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Delivered via email to:

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RE: **USCIS PM – Use of Discretion for Adjustment of Status**, Changes to 7 USCIS-PM A.1 and 7 USCIS-PM A.10, effective upon publication on November 17, 2020.

Dear USCIS:

I am writing on behalf of the Immigrant Legal Resource Center (ILRC) to oppose the policy manual changes, **Applying Discretion in USCIS Adjudications**, cited above,[1] which superseded the Adjudicator's Field Manual (AFM) 10.15.[2] In July 2020, USCIS also altered the policy manual on discretion in dozens of USCIS benefits applications, at 1 USCIS-PM E.8 and 10 USCIS-PM A.5.[3]

We oppose the present changes to the policy manual, as we did the July changes,[4] because they violate existing case law. The changes represent an attempt to impose new eligibility requirements that are also a violation of the Administrative Procedure Act (APA) because they went into effect without the required regulatory notice and comment process. The agency has provided no explanation for this abrupt departure from prior procedure and application of the law. In addition, the policy manual will unduly burden eligible applicants and USCIS adjudicators by requiring a separate, lengthy adjudication

[1] *See* USCIS https://www.uscis.gov/sites/default/files/document/policy-manual-updates/20201117-AOSDiscretion.pdf The new material in the policy manual is found here: https://www.uscis.gov/policy-manual/volume-7-part-a-chapter-10 and https://www.uscis.gov/policy-manual/volume-7-part-a-chapter-1.
[2] The Adjudicator's Field Manual (AFM) 10.15 that was superseded by the policy manual is Appendix 2.
[3] *See* https://www.uscis.gov/sites/default/files/document/policy-manual-updates/20200715-Discretion.pdf.
[4] On August 13, 2020, ILRC submitted comments opposing the July 2020 changes to the policy manual on discretion,
https://www.ilrc.org/sites/default/files/resources/ilrc_opposes_uscis_changes_to_the_policy_manual_on_discretion.pdf.

of thirty specific discretionary factors under a heightened burden of proof that requires adjustment applicants to show "clearly and beyond doubt" that they are eligible for adjustment. The new emphasis on a balancing of a myriad of factors invites arbitrary and inconsistent application of the law.

I. Background on ILRC

ILRC is a national non-profit organization that provides legal trainings, educational materials, and legal support to thousands of legal practitioners and non-profit legal services providers. 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 1979, the ILRC has provided technical assistance on hundreds of thousands of immigration law issues, trained thousands of advocates and pro bono attorneys 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 provides technical support for attorneys and non-profit programs that represent immigrants during the process of applying for a wide variety of immigration benefits, as well as producing webinars, trainings, manuals, and practice advisories. Through our extensive networks with service providers and immigration practitioners we have developed a profound understanding of the barriers immigrants face when seeking to obtain an immigration benefit.

Immigrants and their families, as well as the providers that represent them, are severely impacted by this announced policy change related to discretion. Introducing ambiguous standards into the process muddies the decision-making process and creates doubt about the consistency and integrity of the process. Advocates will not be able to advise clients with certainty about eligibility and likelihood of obtaining status, even where they meet statutory eligibility criteria; families will remain uncertain about the best way to ensure family unity and secure legal status. Indeed, this policy encourages denials of status to those that otherwise demonstrate eligibility for permanent residence and meet the statutory requirements.

II. What the Policy Manual Changed

A. Prior Guidance

The AFM guidance on discretion was brief and did not state specific factors that adjudicators must review to determine discretionary eligibility in adjustment. Instead, the AFM encouraged officers to consult precedent case law, regulatory guidelines, and their supervisors when weighing discretionary factors identified in that case law.[5] The AFM urged adjudicators to exercise caution in applying discretion to adjudications and emphasized the importance of consistency and uniformity of decisions. The brief instruction in the AFM that encouraged officers to use their judgement and follow case law in exercising discretion was in keeping with the Supreme Court's statement, "And if the word 'discretion' means anything in a statutory or administrative grant of power, it means that the recipient must exercise his authority according to his own understanding and conscience."[6]

B. Case Law

[5] Appendix 2 is the former AFM section on discretion. The new discretionary factors imposed by the present policy manual changes are Appendix 1.

[6] *United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260, 266-267 (1954).

Longstanding precedent applying discretion in the adjustment of status context presumes discretion will be granted in favor of an applicant in the absence of negative factors. In *Matter of Arai*, 13 I&N Dec. 494 (BIA 1970) the BIA articulates that a showing of positive factors will most often offset a negative one:

"Where adverse factors are present in a given application, it may be necessary for the applicant to offset these by a showing of unusual or even outstanding equities. Generally, favorable factors such as family ties, hardship, length of residence in the United States, *etc.,* will be considered as countervailing factors meriting favorable exercise of administrative discretion. In the absence of adverse factors, adjustment will ordinarily be granted, still as a matter of discretion." *Arai* at 496.

While the new policy manual cites to *Arai,* it misapplies its holding by heightening the burden of proof and the burden of persuasion on applicants. The guidance abruptly departs from the longstanding principal that absent adverse factors, adjustment will be ordinarily be granted and that a general showing of favorable factors will often overcome a negative concern. The policy manual creates an array of specific factors that must be weighed as to positive and negative impact, effectively creating new eligibility standards and stacking the balancing of factors against the applicant.

III. The New Policy Manual Guidance Violates the APA Because It Imposes New Eligibility Rules, Circumventing the Regulatory Process

A. Thirty Discretionary Factors and an Increased Burden of Proof Are Fundamental Changes that Evaded Regulatory Notice and Comment

The new guidance changes the discretionary analysis for adjustment of status applications. The policy manual adds a total of thirty new positive and negative factors that adjudication officers are directed to review before deciding whether discretion can be exercised favorably to allow adjustment to permanent residence by an otherwise eligible applicant. By requiring officers to consider all these factors, the guidance changes the eligibility criteria for adjustment and increases the burden on applicants.

The new specific factors, gleaned from case law that is irrelevant to adjustment of status, are listed at Appendix 1. They include negative factors such as: moral depravity or criminal tendencies reflected by a single serious crime or an active or long criminal record; lack of reformation of character; public safety or national security concerns; history of employment or underemployment; and other indicators adversely reflecting on the applicant's character and undesirability as a LPR, that go beyond the burden on the applicant to demonstrate admissibility to the United States pursuant to INA §212. The list of positive factors to be weighed include: demonstration of rehabilitation; respect for law and order; education; specialized skills and training obtained from an educational institution in the United States; service in the U.S. armed forces; property, investment, or business ties to the United States; and U.S. family and community ties.

The changes represent a fundamental departure from prior USCIS guidance and policy found in the AFM 10.15.[7] The AFM, in alignment with the statutory provision for adjustment, did not apply dozens of specific discretionary factors to evaluate in discretion for adjustment.[8]

[7] *See* AFM 10.15, Appendix 2.

[8] *See* Appendix 1 for the list of discretionary factors that the policy manual states are relevant to adjustment adjudications.

The case law cited to support the policy manual changes relates almost entirely to other types of applications, especially criminal waiver matters such as INA §212 (c) and INA §212 (h) waivers, which have extremely different legal requirements than adjustment. The one adjustment case cited is mischaracterized by the policy manual.

1. The Changes Rely on Irrelevant and Mischaracterized Case Law

The policy manual mischaