion if the negative factors outweigh the positive factors. Doing so will allow for a more balanced inquiry that takes into account all of the equities in a particular case. A totality of the circumstances approach is also consistent with the statutory scheme in that it ensures that negative factors do not become de facto bars to good moral character and instead are weighed against positive factors.<sup>2</sup> We ask USCIS to amend 12 USCIS-PM F.5(L)(2) as follows:

### 2. Case-by-Case Analysis

*USCIS officers determine on a case-by-case basis whether an unlawful act committed during the statutory period is one that adversely reflects on moral character.*<sup>[72]</sup> *The officer may make a finding that an applicant did not have GMC due to the commission of an unlawful act evidenced through admission, conviction, or other relevant, reliable evidence in the record.*<sup>[73]</sup> *The case-by-case analysis must address whether:*

- *The act is unlawful (meaning the act violates a criminal or civil law in the jurisdiction where committed);*
- *The act was committed or the person was convicted of or imprisoned for the act during the statutory period;*
- *The act adversely reflects on the person’s moral character; and*
- *There is evidence of any extenuating circumstances.*<sup>[74]</sup>
- *There are any counterbalancing factors that bear on the applicant’s moral character.*

*The applicant shall be found to have demonstrated good moral character unless, under the totality of the circumstances, there is no evidence of extenuating circumstances and the negative acts that the applicant committed outweigh the applicant’s positive equities.*

*In addition, in cases under the jurisdiction of the Ninth Circuit, the officer’s analysis must also consider any counterbalancing factors that bear on the applicant’s moral character.*<sup>[75]</sup>

*The following steps provide officers with further guidance on making GMC determinations based on the unlawful acts provision.*

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<sup>1</sup> *Matter of Sanchez-Linn*, 20 I&N Dec. 362, 365 (BIA 1991) (evaluating good moral character involves evaluating “both favorable and adverse” evidence); *Matter of B-*, 1 I&N Dec. 611, 612 (BIA 1943) (“We do not think [good moral character] should be construed to mean moral excellence, or that it is destroyed by a single lapse.”); *see also Torres-Guzman v. INS*, 804 F.2d 531, 534 (9th Cir. 1986) (“Where ... [the] petitioners have not committed acts bringing them within [INA § 101(f)]’s enumerated categories, the Board must consider all of petitioners’ evidence on factors relevant to the determination of good moral character.”).

<sup>2</sup> *Id.*

### *Step 1 – Determine Whether the Applicant Committed, Was Convicted of, or Was Imprisoned for an Unlawful Act during the Statutory Period*

*The officer should determine if the applicant committed, was convicted of, or was imprisoned for any unlawful acts during the statutory period. To determine if an act qualifies as an unlawful act, the officer should identify the applicable law, then look to whether the act violated the relevant law regardless of whether criminal or civil proceedings were initiated or concluded during the statutory period.*<sup>1761</sup>

*Officers should only conclude that a person committed the acts in question based on a conviction record, an admission to the elements of the criminal or civil offense, or other relevant, reliable evidence in the record showing commission of the unlawful act.*<sup>1771</sup>

### *Step 2 – Determine Whether the Unlawful Act Adversely Reflects on GMC*

*The officer should evaluate whether the unlawful act adversely reflects on the moral character of the applicant. Unlawful acts that reflect adversely on moral character are not limited to conduct that would be classified as a CIMT.<sup>1781</sup> In general, an act that is classified as a CIMT<sup>1791</sup> would be an unlawful act that adversely reflects on the applicant's moral character.<sup>1801</sup> An officer should also consider whether the act is against the standards of an average member of the community. For example, mere technical or regulatory violations may not be against the standards of an average member of the community.*<sup>1811</sup>

### *Step 3 – Review for Extenuating Circumstances*

*The officer should review whether the applicant has shown extenuating circumstances which render the crime less reprehensible than it otherwise would be or the actor less culpable than he or she otherwise would be.<sup>1821</sup> Extenuating circumstances must pertain to the unlawful act and must precede or be contemporaneous with the commission of the unlawful act.<sup>1831</sup> It is the applicant's burden to show extenuating circumstances that mitigate the effect of the unlawful act on the applicant's moral character.*<sup>1841</sup>

### *Step 4 – Review for counterbalancing factors.*

*The officer should review whether the applicant has shown additional counterbalancing factors, such as positive equities, mitigating circumstances, or evidence of rehabilitation. In the Ninth Circuit, Positive additional factors counterbalance an unlawful act committed in the statutory period if the factors are sufficient to overcome the weight of the negative act.*

*If the applicant meets his or her burden of proof to demonstrate extenuating circumstances **or counterbalancing factors that outweigh the unlawful act**, the officer may find that commission of the unlawful act<sup>1851</sup> does not preclude the applicant from establishing GMC.<sup>1861</sup> ~~An officer may not, however, consider conduct or equities (including evidence of reformation or rehabilitation) subsequent to the commission of the unlawful act as an extenuating circumstance. Consequences after the fact and future hardship(s) are not extenuating circumstances.~~<sup>1871</sup>*

**Second, the USCIS Policy Manual should clarify that conduct prior to the good moral character statutory time period cannot form the sole basis of a discretionary denial and cannot be considered at all unless directly relevant to conduct within the good moral character statutory time period—five years, or three years if applying as the spouse of a U.S. citizen. The INA already mandates that certain acts bar someone from establishing good moral character indefinitely, such as aggravated felony convictions or**

assistance in Nazi persecution.<sup>3</sup> Likewise, INA § 316 allows the government to consider conduct before the good moral character statutory time period. But the statutes do not authorize conduct prior to the statutory time period to be the *cause* of a denial of good moral character, outside of the exceptions mentioned above. Many circuits, including the Second, Fourth, Eighth, and Ninth have explicitly reasoned as much.<sup>4</sup> Not only would this guidance more closely comport with the statutory scheme,<sup>5</sup> but it also would streamline adjudications by allowing USCIS to focus on conduct within the good moral character statutory period and thus more efficiently, and more fairly, assess good moral character.

We ask USCIS to add the following in 12 USCIS-PM F.2(B):

*USCIS is not limited to reviewing the applicant's conduct only during the applicable GMC period. An applicant's conduct prior to the GMC period may affect the applicant's ability to establish GMC if the applicant's present conduct does not reflect a reformation of character or the earlier conduct is relevant to the applicant's present moral character.<sup>6</sup> Negative acts that occurred prior to the statutory period may not be the sole basis of a discretionary denial and may not be considered at all unless directly relevant to conduct within the good moral character statutory time period.*

## **2. USCIS Should Withdraw the Section in 12 USCIS-PM F.5(c)(2) Entitled “Conditional GMC Bar Applies Regardless of State Law Decriminalizing Marijuana.”**

We ask USCIS to withdraw the changes in 12 USCIS-PM F.5(c)(2), announced with the policy alert entitled, “Controlled Substance-Related Activity and Good Moral Character Determinations” on April 19, 2019. This guidance currently provides that an LPR lacks good moral character if (a) they are legally (under state law) employed in the multi-billion dollar cannabis industry and pay state and federal income taxes on their work; or (b) they use medical or recreational marijuana in accord with state law. Like most Americans who live in states where marijuana is legalized, and often highly advertised, applicants have no way of knowing that their employment or use technically violates federal law. In practice, this rule acts

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<sup>3</sup> INA § 101(f)(8) (“one who at any time has been convicted of an aggravated felony”); INA § 101(f)(9) (“one who at any time has engaged in conduct described in section 212(a)(3)(E)”).

<sup>4</sup> See *Nyari v. Napolitano*, 562 F.3d 916, 920 (8th Cir. 2009) (“An applicant’s conduct prior to the statutory period is relevant only to the extent that it reflects on his or her moral character within the statutory period.”); *Santamaria-Ames v. INS*, 104 F.3d 1127, 1132 (9th Cir. 1996) (“If the petitioner demonstrates ‘exemplary conduct with every evidence of reformation and subsequent good moral character’ from the beginning of the [statutory] period to the present, then his application cannot be denied based solely on his prior criminal record....”); *Pignatello v. Att’y Gen. of U. S.*, 350 F.2d 719, 725 (2d Cir. 1965) (noting that the adjudicator does not need to consider conduct before the good moral character statutory period, and that if the adjudicator does, they can only do so to the extent that the pre-period conduct relates to whether the petitioner has shown good moral character in the statutory period); *Marcantonio v. U.S.*, 185 F.2d 934, 936–37 (4th Cir. 1950) (reversing the judge’s finding that applicant was not of good moral character based on three convictions where the crimes were committed outside the statutory period and the applicant demonstrated he was rehabilitated); see also *Davis v. Sessions*, 293 F. Supp. 3d 678, 686–87 (S.D. Tex. 2018) (holding that acts outside the statutory period must be tied to current conduct); *Matter of Carbajal*, 17 I&N Dec. 272 (Comm. 1978) (holding that a noncitizen’s prior immigration violations standing alone are insufficient to find that he is not of good moral character).

<sup>5</sup> INA §§ 101(f)(8)-(9); see also *Santa Maria Ames v. INS*, 104 F.3d 1127, 1130 (9th Cir. 1996) (“To hold otherwise would sanction a denial of citizenship where the applicant’s misconduct, and evident bad moral character, was many years in the past, and where a former bad record has been followed by many years of exemplary conduct with every evidence of reformation and subsequent good moral character. Such a conclusion would require a holding that Congress had enacted a legislative doctrine of predestination and eternal damnation.”); *Petition of Zele*, 140 F.2d 773, 776 (2d Cir. 1944) (“Under the law the burden is on the petitioner to establish good moral character only during the five-year period, not earlier.... And it has consistently been construed liberally so as to sanction forgiveness after the expiration of five years from the date of a disbarring misdeed.”).

as a cynical entrapment of people who reasonably believe that they are obeying all laws and specifically and unfairly targets immigrant workers.

We ask USCIS to withdraw this section in its entirety and replace it with the following:

*Officers should not affirmatively inquire about marijuana use unless there is some objective indication of such use, such as a prior criminal conviction.*

*1. Conditional GMC Bar Applies Regardless of State Law Decriminalizing Marijuana*

*A number of states and the District of Columbia (D.C.) have enacted laws permitting “medical”[19] or “recreational”[20] use of marijuana.[21] Marijuana, however, remains classified as a “Schedule I” controlled substance under the federal CSA.[22] Schedule I substances have no accepted medical use pursuant to the CSA.[23] Classification of marijuana as a Schedule I controlled substance under federal law means that certain conduct involving marijuana, which is in violation of the CSA, continues to constitute a conditional bar to GMC for naturalization eligibility, even where such activity is not a criminal offense under state law.[24]*

*Such an offense under federal law may include, but is not limited to, possession, manufacture or production, or distribution or dispensing of marijuana.[25] For example, possession of marijuana for recreational or medical purposes or employment in the marijuana industry may constitute conduct that violates federal controlled substance laws. Depending on the specific facts of the case, these activities, whether established by a conviction or an admission by the applicant, may preclude a finding of GMC for the applicant during the statutory period. An admission must meet the long held requirements for a valid “admission” of an offense.[26] Note that even if an applicant does not have a conviction or make a valid admission to a marijuana related offense, he or she may be unable to meet the burden of proof to show that he or she has not committed such an offense.*

**3. USCIS Should Withdraw the Section on “Extreme Vetting” in 12 USCIS-PM D.2(D) and Authorize Nunc Pro Tunc Waivers at Time of Naturalization.**

We ask USCIS to withdraw the section on “extreme vetting,” as announced in the policy alert entitled “Prerequisite of Lawful Admission for Permanent Residence under All Applicable Provisions for Purposes of Naturalization,” issued November 18, 2020. This section requires officers to engage in unnecessary, time-intensive, and burdensome re-adjudication of prior immigration applications. Officers must “verify” the underlying lawful permanent residence (LPR) status in all naturalization cases, even where no question about eligibility is raised, in essence re-adjudicating an individual’s LPR status. In the process of this “readjudication,” officers are requesting documentation “proving” eligibility that in many cases is no longer available, or should be in the possession of USCIS, such as an alleged prior “deportation order” from the 1970s when the applicant had indicated they received “voluntary departure.” This disproportionately affects low-income, vulnerable, and unrepresented naturalization applicants as well as applicants of color, as they may not have resources to obtain verification for various filings and information provided at the original application for LPR status, sometimes decades in the past.<sup>6</sup>

For these reasons, we ask USCIS to withdraw 12 USCIS-PM D.2(D) in its entirety and replace it with the existing first paragraph with the following edit:

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<sup>6</sup> Randy Capps & Carlos Echeverría-Estrada, Migr. Pol’y Inst., *A Rockier Road to U.S. Citizenship? Findings of a Survey on Changing Naturalization Procedures* (2020), available at <https://www.migrationpolicy.org/research/changing-uscis-naturalization-procedures>.



#### *D. Underlying Basis of Admission*

*To adjust status to that of an LPR or be admitted as an LPR, an applicant must first be eligible for one of the immigrant visa categories established under the law. During a naturalization proceeding, the officer ~~can~~ **must** verify the underlying immigrant visa petition or other basis for immigrating<sup>[74]</sup> that formed the basis of the adjustment of status or admission as an immigrant to the United States.<sup>[75]</sup>*

Second, we ask that USCIS issue guidance in the USCIS Policy Manual to **recognize the ability to apply for nunc pro tunc waivers related to inadmissibility** at the time of LPR adjudication during the naturalization process. When USCIS adjudicates a naturalization application, officers are currently required to “verify” the underlying LPR status, even where no question about eligibility is raised, in essence re-adjudicating an individual’s LPR status. In these re-adjudications, USCIS sometimes re-interprets facts and comes to different conclusions than it did previously, leaving an applicant no recourse for having relied on the agency’s prior interpretation, such as regarding whether certain facts triggered a ground of inadmissibility requiring a waiver at the time of issuance of an immigrant visa or admission as a permanent resident. Where USCIS determines that a waiver was available at the time of adjudication but not applied for (for example, perhaps facts relating to inadmissibility were disclosed but a waiver deemed not necessary or applicable), applicants in certain previous administrations were allowed to apply for a nunc pro tunc waiver at the time of naturalization adjudication. We ask that USCIS explicitly authorize this practice in the Policy Manual.

Nunc pro tunc waivers are recognized in other areas of immigration law. For example, 212(k) waivers can be granted nunc pro tunc for individuals in removal proceedings to apply to their prior grant of status.<sup>7</sup> Similarly I-212 waivers may be granted nunc pro tunc to apply to individuals’ prior entry.<sup>8</sup>

Accordingly, we ask USCIS to add the following language to 12 USCIS-PM D.2(A)(1):

*In order for the applicant to establish that he or she was lawfully admitted for permanent residence, the applicant must have met all the requirements for admission as an immigrant for adjustment of status.<sup>[4]</sup> An applicant is not lawfully admitted for permanent residence in accordance with all applicable provisions of the INA if his or her LPR status was obtained by fraud, willful misrepresentation, or if the admission was otherwise not in compliance with the law.<sup>[5]</sup> Any such applicant is ineligible for naturalization in accordance with INA 318.*

*If USCIS determines that the applicant was inadmissible at the time of entry, admission, or adjustment as a permanent resident, such inadmissibility should be considered waived nunc pro tunc, if a waiver for such inadmissibility was available at the time of the issuance of an immigrant visa, entry, admission, or adjustment, and the applicant demonstrates that he or she would have been eligible for the waiver. Such applicants eligible for a nunc pro tunc waiver are not ineligible for naturalization under INA 318.*

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<sup>7</sup> *Kyong Ho Shin v. Holder*, 607 F.3d 1213 (9th Cir. 2010) (reversing the BIA to find noncitizens in removal proceedings eligible for 212(k) waivers to cure invalid immigrant visas procured for them).

<sup>8</sup> See *Matter of Garcia Linares*, 21 I&N Dec. 254, 257 (BIA 1996) (finding that although “there is no provision in the immigration laws that expressly authorizes nunc pro tunc permission to reapply for admission to cure [a noncitizen’s] failure to obtain such permission prior to reentry after deportation. . . even prior to the enactment of the Immigration and Nationality Act of 1952, ch. 477, 66 Stat. 163, there had long been an administrative practice of granting such relief ‘in a few well-defined instances’”) (quoting *Matter of S-N-*, 6 I & N Dec. 73, 76 (A.G. 1954)); *Matter of Ducret*, 15 I&N Dec. 620 (BIA 1976) (holding that an immigration judge has the power in deportation proceedings to grant nunc pro tunc permission to reapply for admission following deportation if it would conclude the proceedings); see also AFM at Ch. 43.1(c).

#### **4. USCIS Should Withdraw the Changes Regarding the Adjudication of Discretionary Determinations in 1 USCIS-PM E.8 and 7 USCIS-PM A.10.**

We want to start this suggestion by thanking USCIS for already removing the harmful language in Volume 10, Part A, Chapter 5, that laid out many discretionary factors that could be used to deny employment authorization. Having this language out of the Policy Manual is a much appreciated first step in addressing this issue. However, two other sections remain in the Policy Manual, and cases continue to be denied as a result.

We ask USCIS to withdraw these sections on discretion at 1 USCIS-PM E.8 and 7 USCIS-PM A.10, which were implemented during the former administration. These sweeping changes to the definition of discretion added more than two dozen new factors for applicants to document and adjudicators to consider that fundamentally altered applicants' ability to qualify for a benefit—yet the affected public was not given an opportunity to review and respond to these changes before they went into effect.

These remaining discretion sections are a priority because they impact so many different benefit applications; create unnecessary barriers to benefits for those eligible; waste time and resources of adjudicators, applicants, and legal workers; exacerbate the backlog; and moreover, rely on erroneous legal authority.

According to the Policy Manual, all of the following benefits applications are impacted by this onerous discretion analysis: fiancé petitions (Form I-129F), applications to change or extend nonimmigrant status (I-539), advance permission to enter as a nonimmigrant (I-192), humanitarian parole and advance parole (I-131), temporary protected status (I-821), adjustment of status (I-485) (with some exceptions where statutory language prohibits discretion, such as adjustment under the Liberian Refugee Immigration Fairness Act, or refugee-based adjustment under INA § 209(a)(2)), refugee status (with some exceptions, such as the I-730 refugee/asylee relative petition), asylum (I-589), petition to classify an alien as an employment-based immigrant (I-140), petitions to classify as an immigrant investor (I-526), waivers of inadmissibility (I-601, I-601A, I-602), consent to reapply for admission (I-212), employment authorization (I-765) (with some exceptions);<sup>9</sup> and some applications to remove conditions on residence (I-751).<sup>10</sup>

Confusingly, the lengthy November 2020 list of discretionary considerations contains some of the same factors named in the July 2020 Policy Manual release, rewords others that are similar to the July 2020 guidance, and adds new factors as well.<sup>11</sup> Both lists of discretionary factors apply to adjustment applicants.

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<sup>9</sup> Volume 1 of the Policy Manual contains a chart of applications subject to discretionary analysis. The chart includes employment authorization, I-765, annotated as “with some exceptions,” but without further explanation. 1 USCIS-PM E.8(A). That section goes on to name a non-exhaustive list of 22 factors that adjudicators should apply in all discretionary adjudications, including employment authorization. We are grateful that the chapter on discretion within Volume 10 on employment authorization has been removed; however, the fact that the discretionary analysis in Volume 1 remains, and that employment authorization is a discretionary determination, means that these factors can still be seen to apply. In fact, in Volume 10 on employment authorization, footnote 8 specifically states that the categories of employment authorizations under 8 CFR 274a.12(c) (which lists 36 categories of employment authorization) are discretionary. 10 USCIS-PM A.4.

<sup>10</sup> 1 USCIS-PM E.8 has a “non-exhaustive overview of immigration benefits” that USCIS considers discretionary.

<sup>11</sup> Compare the list of discretionary factors in 1 USCIS-PM E.8 (July 15, 2020) with the positive and negative list of factors found in 7 USCIS-PM A.10 (Nov. 14, 2020). Some factors are similar but reworded. For example, the November Policy Manual additions require “compliance with tax laws” as a positive discretionary factor, whereas in

The prior guidance on discretion was a half-page instruction in the Adjudicators Field Manual (AFM) that urged adjudicators to review difficult discretionary issues with supervisors and to consult precedent case law. The new guidance has voluminous instructions directing adjudicators to consider more than twenty-four factors<sup>12</sup> as well as “other indicators of an applicant or beneficiary’s character,”<sup>13</sup> creating enormous discretion for adjudicators to find almost any factor relevant.

The undue burden on applicants and adjudicators that these guidelines pose is not supported by law and instead mischaracterizes existing regulations and case law on discretion. The Policy Manual cites BIA decisions which are extremely specific to the relief discussed in the particular case, such as INA § 212(c) criminal waivers,<sup>14</sup> and then applies the discussion of discretionary factors to adjustment and other applications which the BIA never considered in those decisions.<sup>15</sup>

No justification was provided to support these massive changes to discretion in the Policy Manual. The prior guidance in the Adjudicator’s Field Manual (AFM 10.15) for all discretionary considerations was succinct and clear. The AFM emphasized consistency, fairness, following pertinent case law, and consulting with supervisors and peers in difficult cases. This guidance should be re-instated immediately to prevent harm to applicants.

For these reasons, the changes should be withdrawn in their entirety and the two-paragraph instruction of the AFM on discretion re-produced below should be restored.

*USCIS Adjudicator’s Field Manual (AFM) 10.15: Exercise of Discretion; Uniformity of Decisions. Although all types of adjudications involve proper application of laws and regulations, a few also involve an exercise of discretion: adjustment of status under section 245 of the Act, change of status under section 248 of the Act and various waivers of inadmissibility are all discretionary applications, requiring both an application of law and a consideration of the specific facts relevant to the case. An exercise of discretion does not mean the decision can be arbitrary, inconsistent or dependent upon intangible or imagined circumstances. Although regulations can provide guidelines for many of the types of factors which are appropriate for consideration, a regulation cannot dictate the outcome of a discretionary application. [See, for example, HHS Poverty Guidelines in Appendix 10-3.] For each type of adjudication, there is also a body of precedent case law which is intended to provide guidance on how to consider evidence and weigh the favorable and adverse factors present in a case. The adjudicator must be familiar with the common factors and how much weight is given to each factor in the body of precedent*

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July 2020, the discretionary factor was “history of taxes paid.” New factors added in November 2020 include: “other indicators adversely reflecting on applicant’s character and undesirability as an LPR,” “failure to pay child support,” “lack of reformation of character or rehabilitation,” whereas positive factors include “good moral character (in the United States and abroad.)” These factors are derived from criminal waiver law, not from adjustment.

<sup>12</sup> 1 USCIS-PM E.8(C).

<sup>13</sup> 1 USCIS-PM E.8(C)(2).

<sup>14</sup> The footnotes in this section cite dozens of times to a series of criminal waiver cases under former INA § 212(c) waivers for certain permanent residents. 1 USCIS-PM E.8. FNs 46-67 (citing *Matter of Marin*, 16 I&N Dec. 581 (BIA 1978); *Matter of Buscemi*, 19 I&N Dec. 628 (BIA 1988); *Matter of Edwards*, 20 I&N Dec. 191 (BIA 1990)).

<sup>15</sup> *Matter of Buscemi*, 19 I&N Dec. 628 (BIA 1988), *Matter of Marin*, 16 I&N 581 (BIA 1978), and *Matter of Edwards*, 20 I&N 191 (BIA 1990) are cited in the Policy Manual 33 times, at footnotes 10, 20, 25, 26, 27, 28, 30, 33, 35, 38, 39, 40, 41, 42, and 44, to justify the increased burden of proof on applicants and inclusion of particular discretionary factor analyses in adjustment. In these cases, the severity of the conviction and evidence of rehabilitation were key to the BIA’s findings, and to whether unusual or outstanding equities would be required to exercise discretion favorably. These cases are entirely distinguishable from discretion in an adjustment of status adjudication because the underlying law is completely different.

*case law. The case law and regulatory guidelines provide a framework to assist in arriving at decisions which are consistent and fair, regardless of where the case is adjudicated or by whom. It will be useful, particularly for inexperienced adjudicators, to discuss unusual fact patterns and novel cases requiring an exercise of discretion with peers and supervisors. In particularly difficult or unusual cases, the decision may be certified for review to the Administrative Appeals Office. Such certifications may ultimately result in expansion of the body of precedent case law. Discretionary decisions or those involving complex facts, whether the outcome is favorable or unfavorable to the petitioner or applicant, require supervisory review. NOTE: Even in non-discretionary cases, the consideration of evidence is somewhat subjective. For example, in considering an employment-based petition, the adjudicator must examine the beneficiary's employment experience and determine if the experience meets or exceeds, in quality and quantity, the experience requirement stated on the labor certification by the employer. However, a subjective consideration of facts should not be confused with an exercise of discretion. Like an exercise of discretion, a subjective consideration of facts does not mean the decision can be arbitrary, inconsistent or dependent upon intangible or imagined circumstances.*

#### **5. USCIS Should Correct the Legal Error in 7 USCIS C.2(C)(2) and 7 USCIS C.2(D)(1)-(2) on Grandfathering Under INA § 245(i).**

We ask USCIS to correct the legal error present in 7 USCIS C.2(C)(2) on grandfathering under INA § 245(i) and ensure correct application of the 2013 BIA decision *Matter of Estrada* regarding derivative beneficiaries. According to *Matter of Estrada*, 26 I&N Dec. 180 (BIA 2013), derivative beneficiaries are considered independently grandfathered for purposes of 245(i) as long as two conditions are met: 1) the relationship to the principal beneficiary was established<sup>16</sup> on or before the 245(i) sunset date of April 30, 2001, and 2) there is a properly filed petition (e.g., Form I-130) on file by the sunset date under which they would be considered a legal derivative. However, recent USCIS Policy Manual additions are ambiguous or conflicting on this topic. For example, the chart on grandfathering in 7 USCIS-PM C.2(D)(1) states that the relationship must be established “before the qualifying petition or application was filed (on or before April 30, 2001).” In order to be properly considered a derivative, it is sufficient that the relationship is formed before adjudication of the petition. It is an error to imply that the relationship must exist at time of filing—it is legally sufficient for the relationship to come into being after filing (as long as still on or before April 30, 2001, for 245(i) purposes), because such a person would be properly included before the sunset date. A recent BIA case on 245(i) grandfathering, *Matter of Traina*, 28 I&N Dec. 659 (BIA 2022), reiterates this point: “Derivative beneficiaries of the principal beneficiary may also be grandfathered into the provision if a spouse or child relationship existed with the principal beneficiary *on or before April 30, 2001*.”<sup>17</sup> The BIA does not add the requirement USCIS appears to be imposing, that the spouse or child relationship existed not only on or before April 30, 2001, but also prior to the date the petition was filed.

USCIS should re-word the 7 USCIS-PM C.2(C)(2) discussion on grandfathered derivative beneficiaries so that it comports with *Matter of Estrada* and does NOT imply an additional requirement that the qualifying derivative relationship have come into existence before the petition was filed as well as on or before April 30, 2001. We recommend USCIS change the language as follows:

#### *2. Special Considerations for Derivative Beneficiaries Grandfathering Eligibility*

*A qualifying immigrant visa petition or labor certification application may serve to grandfather the principal beneficiary's immediate family members ~~at the time the visa petition or labor certification~~*

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<sup>16</sup> For a derivative spouse, by their marriage to the principal beneficiary; for a derivative child, by the child's birth.

<sup>17</sup> 28 I&N Dec. at 661-662 (emphasis added).

~~application was filed (his or her spouse and child(ren))~~ as grandfathered derivative beneficiaries if they qualified as derivatives (principal beneficiary's spouse and child(ren)) on or before April 30, 2001.<sup>1291</sup> The spouse or child does not have to be named in the qualifying petition or application and does not have to continue to be the principal beneficiary's spouse or child. As long as an applicant can demonstrate that he or she was the spouse or child (unmarried and under 21 years of age) of a grandfathered principal beneficiary ~~on the date the qualifying petition or application was properly filed on or before April 30, 2001,~~ the applicant is grandfathered and eligible to seek [INA 245\(i\)](#) adjustment in his or her own right.<sup>1301</sup>

A derivative beneficiary who qualifies as a grandfathered noncitizen may benefit from INA 245(i) in the same way as a principal beneficiary. If the derivative beneficiary meets all eligibility requirements, the beneficiary may adjust despite an entry without inspection or being subject to the specified adjustment bars.<sup>1311</sup>

#### Underlying Basis for Adjustment

If a grandfathered derivative beneficiary<sup>1321</sup> remains the spouse or child of the grandfathered principal beneficiary, the derivative beneficiary may accompany or follow to join the principal beneficiary, provided the principal beneficiary is adjusting status under INA 245(i). In this case, the grandfathered principal beneficiary is the principal adjustment applicant and the grandfathered derivative beneficiary is the derivative applicant.<sup>1331</sup>

A grandfathered derivative beneficiary may also adjust under [INA 245\(i\)](#) in his or her own right, on some basis completely independent of the grandfathered principal beneficiary.<sup>1341</sup> This is true whether or not the grandfathered derivative beneficiary remains the grandfathered principal beneficiary's spouse or child. For instance, a grandfathered derivative beneficiary spouse who becomes divorced from the grandfathered principal beneficiary after the qualifying petition or application is filed is still a grandfathered noncitizen eligible to seek adjustment independently under 245(i). Similarly, a grandfathered derivative beneficiary child who marries or reaches 21 years of age after the qualifying petition or application is filed is still grandfathered and eligible to seek INA 245(i) adjustment on his or her own basis through a different petition.

#### Example: Derivative Beneficiary Eligible After Divorce from Principal Beneficiary

Date	Event
January 1, 2000	An employer files a permanent labor certification application on behalf of a married employee. The married employee is the principal beneficiary of the permanent labor certification application. The application is determined to be approvable when filed and the married employee noncitizen is a grandfathered noncitizen. As the employee was married <del>at the time the labor certification application was filed, on or before April 30, 2001,</del> the employee's spouse is the derivative beneficiary and is also a grandfathered noncitizen.
January 1, 2003	The employee and spouse divorce.
Today	The employee's former spouse is selected in the diversity visa program.

In this example, the employee is the grandfathered principal beneficiary for [INA 245\(i\)](#) adjustment because the qualifying permanent labor certification application was filed directly on the employee's behalf on or before April 30, 2001. The employee's former spouse is a grandfathered derivative beneficiary because they were married ~~at the time the qualifying permanent labor certification application was filed to the principal beneficiary on or before April 30, 2001.~~ The qualifying application serves to grandfather both the principal and derivative beneficiaries. Therefore, as a grandfathered

derivative beneficiary, the former spouse may apply for adjustment under 245(i) based on being selected in the diversity visa program, regardless of the grandfathered principal beneficiary's basis for adjustment and regardless of the fact that their marital relationship no longer exists.

If a grandfathered derivative beneficiary is adjusting on a separate basis from the grandfathered principal beneficiary, the grandfathered derivative beneficiary becomes the principal adjustment applicant. As the principal applicant, the grandfathered derivative beneficiary's current spouse and child(ren) may accompany (or follow-to-join) the applicant.<sup>[35]</sup>

[29] See [INA 203\(d\)](#). See [INA 245\(i\)\(1\)\(B\)](#). See [8 CFR 245.10\(a\)\(1\)\(i\)](#). Under INA 245(i), spouses and children are only included as grandfathered derivative beneficiaries if they are "eligible to receive a visa under section 203(d)." Immediate relatives of U.S. citizens are not included. See [Matter of Estrada and Estrada \(PDF\)](#), 26 I&N Dec. 180, 184 (BIA 2013) ("aliens who became the spouse or child of . . . principal grandfathered aliens on or before April 30, 2001, and who met the requirements of section 203(d) of the Act qualify as derivative grandfathered aliens.").

[30] Where the relationship was created after ~~the qualifying petition or application was filed April 30, 2001~~, the grandfathered principal beneficiary's current spouse or child may still adjust under INA 245(i) as an accompanying (or following-to-join) adjustment applicant. See Section D, Current Family Members of Grandfathered Noncitizens, Subsection 1, Grandfathered Principal Beneficiary's Spouse and Children [[7 USCIS-PM C.2\(D\)\(1\)](#)]. Such child or spouse would not be a grandfathered noncitizen in his or her own right but would be eligible to use INA 245(i) as the derivative spouse or child of a grandfathered noncitizen. See [Matter of Estrada and Estrada \(PDF\)](#), 26 I&N Dec. 180, [184-85](#) (BIA 2013) ("~~the spouses or children of principal grandfathered aliens . . . where the spouse or child relationship was established after April 30, 2001 . . . do not qualify as grandfathered aliens for purposes of section 245(i) adjustment.~~").

[31] See Chapter 1, Purpose and Background, Section C, Overcoming INA 245(a) Adjustment Ineligibility [[7 USCIS-PM C.1\(C\)](#)].

[32] For information about derivative family members acquired after ~~the qualifying petition or labor certification application April 30, 2001~~, see Section D, Current Family Members of Grandfathered Noncitizens [[7 USCIS-PM C.2\(D\)](#)]. See [Matter of Estrada \(PDF\)](#), 26 I&N Dec. 180, 186 (BIA 2013) ("A subsequent change in circumstances cannot confer grandfathered status on an alien who did not meet the grandfathering requirements prior to the April 30, 2001, sunset date. Thus, an alien who was not grandfathered as of April 30, 2001, but subsequently married a principal grandfathered alien does not, by virtue of that marriage, become a derivative grandfathered alien.").

[33] See [INA 203\(d\)](#).

[34] The derivative beneficiary is still required to seek adjustment under a family-based, employment-based, special immigrant, or diversity visa immigrant category. See Chapter 3, Eligibility and Filing Requirements, Section A, Adjustment Eligibility under INA 245(i) [[7 USCIS-PM C.3\(A\)](#)], and Chapter 4, Documentation and Evidence, Section D, Demonstrating Underlying Basis for Adjustment [[7 USCIS-PM C.4\(D\)](#)].

[35] See Section D, Current Family Members of Grandfathered Noncitizens [[7 USCIS-PM C.2\(D\)](#)].

Similarly, we ask USCIS to re-word 7 USCIS C.2(D)(1)-(2) on grandfathered derivative beneficiaries so that it comports with *Matter of Estrada* and does NOT imply an additional requirement that the qualifying derivative relationship have come into existence before the petition was filed as well as on or before April 30, 2001. We recommend USCIS change the language as follows:

#### **D. Current Family Members of Grandfathered Noncitizens**

In general, today's principal adjustment applicant's spouse or child(ren)<sup>[43]</sup> may also adjust status if "accompanying" or "following-to-join" the principal.<sup>[44]</sup> A spouse or child is "accompanying" the principal when seeking to adjust status together with the principal or within 6 months of when the

principal became a permanent resident; the spouse or child is considered to be following-to-join if seeking to adjust more than 6 months after the principal became a permanent resident.<sup>1451</sup>

The spouse and child(ren) as of the date of adjustment accompanying (or following-to-join) a principal INA 245(i) applicant (who is a grandfathered noncitizen) are eligible to seek adjustment under 245(i) even though they are not grandfathered noncitizens in their own right. The spouse and child(ren) may also benefit from INA 245(i) provisions allowing applicants to adjust despite an entry without inspection or being subject to the specified adjustment bars.<sup>1461</sup> If the spouse and child(ren) were properly inspected and admitted or inspected and paroled (and are not subject to the INA 245(c) bars) they do not need to file a Supplement A. The spouse and child(ren) may simply seek adjustment under INA 245(a) by filing only the Application to Register Permanent Residence or Adjust Status (Form I-485).

#### 1. Grandfathered Principal Beneficiary’s Spouse and Children

A noncitizen may be eligible to adjust as a grandfathered derivative beneficiary under INA 245(i) in his or her own right or as an accompanying (or following-to-join) spouse or child if:

- The noncitizen demonstrates that he or she was the spouse or child (unmarried and under 21 years of age) of a grandfathered principal beneficiary on or before April 30, 2001 and the at the time a qualifying petition or application was properly filed on or before April 30, 2001; and or
- The noncitizen is still currently the spouse or child of the grandfathered principal beneficiary.<sup>1471</sup>

A noncitizen who became the spouse or child of a grandfathered principal beneficiary after ~~the qualifying petition or application was filed April 30, 2001~~ may only seek INA 245(i) adjustment through the principal beneficiary as an accompanying (or following-to-join) immigrant.<sup>1481</sup> These applicants do not qualify as grandfathered derivative beneficiaries who may adjust in their own right under INA 245(i).<sup>1491</sup>

#### Example: Spouse and Child Acquired After Filing of Principal Beneficiary’s Qualifying Application

Date	Event
January 1, 1998	A noncitizen enters the United States without inspection.
January 1, 2000	An employer files a permanent labor certification application on behalf of the noncitizen. The noncitizen is unmarried at time of filing.
January 1, 2002	The noncitizen marries a noncitizen and has a child.
January 1, 2004	The employment-based immigrant visa petition filed on the noncitizen’s behalf is approved. The noncitizen applies for adjustment of status, as do the spouse and child.

As a principal beneficiary of the qualifying permanent labor certification application, the noncitizen is grandfathered and eligible to file for adjustment under INA 245(i). Because the noncitizen married and had the child after ~~the qualifying application was filed April 30, 2001~~, the spouse and child are not grandfathered derivative beneficiaries and may not adjust in their own right under 245(i). The spouse and child, however, may still seek INA 245(i) adjustment (or INA 245(a) adjustment, if eligible) as the principal beneficiary’s accompanying (or following-to-join) spouse and child under INA 203(d).

#### Eligibility of Grandfathered Principal Beneficiary’s Spouse or Child

The following chart provides a summary of whether the spouse or child of a grandfathered principal beneficiary may be grandfathered in his or her own right or eligible to accompany or follow to join the grandfathered principal beneficiary.

#### 245(i) Adjustment Eligibility of Grandfathered Principal Beneficiary’s Spouse or Child

<b>When Was Relationship Established?</b>	<b>Eligible as an Accompanying or Following-to-Join Applicant?</b>	<b>Eligible as a Grandfathered Derivative Beneficiary Who May Apply to Adjust Under INA 245(i) Independently from Principal?</b>
<del>Before</del> <i>On or before the qualifying petition or application was filed (on or before April 30, 2001)</i>	Yes, if relationship continues to exist and principal beneficiary is granted LPR status (and remains an LPR)	Yes, on a different basis, whether or not relationship to principal beneficiary continues to exist <sup>[50]</sup>
After April 30, 2001 but before principal beneficiary adjusts status	Yes, if relationship continues to exist and principal beneficiary is granted LPR status (and remains an LPR)	No
After principal beneficiary adjusts status	No	No

## 2. Grandfathered Derivative Beneficiary's Spouse and Children

Derivative beneficiaries of a qualifying immigrant visa petition or labor certification application are grandfathered in their own right. These grandfathered derivative beneficiaries may adjust independently from the principal beneficiary of the grandfathering petition or application. Accordingly, their current spouse and children may be eligible to adjust under the usual accompanying or following-to-join rules.

### Continuing Spouse or Child Relationship Required

The accompanying (or following-to-join) spouse or child must continue to have the qualifying relationship with the principal adjustment applicant (grandfathered derivative beneficiary) both at the time of filing and approval of their individual adjustment applications.<sup>[51]</sup>

[43] The child must be unmarried and under 21 years of age. See [INA 101\(b\)\(1\)](#).

[44] See [INA 203\(d\)](#). See [22 CFR 40.1\(a\)\(1\)](#). See Part A, Adjustment of Status Policies and Procedures, Chapter 6, Adjudicative Review [[7 USCIS-PM A.6](#)].

[45] See [9 FAM 503.2-4\(A\)\(c\)](#), If Spouse or Child Acquired Prior to Admission, and [9 FAM 503.2-4\(A\)\(d\)](#), If Spouse or Child Acquired Subsequent to Admission.

[46] See Chapter 1, Purpose and Background, Section C, Overcoming INA 245(a) Adjustment Ineligibility [[7 USCIS-PM C.1\(C\)](#)].

[47] For more information on adjusting as a grandfathered derivative beneficiary, see Section C, Beneficiary of Qualifying Immigrant Visa Petition or Permanent Labor Certification Application, Subsection 2, Special Considerations for Derivative Beneficiaries [[7 USCIS-PM C.2\(C\)\(2\)](#)].

[48] See [INA 203\(d\)](#).

[49] Similarly, the spouse of a qualified principal beneficiary who married the principal beneficiary only after the principal beneficiary adjusted under [INA 245\(i\)](#) is not eligible to adjust as a grandfathered derivative beneficiary under 245(i). See [Landin-Molina v. Holder \(PDF\)](#), 580 F.3d 913 (9th Cir. 2009).

[50] The spouse remains eligible to adjust (on a different basis) even if the spouse later became divorced from the principal beneficiary and the child remains eligible to adjust (on a different basis) even if the child has since married or turned 21 years of age.

[51] See [8 CFR 103.2\(b\)\(1\)](#). See [9 FAM 502.1-1\(C\)\(2\)\(b\)\(2\)\(A\)](#), Basis for Following-to-Join. In contrast, grandfathered derivative beneficiaries only need to establish the qualifying relationship existed **on or**



~~before April 30, 2001 and in relation to a properly filed at the time the~~ qualifying petition or labor certification application ~~was properly filed~~. This is a unique aspect of [INA 245\(i\)](#) adjustment. Grandfathered derivative beneficiaries do not need to show the qualifying relationship continues to exist at the time they seek adjustment unless they are adjusting as an accompanying or following-to-join spouse or child of the principal beneficiary. For more information on qualifying to adjust status as a principal applicant's accompanying or following-to-join spouse or child, see Part A, Adjustment of Status Policies and Procedures, Chapter 6, Adjudicative Review [[7 USCIS-PM A.6](#)].

## **6. USCIS Should Withdraw Good Moral Character Guidance Regarding DUIs and Correct Chart in 12 USCIS-PM F.5.**

We ask that USCIS remove harmful language from the USCIS Policy Manual expanding former Attorney General's October 25, 2019, decision in *Matter of Castillo-Perez* to include USCIS adjudications and continue to advocate with the Department of Justice (DOJ) to reverse this decision.

Despite the INA already containing bars to good moral character that do not include driving under the influence (DUI) convictions, *Matter of Castillo-Perez* created an ultra vires presumption that individuals with two or more DUI convictions within the statutory period lack good moral character. Further, although the former Attorney General issued *Matter of Castillo-Perez* in the context of non-lawful permanent resident (LPR) cancellation of removal, USCIS has interpreted the decision much more broadly and has extended it beyond this context to other immigration benefits that require a showing of good moral character. Naturalization applicants and VAWA petitioners are therefore now susceptible to extra scrutiny and vulnerable to being denied benefits based on a presumptive lack of good moral character. Naturalization applicants and VAWA petitioners of color are especially susceptible to denial pursuant to *Matter of Castillo-Perez* because local law enforcement tend to target drivers of color at higher rates than white drivers, and drivers of color are convicted of DUIs at a higher rate than white drivers.

While we believe that *Matter of Castillo-Perez* was wrongly decided by the former Attorney General, we believe that USCIS was not required to, nor should have, extended the holding of *Castillo-Perez* to the affirmative adjudication context. The language of the decision itself emphasizes the unique nature of cancellation of removal, stating, “[c]ancellation of removal is a coveted and scarce form of relief,” and highlighting that Congress only authorized 4,000 cancellation grants per year. There is no similar congressional intent to limit the number of naturalization or VAWA applications that can be granted per year, and USCIS should not have imported this very stringent standard into the affirmative application context.<sup>18</sup>

We ask USCIS to edit 12 USCIS-PM F.5, and the table entitled “Conditional Bars to GMC for Acts Committed in Statutory Period,” as follows:

### *K. Certain Acts in Statutory Period*

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<sup>18</sup> For more arguments and examples on this issue, please see National Immigration Project's (NIPNLG) Letter to Amanda Baran and Ashley Tabbador, Re: Follow up to meeting on suggested USCIS actions regarding *Matter of Castillo-Perez*, (Jan. 19, 2022), joined by ILRC, NIJC, NILA, NILC, and the Public Defender Coalition for Immigrant Justice.

Although the INA provides a list of specific bars to good moral character,[48] the INA also allows a finding that “for other reasons” a person lacks good moral character, even if none of the specific statutory bars applies.[49] The following sections provide examples of acts that may lead to a finding that an applicant lacks GMC “for other reasons.”[50]

~~1. Driving Under the Influence The term “driving under the influence” (DUI) includes all state and federal impaired-driving offenses, including “driving while intoxicated,” “operating under the influence,” and other offenses that make it unlawful for a person to operate a motor vehicle while impaired. This term does not include lesser included offenses, such as negligent driving, that do not require proof of impairment. Evidence of two or more DUI convictions during the statutory period establishes a rebuttable presumption that an applicant lacks GMC.[51] The rebuttable presumption may be overcome[52] if the applicant is able to provide “substantial relevant and credible contrary evidence” that he or she “had good moral character even during the period within which he [or she] committed the DUI offenses,” and that the “convictions were an aberration.”[53] An applicant’s efforts to reform or rehabilitate himself or herself after multiple DUI convictions do not in and of themselves demonstrate GMC during the period that includes the convictions.~~

<b>Offense</b>	<b>Citation</b>	<b>Description</b>
<b>One or More Crimes Involving Moral Turpitude (CIMTs)</b>	<ul style="list-style-type: none"> <li>• INA 101(f)(3)</li> <li>• 8 CFR 316.10(b)(2)(i), (iv)</li> </ul>	Conviction or admission of one or more CIMTs (other than political offense), except for one petty offense
<b>Aggregate Sentence of 5 Years or More</b>	<ul style="list-style-type: none"> <li>• INA 101(f)(3)</li> <li>• 8 CFR 316.10(b)(2)(ii), (iv)</li> </ul>	Conviction of two or more offenses with combined sentence of 5 years or more (other than political offense)
<b>Controlled Substance Violation</b>	<ul style="list-style-type: none"> <li>• INA 101(f)(3)</li> <li>• 8 CFR 316.10(b)(2)(iii), (iv)</li> </ul>	Violation of any law on controlled substances, except for simple possession of 30g or less of marijuana
<b>Incarceration for 180 Days</b>	<ul style="list-style-type: none"> <li>• INA 101(f)(7)</li> <li>• 8 CFR 316.10(b)(2)(v)</li> </ul>	Incarceration for a total period of 180 days or more, except political offense and ensuing confinement abroad
<b>False Testimony under Oath</b>	<ul style="list-style-type: none"> <li>• INA 101(f)(6)</li> <li>• 8 CFR 316.10(b)(2)(vi)</li> </ul>	False testimony for the purpose of obtaining any immigration benefit

<i>Offense</i>	<i>Citation</i>	<i>Description</i>
<b>Prostitution Offenses</b>	<ul style="list-style-type: none"> <li>• INA 101(f)(3)</li> <li>• 8 CFR 316.10(b)(2)(vii)</li> </ul>	<i>Engaged in prostitution, attempted or procured to import prostitution, or received proceeds from prostitution</i>
<b>Smuggling of a Person</b>	<ul style="list-style-type: none"> <li>• INA 101(f)(3)</li> <li>• 8 CFR 316.10(b)(2)(viii)</li> </ul>	<i>Involved in smuggling of a person to enter or try to enter the United States in violation of law</i>
<b>Polygamy</b>	<ul style="list-style-type: none"> <li>• INA 101(f)(3)</li> <li>• 8 CFR 316.10(b)(2)(ix)</li> </ul>	<i>Practiced or is practicing polygamy (the custom of having more than one spouse at the same time)</i>
<b>Gambling Offenses</b>	<ul style="list-style-type: none"> <li>• INA 101(f)(4)–(5)</li> <li>• 8 CFR 316.10(b)(2)(x)–(xi)</li> </ul>	<i>Two or more gambling offenses or derives income principally from illegal gambling activities</i>
<b>Habitual Drunkard</b>	<ul style="list-style-type: none"> <li>• INA 101(f)(1)</li> <li>• 8 CFR 316.10(b)(2)(xii)</li> </ul>	<i>Is or was a habitual drunkard</i>
<b>Two or More Convictions for Driving Under the Influence (DUI)</b>	<ul style="list-style-type: none"> <li>• <del>INA 101(f)</del></li> </ul>	<del>Two or more convictions for driving under the influence during the statutory period</del>

[...]

**7. USCIS Should Clarify Treatment of TPS Travel While Z-R-Z-C- Was in Effect, Jurisdiction Over “Arriving Aliens,” and Effect of Supreme Court Decision on Family-Based Petitions.**

We thank USCIS again for rescinding *Matter of Z-R-Z-C-* as an adopted decision. We also ask that USCIS clarify current treatment of past travel with TPS authorization while *Z-R-Z-C-* was in effect. As the new Policy Manual guidance outlines in 7 USCIS-PM B.2(A)(5), for cases outside the Fifth Circuit and where it will make a difference for the person to have been “admitted” rather than “paroled,” USCIS will engage in a five-factor retroactivity analysis to determine whether to apply current guidance to past

TPS-authorized travel. However, the guidance is silent on whether travel during the *Z-R-Z-C-* window will now be treated differently, following *Z-R-Z-C-*'s rescission (a chart in the Policy Manual entitled "Effect of Authorized Travel on TPS Beneficiaries Under Applicable Policy" summarizes the legal effect *at that moment in time* but does not explain how such travel will be treated today) or else seems to imply that travel during the *Z-R-Z-C-* window will continue to be treated as resulting in neither parole nor admission, absent retroactive application (for instance, the Policy Manual states that where USCIS decides not to retroactively apply current guidance to past travel, USCIS will "[apply] the policy that was in effect at the time of departure."<sup>19</sup>). The guidance should more clearly state that now that *Z-R-Z-C-* has been rescinded, travel during the time period when *Z-R-Z-C-* was in effect will be treated as having resulted in a parole entry.<sup>20</sup> If applicants and practitioners are uncertain about current treatment of past TPS-authorized travel while *Z-R-Z-C-* was in effect, they will not know whether to argue for retroactive application of current guidance, and whether that past travel will satisfy INA § 245(a) as an inspection and admission or parole.

We ask USCIS to edit 7 USCIS-PM B.2(A)(5), and the table entitled "Effect of Authorized Travel on TPS Beneficiaries Under Applicable Policy," as follows:

Date of Departure	Did Parole or Admission Upon Return Satisfy INA 245(a)?
From December 12, 1991, until February 25, 2016	While there was no stated agency policy, noncitizens were generally considered paroled for the purpose of INA 245(a) (regardless of whether the beneficiary had been admitted or paroled before departing).
From February 25, 2016, until August 20, 2020	Yes, regardless of whether the beneficiary had been admitted or paroled before departing.[66]
After August 20, 2020, until July 1, 2022	No, the beneficiary's status as admitted or paroled for INA 245(a) was unchanged by travel.[67] <b>However, now that <i>Matter of Z-R-Z-C-</i> has been rescinded, noncitizens who traveled during this period with advance parole are considered to have been paroled for the purpose of INA 245(a).</b>

<sup>19</sup> 7 USCIS-PM B.2(A)(5).

<sup>20</sup> Note we understand through litigation (*Gomez v. Jaddou* case) that this is the government's position, but it would be helpful to clarify in the USCIS Policy Manual guidance.

Date of Departure	Did Parole or Admission Upon Return Satisfy INA 245(a)?
On or after July 1, 2022	Yes, regardless of whether the beneficiary had been admitted or paroled before departing.[68]

Second, we ask USCIS to **clarify guidance on jurisdiction over “arriving aliens.”** ILRC asks USCIS to add guidance to clarify that it has jurisdiction over individuals who can make a clear factual showing that they are arriving aliens, regardless of how they were originally charged in the Notice to Appear. In this way, USCIS will comport with its statutory duties to provide venue to individuals who are adjustment eligible, including those whose proceedings have been administratively closed or have an outstanding final order of removal or deportation. Specifically, USCIS should add the following in 7 USCIS-PM A.3(D):

*D. Jurisdiction*

*USCIS has the legal authority to adjudicate most adjustment of status cases, including applications by noncitizens who have been placed in deportation or removal proceedings as “arriving aliens” or who can otherwise make a clear factual showing that they are “arriving aliens.”<sup>[18]</sup> An immigration judge (IJ) of the Executive Office for Immigration Review (EOIR) has jurisdiction in all other cases where an applicant is in removal proceedings. **These jurisdictional guidelines apply**; even if the proceedings have been administratively closed or if there is a final order of deportation or removal which has not yet been executed.<sup>[19]</sup> As an exception to the general rule regarding “arriving aliens,” the IJ also has jurisdiction over an application filed by a noncitizen who has been placed in deportation or removal proceedings as an “arriving alien” when all of the following conditions apply . . .*

Finally, we ask USCIS to **clarify effect of Supreme Court decision on family-based petitions.** Following the Supreme Court decision *Scialabba v. Cuellar de Osorio*, 573 U.S. 41 (2014), USCIS issued a policy memorandum stating that notwithstanding 8 C.F.R. § 204.2(a)(4), USCIS would not require a separate petition be filed when a derivative beneficiary child ages out and automatically converts to another category. However, policy guidance does not clearly describe that such a petition can then continue to move through the preference categories. For instance, once a derivative in category 2A turns 21 under their CSPA age, they are considered to have their own I-130 and move to category 2B. USCIS guidance should make clear that such an automatic conversation remains in place as the person then potentially slides to category F1, etc. Additionally, reading *Osorio* and the 2018 Ninth Circuit decision *Rodriguez Tovar v. Sessions*, 882 F.3d 895 (9th Cir. 2018), together, a family-based derivative beneficiary who remains in 2A after age twenty-one because they are protected by CSPA automatically converts to an immediate relative when the petitioning parent naturalizes without needing a new I-130 filed on their behalf. Adding these clarifications, that an automatic conversion under *Osorio* remains in place for consideration in other family-based preference categories, will avoid unnecessary I-130 filings, which currently create inefficiencies, cause confusion, and exacerbate the backlog.

**8. USCIS Should Instruct its Officers Not to Request Information Regarding Juvenile Adjudications.**

USCIS should stop using juvenile delinquency findings as an adverse discretionary factor in immigration adjudications. Juvenile justice systems do not consider juvenile delinquency proceedings to be criminal in

nature. Rather, the nation’s juvenile justice systems recognize the significant developmental differences between children and adults. Unlike adult proceedings, juvenile proceedings are typically designed to provide early interventions, community-based resources, and restorative supports to assist young people in rehabilitation and their successful transition to adulthood. Even the Supreme Court has recognized that youthful violations of the law may not be indicative of adult character and behavior. *See Roper v. Simmons* 543 U.S. 551, 570 (2005). It is therefore contrary to the purpose of juvenile justice systems to use juvenile adjudications to deny immigration benefits. USCIS should exclude juvenile adjudications from discretionary review by altering the Policy Manual in the following ways:

- Remove “Findings of juvenile delinquency,” from the bulleted list of factors that USCIS adjudicators may consider in 1 USCIS-PM E(8)(C)(2);
- Add a section to the same chapter in the Policy Manual at 1 USCIS-PM E(8)(C)(2) specifically directing adjudicators not to consider juvenile delinquency adjudications:  
*Adjudicators shall not consider juvenile adjudications, findings of delinquency, or encounters with law enforcement when the requestor was a minor when assessing a request for benefits subject to adjudicative discretion.*
- Amend 7 USCIS-PM F.7(C)(4) similarly:  
*Juvenile Delinquency*  
*Findings of juvenile delinquency are not considered criminal convictions for purposes of immigration law. Adjudicators shall not consider juvenile adjudications, findings of delinquency, or encounters with law enforcement when the requestor was a minor when assessing a request for benefits subject to adjudicative discretion. However, certain grounds of inadmissibility do not require a conviction. In some cases, certain conduct alone may be sufficient to trigger an inadmissibility ground.[32]*  
~~*Furthermore, findings of juvenile delinquency may also be part of a discretionary analysis.[33] USCIS will consider findings of juvenile delinquency on a case-by-case basis based on the totality of the evidence to determine whether a favorable exercise of discretion is warranted. Therefore, an adjustment applicant must disclose all arrests and charges. If any arrest or charge was disposed of as a matter of juvenile delinquency, the applicant must include the court or other public record that establishes this disposition.*~~
- Amend 6 USCIS-PM F.2 “Considerations Before Issuing Requests for Evidence or Notice of Intent to Deny” to add the following heading and language:  
***Juvenile encounters and adjudications***  
*Where the adjudicator has information that indicates that an applicant was arrested or otherwise encountered by law enforcement as a juvenile or where the applicant was the subject of a case handled in the juvenile justice system under relevant state law, a Request for Evidence should not be sent on these grounds alone.*

## **9. USCIS Should Eliminate the Question about the Oath of Allegiance from 12 USCIS-PM J.3 and Consider Flexible Testing Alternatives, Oath Ceremonies, and Name Changes.**

First, we greatly appreciate the October 19, 2022, improvements to the Policy Manual on access to the English/civics waiver for naturalization due to disability.<sup>21</sup> We remain concerned, however, by the addition to the Policy Manual and Form N-648 of a question asking the medical professional to make a judgement on the applicant’s ability to understand the oath of allegiance for naturalization. This inquiry was added to the Policy Manual at 12 USCIS-PM J.3 at the same time that Form N-648 was modified to

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<sup>21</sup> See <https://www.uscis.gov/sites/default/files/document/policy-manual-updates/20221019-N-648MedicalCertification.pdf>.

include this question in Part 4, Question 1: “Is the applicant able to understand and communicate that they understand the meaning of the Oath of Allegiance to the United States?” Its inclusion is described in the revised Policy Manual.<sup>22</sup> The question of the oath waiver has never been included in Form N-648 before, as it is based on a separate law and is requested through a separate process.

Congress changed the statute in 2000 to make an oath waiver available to certain applicants with disabilities who could not understand the oath.<sup>23</sup> This was an entirely separate law than the 1994 naturalization disability waiver of the English/Civics requirement.<sup>24</sup> These two laws should not be conflated by asking a medical professional who is required to assess the ability to learn English and/or civics also to judge whether an oath of allegiance can be understood, thus determining whether an oath waiver is needed. The medical professional completing an N-648 is being asked what condition the patient has that affects ability to learn and understand English and civics. The ability to understand the oath of allegiance is not necessarily within the medical professional’s expertise.<sup>25</sup>

The medical professional reviewing an applicant’s ability to learn and understand English and civics will have no professional knowledge of what the oath contains or what an oath waiver entails, nor how an oath may legally be modified or simplified for an appropriate applicant. In fact, in a recent example of confusion that this question causes, a partner program informed us that a doctor was filling out the N-648 under the new guidance, and when they came to the oath of allegiance question, not knowing what that meant, the doctor googled it, and concluded that it must be the pledge of allegiance. The doctor then questioned the naturalization applicant about their understanding of the pledge of allegiance before arriving at an answer for the N-648. This kind of confusion is created by including this question on Form N-648.

The addition of this question will likely lead to many unnecessary oath waiver requests. If an oath waiver is requested, according to the USCIS Policy Manual, the applicant will need to have a qualifying U.S. citizen relative who is also a primary caregiver or a court-ordered legal guardian, surrogate, or designated representative act on their behalf.<sup>26</sup> Many applicants do not have one of the designated U.S citizen relatives, and a court process to obtain a legal guardian requires both time and money that many applicants lack. Disabled applicants are often in frail health and a further delay in their naturalization may

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<sup>22</sup> 12 USCIS-PM J.3(C).

<sup>23</sup> INA § 337(a). Pub. L. 106–448 (July 12, 2000).

<sup>24</sup> INA § 312(b)(1). Section 108 of the Immigration and Nationality Technical Corrections Act of 1994, Pub. L. 103-416 (Oct. 25, 1994).

<sup>25</sup> The oath of allegiance requires the naturalization applicant to recite: “*I hereby declare, on oath, that I absolutely and entirely renounce and abjure all allegiance and fidelity to any foreign prince, potentate, state, or sovereignty, of whom or which I have heretofore been a subject or citizen; that I will support and defend the Constitution and laws of the United States of America against all enemies, foreign and domestic; that I will bear true faith and allegiance to the same; that I will bear arms on behalf of the United States when required by the law; that I will perform noncombatant service in the Armed Forces of the United States when required by the law; that I will perform work of national importance under civilian direction when required by the law; and that I take this obligation freely, without any mental reservation or purpose of evasion; so help me God.*” The oath can be modified in several ways and sometimes waived. See 12 USCIS PM J(3).

<sup>26</sup> This limited list of persons who can act in place of a disabled applicant are in 12 USCIS-PM C.3(A)(4) and 12 USCIS-PM J.3(C)(2). ILRC has commented separately to USCIS that the requirements of certain U.S. citizen relatives or a court-ordered guardian are an unreasonable barrier to the oath waiver that was created by the USCIS Policy Manual. To avoid creating additional bars to oath waiver applicants, USCIS should allow a more inclusive list such as “a family member, social worker or trusted individual” to stand in for the naturalization applicant who cannot understand the oath. ILRC, *Advocacy Letter on Oath Waiver and Accommodations for Naturalization Applicants with Disabilities* (June 21, 2022) <https://www.ilrc.org/ilrc-advocacy-letter-oath-waiver-and-accommodations-naturalization-applicants-disabilities>.

mean that they can never complete the process. This onerous requirement does not exist for applicants seeking a disability waiver of the English and/or civics requirement.

We recommend that USCIS eliminate the question about the oath of allegiance from the Policy Manual section on disability waivers and the oath and from Form N-648.

**USCIS should also consider adopting broad flexibilities in naturalization testing and oaths.**

Generally, USCIS has broad discretion to determine the parameters of naturalization interviews, testing, and oath administration. Using broad discretion will ease the burden on adjudicators and encourage more eligible LPRs to apply for naturalization.

**Testing:** The naturalization statute does not require a formal examination of an applicant’s ability to read and write English and knowledge of U.S. civics, but rather that the applicant “demonstrate an understanding of the English language, including an ability to read, write, and speak words in ordinary usage in the English language” and a knowledge and understanding of the fundamentals of the history, and of the principles and form of government, of the United States.”<sup>27</sup> Further, the regulations dictating testing for English specifically state that the manner of testing for both English and civics is left to USCIS to determine.<sup>28</sup>

Per the statute and the regulations, the agency has the ability to provide for equivalency measures – such as proof that the applicant graduated from the U.S. high school – that would negate the need for a formal test. Additionally, USCIS can establish alternative testing options allowing for trusted community organizations to administer English and civics tests, which would make the process more user-friendly and encourage more naturalization applications, particularly from pro se applicants. As such, USCIS should provide guidance in the Policy Manual to allow for testing flexibilities as an efficiency measure.

**Oaths:** USCIS should consider adding language to the Policy Manual to allow for daily oath ceremonies or ceremonies held multiple times each week to allow naturalization applicants whose applications have been approved to take the oath on the same day as their interview. Currently, the regulations state that oath ceremonies should be held at “regular intervals as frequently as necessary to ensure timely naturalization.”<sup>29</sup> Same day oaths will shorten the time between application approval and completion of the naturalization process and would lessen the administrative burden on USCIS officials and applicants alike.

Similarly, USCIS should consider expanding the availability of virtual oath ceremonies. USCIS already provides virtual oaths for military members stationed overseas and should consider expanding that capability as an option for all naturalization applicants. Oath accommodations and waivers are provided for in the regulations already. The agency benefits by providing flexibility from an efficiency standpoint and would reserve resources including staffing. Further, remote ceremonies would allow for flexibility for home-bound applicants who cannot easily travel to USCIS offices. ILRC has been advocating for expansion to remote oaths since 2020.<sup>30</sup> Further, virtual oath ceremonies can also be public ceremonies, thereby satisfying the requirement for a public ceremony in the regulations.<sup>31</sup> A link to the ceremonies could be published on the USCIS website and circulated electronically via USCIS listservs as other agency communications are delivered.

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<sup>27</sup> INA § 312(a)(1).

<sup>28</sup> 8 CFR § 312.1(c)(2); 8 CFR § 312.2(c)(2).

<sup>29</sup> 8 CFR § 337.2(a).

<sup>30</sup> See ILRC, *Remote Naturalization Oaths are Legally Permissible*, (July 2020) <https://www.ilrc.org/resources/remote-naturalization-oaths-are-legally-permissible>.

<sup>31</sup> 8 CFR § 337.2(a).



**Name Changes:** Several states allow common law name changes, which grant individuals the ability to legally change their name without attaining a court order. For example, California’s Code of Civil Procedure holds that the statutory name change procedure is not necessary for a changed name to be deemed legally valid and does not impede upon the ability of an individual to pursue a name change through common law. The common law alternative, known in California as the “usage method,” allows a person to change his or her name without legal proceedings by adopting another name and using it as his or her own, limited only by the mandate that the purpose of the name change is not fraudulent.

The USCIS Policy Manual currently requires state-issued documentation to prove a name’s continued usage, which often makes it unfeasible for an immigrant’s name changed through common law to be either recognized in the naturalization process or amended after citizenship is attained. We ask USCIS to recognize common law name changes and amend the following language in 12 USCIS-PM K.4 accordingly:

<b>Basis for Requests of Replacement Certificate of Citizenship or Naturalization   Form N-565</b>					
<b>Certificate</b>	<b>Correct USCIS Clerical Error</b>	<b>Date of Birth Correction No clerical error</b>	<b>Legal Name Change</b>	<b>Lost or Mutilated Certificate</b>	<b>Legal Gender Change</b>
Certificate of Citizenship	Permitted; no fee required	Permitted if correction through U.S. state court order or similar state vital record (fee required)	Permitted if name change through court order or operation of law, <b>including common law usage</b> (fee required)	Permitted (fee required)	
Certificate of Naturalization	Permitted; no fee required	Not permitted (8 CFR 338.5)		Permitted (fee required)	

**10. USCIS Should Make Changes to Increase Access to Citizenship for Children Born Abroad to U.S. Citizen Parents.**

There are several small changes USCIS could make to increase access to citizenship for children born abroad to U.S. citizen parents. We list them below:

First, **USCIS could clarify in 12 USCIS-PM H App. Chart 2 that individuals can acquire citizenship through a U.S. citizen mother without satisfying the paternity requirements.** Department of State

(DOS) and Department of Homeland Security (DHS) policy is that when a child is born out of wedlock to two U.S. citizen parents, the child can claim citizenship through either parent. However, DOS and DHS both interpret *Sessions v. Morales*, 137 S.Ct. 1678 (2017), which held that all claims through unwed mothers and unwed fathers must be treated equally, to mean that the paternity requirements under INA § 309(a) apply to births on or after June 12, 2017, regardless of whether the child is seeking citizenship through the U.S. citizen mother or father. Nevertheless, both agencies advise their officers to seek further review if the father does not meet the paternity requirements but one or both parents had resided in the United States at some point. 7 FAM § 1133.4-5(A); 12 USCIS-PM H.3 App. Chart 2.

Adding such a paternity requirement to claims through U.S. citizen mothers would seem to violate the Equal Protection Clause and contradict *Sessions*. The Supreme Court ruled that the physical presence and residency requirements must be equal between mothers and fathers. Nowhere did the Supreme Court suggest that paternity requirements should now be imposed upon claims to citizenship made through unwed mothers; in fact, it has upheld the separate paternity requirements in Part 2 as justifiable when applied to unwed U.S. citizen fathers. 137 S.Ct. at 1694; see also *Nguyen v. INS*, 533 U.S. 53 (2001). Nationality Chart 2, “Children Born Outside the United States Out of Wedlock,” in 12 USCIS-PM H currently does not even mention a way to acquire citizenship through a U.S. citizen mother. Under the time period “On or After June 12, 2017,” there is only guidance for “Citizenship through U.S. Citizen Father.” This absence of guidance is notable. For every other time period, the Policy Manual has guidance for “citizenship through U.S. Citizen Mother,” and “citizenship through U.S. Citizen Mother.” ILRC has already seen the confusion this chart currently causes both examiners and practitioners. For example, ILRC has seen acquisition cases where a child claiming citizenship through the U.S. citizen mother received Requests for Evidence for proof of paternity requirements, even though the claim is through the U.S. citizen mother and those paternity requirements are not necessary to establish citizenship.

We ask USCIS to add the following section to 12 USCIS-PM H App 2, Nationality Chart 2, Table 4, “Children Born Out of Wedlock to Two U.S. Citizen Parents,” last row:

<p style="text-align: center;"><i>On or After</i></p> <p style="text-align: center;">Nov. 14, 1986</p> <p style="text-align: center;"><i>and Prior To</i></p> <p style="text-align: center;">June 12, 2017</p>	<p><b><i>Citizenship through U.S. Citizen Mother</i></b></p> <ul style="list-style-type: none"> <li>• The mother had at least 1 year of continuous physical presence in the United States or OLP at any time prior to the child’s birth.</li> </ul> <p><b><i>Citizenship through U.S. Citizen Father</i></b></p> <ul style="list-style-type: none"> <li>• The child was legitimated OR acknowledged before age 18* (legitimated under the laws of the child’s residence or domicile; or paternity acknowledged in writing under oath; or paternity established by court order);</li> <li>• A blood relationship between the child and father was established;</li> <li>• The father, unless deceased, has agreed in writing to provide financial support until child reaches age 18;<sup>[9]</sup></li> <li>• The child must be unmarried; and</li> <li>• Either parent resided in the United States at any time prior to the child’s birth.</li> </ul> <p><i>*A child age 18 or over on Nov. 14, 1986 could use the old law.<sup>[10]</sup> A child at least age 15, but under 18, could use either law (date of birth on or after Nov. 15, 1968).</i></p>
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<p><i>On or After</i></p> <p><b>June 12, 2017</b></p>	<p><b><i>Citizenship through U.S. Citizen Mother</i></b></p> <ul style="list-style-type: none"> <li>• One parent had resided in the U.S. or its outlying possessions at any time prior to the child’s birth.</li> </ul> <p><b><i>Citizenship through U.S. Citizen Father</i></b></p> <ul style="list-style-type: none"> <li>• The child was legitimated OR acknowledged before age 18 (legitimated under the laws of the child’s residence or domicile; or paternity acknowledged in writing under oath; or paternity established by court order);</li> <li>• A blood relationship between child and father was established;</li> <li>• The father, unless deceased, has agreed in writing to provide financial support until child reaches age 18;<sup>[11]</sup></li> <li>• The child must be unmarried; and</li> <li>• Either parent resided in the United States at any time prior to the child’s birth.</li> </ul> <p>If the child does not meet these requirements, but one or both parents resided in the United States at any time prior to the child’s birth, the officer should consult the Office of Chief Counsel (OCC).</p>
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Second, **ILRC asks USCIS to incorporate guidance and implementation of recent derivation caselaw in to the 12 USCIS-PM H.4(d)**. On May 13, 2021, the Ninth Circuit Court en banc issued a decision, *Cheneau v. Garland*, 997 F.3d 916 (9th Cir. 2021), finding that a child could derive citizenship under former INA § 321 (8 USC § 1432(a)(5)) without necessarily being a lawful permanent resident. The Ninth Circuit agreed with the Second Circuit in *Nwozuzu v. Holder*, 726 F.3d 323 (2d Cir. 2013), to hold that the statutory requirement that the applicant “reside permanently” in former INA § 321 (8 USC § 1432(a)(5)) (repealed 2000) could include something lesser than lawful permanent residence.

In light of this case, we encourage USCIS to issue guidance in the USCIS Policy Manual defining “reside permanently” broadly to align with how those terms are defined elsewhere in the INA. We ask USCIS to clarify that “reside permanently” includes not just applying for lawful permanent residence, but anyone who in fact has the United States as their residence (defined in INA § 101(a)(33) as the principal, actual dwelling place in fact) for a “continuing or lasting nature” (see the definition of “permanent” in INA § 101(a)(31)).

We also encourage USCIS to implement a process whereby any applicants who derived citizenship under *Cheneau* or *Nwozuzu* but were previously denied will have their N-600 applications re-opened sua sponte by USCIS. This is particularly important in that by regulation, an applicant cannot refile an N-600 application once it has been denied by USCIS, and the deadline to appeal is 30 days from the denial. In the alternative, we ask USCIS to issue guidance allowing these applicants to file a motion to re-open their N-600 application “sua sponte” to avoid the motion to re-open deadline, or clarifying that any motion to reopen on this basis will be deemed timely, and any delay beyond the 30 day filing period will be deemed “reasonable” and “beyond the control” of the applicant under 8 CFR § 103.5.

To that end, we ask USCIS to add the following language to “Acquiring Citizenship Before the Child Citizenship Act of 2000” in 12 USCIS-PM H.4(d):

*In general, a child born outside of the United States to two noncitizen parents, or one noncitizen parent and one U.S. citizen parent who subsequently lost U.S. citizenship, acquires citizenship under former INA 321 if:*

- *The child’s parent(s) meet one of the following conditions:*
  - *Both parents naturalize;*

- One surviving parent naturalizes if the other parent is deceased;
- One parent naturalizes who has legal custody of the child if there is a legal separation of the parents; or
- The child’s mother naturalizes if the child was born out of wedlock and paternity has not been established by legitimation.
- The child is under 18 years of age when his or her parent(s) naturalize; and
- The child is residing in the United States pursuant to a lawful admission for permanent residence at the time the parent(s) naturalized or thereafter begins to reside permanently in the United States. *“Reside permanently” has been found by some circuits to include something lesser than permanent residence.<sup>[1]</sup> In those circuits, any individual who has the United States as their principal, actual dwelling place<sup>[2]</sup> for a continuing or lasting nature<sup>[3]</sup> meets this requirement. A motion to re-open on this basis for any application that was previously denied for not meeting the lawful permanent residence standard will be deemed timely, and any delay beyond the 30 day filing period will be deemed “reasonable” and “beyond the control” of the applicant under 8 CFR § 103.5.*

<sup>[1]</sup> *Cheneau v. Garland*, 997 F.3d 916 (9th Cir. 2021) (en banc); *Nwozuzu v. Holder*, 726 F.3d 323 (2d Cir. 2013); see also *Thomas v. Lynch*, 828 F.3d 11 (1st Cir. 2016) (discussing the issue without deciding, finding that the non-LPR client before the court had not shown that he had begun to “reside permanently” even if it were interpreted to include something other than lawful permanent residence); *United States v. Juarez*, 672 F.3d 381 (5th Cir. 2012) (declining to interpret “reside permanently” but recognizing multiple interpretations); but see *United States v. Forey-Quintero*, 626 F.3d 1323 (11th Cir. 2010); *Matter of Nwozuzu*, 24 I&N Dec. 609 (BIA 2008).

<sup>[2]</sup> *INA § 101(a)(33)*.

<sup>[3]</sup> *INA § 101(a)(31)*.

Finally, ILRC asks USCIS to instruct adjudicators in 12 USCIS-PM H.5(h) to prioritize N-600K applicants about to age out. An applicant for § 322 citizenship must become eligible and complete the entire process before they turn eighteen years old and before their lawful status in the United States expires. This means that they must be admitted to citizenship before their eighteenth birthday and before their visa expires. Prior INS guidance instructed local USCIS offices that immediate priority should be given to § 322 applications for children approaching their eighteenth birthdays. See INS, *Expedited Naturalization Procedures for Certain Children Pursuant to Revised Section 322 of INA* (July 7, 1995).

We encourage USCIS to add similar language in USCIS Policy Manual in Volume 12, Part H, Chapter 5:

#### ***H. Citizenship Interview and Waiver***

*In general, an applicant must appear in person for an interview before a USCIS officer after filing an Application for Citizenship and Issuance of Certificate Under Section 322 (Form N-600K). This includes the U.S. citizen parent or parents if the application is filed on behalf of a child under 18 years of age.<sup>[22]</sup> USCIS, however, waives the interview requirement if all the required documentation necessary to establish the applicant’s eligibility is already included in USCIS administrative records or if any of the following documentation is submitted along with the application.<sup>[23]</sup> Adjudicators should give immediate priority to § 322 applications for children approaching their eighteenth birthdays.*

### **11. USCIS Should Clarify Guidance in 12 USCIS-PM D Regarding the Effects of Absences on Naturalization.**

First, we ask USCIS to clarify guidance in 12 USCIS-PM D.3 regarding breaks in continuous residence for periods of less than 6 months for naturalization eligibility. The Immigration and

Nationality Act (INA) does not describe the effect on continuous residence for trips abroad of fewer than six months. If someone has abandoned their residence, that is a separate determination, apart from continuous residence. For continuous residence purposes, a trip lasting fewer than six months should not disrupt continuous residence. A trip of less than one year should also not disrupt where someone is considered to *reside*, for purposes of continuous residence. 8 CFR 316.5 (“(5) *Residence during absences of less than one year.* (i) An applicant’s residence during any absence of less than one year shall continue to be the State or Service district where the applicant last resided at the time of the applicant’s departure abroad.”). Nevertheless, the USCIS Policy Manual currently encourages adjudicators to review applications for continuous residence breaks even where there are absences of fewer than six months. This guidance is *ultra vires* and can lead to erroneous denials.

We ask USCIS to rescind the following language from 12 USCIS-PM D.3:

~~*An officer may also review whether an applicant with multiple absences of less than 6 months each will be able to satisfy the continuous residence requirement. In some of these cases, an applicant may not be able to establish that his or her principal actual dwelling place is in the United States or establish residence within the United States for the statutorily required period of time.*~~

Second, we ask that USCIS correct guidance in 12 USCIS-PM D.2(B) on “abandonment,” as announced in the policy alert entitled “Prerequisite of Lawful Admission for Permanent Residence under All Applicable Provisions for Purposes of Naturalization,” issued November 18, 2020. This guidance erroneously instructs USCIS on how to make an abandonment determination. However, USCIS does not have that authority. Only an immigration judge or the Board of Immigration Appeals can make an abandonment finding, not USCIS. Even if USCIS suspects an applicant has abandoned, the applicant is still eligible to naturalize because an immigration judge has not made a legal finding of abandonment. Someone whom USCIS suspects has abandoned their lawful permanent residence can still naturalize if the adjudicator uses discretion and fails to issue a Notice to Appear, and the individual is still eligible to naturalize. Suspicion of abandonment of residence prior to a finding by an immigration judge is not a ground for denial.

For these reasons, we ask USCIS to withdraw the section on abandonment in 12 USCIS-PM D.2(b) and replace it with the following modified introduction:

*B. Abandonment of Lawful Permanent Residence*

~~*An applicant who has abandoned his or her LPR status is not eligible for naturalization.[20] To naturalize under most provisions of the immigration laws,[21] an applicant must be lawfully admitted for permanent residence and have maintained LPR status through the naturalization process.[22] There are some instances where an immigration judge or the Board of Immigration Appeals may find that an LPR has abandoned their LPR status.*~~

~~*Abandonment of LPR status occurs when an immigration judge or the Board of Immigration Appeals finds that the LPR has demonstrated his or her intent to no longer reside in the United States as an LPR after departing the United States.[23] In addition, abandonment of LPR status by a parent is imputed to a minor child who is in the parent’s custody and control.[24] While LPRs are permitted to travel outside the United States,[25] depending on the length and circumstances of the trip abroad, the trip may lead to a determination that the LPR abandoned his or her LPR status.[26]*~~

~~*If the evidence suggests that an applicant abandoned his or her LPR status and was subsequently erroneously permitted to enter as a returning LPR, the applicant is ineligible for naturalization. This is because the applicant failed to establish that he or she was a lawfully admitted for permanent residence*~~

~~at the time of the subsequent reentry[27] and failed to meet the continuous residence requirement for naturalization.[28]~~

~~If the officer determines that the naturalization applicant has failed to meet the burden of establishing that he or she maintained LPR status, DHS places the applicant in removal proceedings by issuing a Notice to Appear (NTA) (Form I-862), where issuance would be in accordance with established guidance.[29] USCIS then denies the naturalization application.[30] An immigration judge (IJ) makes a final determination as to whether the applicant has abandoned his or her LPR status. The applicant does not lose his or her LPR status unless and until the IJ issues an order of removal and the order becomes final.[31]~~

## **12. USCIS Should Affirm that a Grant of U Nonimmigrant Status is an “Admission.”**

The BIA has repeatedly found that a grant of U nonimmigrant status is an “admission.” *Matter of Garnica Silva*, A098 269 615 (BIA June 29, 2017); *Matter of Ramirez-Lainez*, A205 236 187 (BIA Aug. 21, 2014). However, these decisions are unpublished, and there is great need for the USCIS Policy Manual to clarify the issue to provide guidance to practitioners, adjudicators, and U nonimmigrant status holders.<sup>32</sup> The BIA has based its arguments on the clear language of the statute. Section 245(m)(1) limits U adjustment eligibility to a person who has been physically present for at least 3 years “since the date of admission as a nonimmigrant.” The BIA looked to similar language for S and T visas (e.g., limiting T adjustment eligibility to a “nonimmigrant admitted into the United States under section 101(a)(15)(T)(i) [who] has been physically present . . . for at least 3 years since the date of admission as a nonimmigrant.”). As the BIA reasoned, if you interpreted “admission” to be a lawful entry, 245(m) adjustment would be unavailable to almost all U nonimmigrants, the only exceptions being the few beneficiaries (typically derivative beneficiaries) who were “admitted” through a port of entry. We thus ask USCIS to state clearly in 3 USCIS-PM C.7(D)(1) what the BIA has reasoned:

*A grant of U nonimmigrant status is considered an “admission” into the United States even if the individual never made an “entry” within the meaning of INA § 101(a)(13)(A).*

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<sup>32</sup> This need for clarity has increased after the Supreme Court’s decision that a grant of temporary protected status, albeit pursuant to a different statutory scheme, is not an admission. *Sanchez v. Mayorkas*, 141 S.Ct. 1809 (2021).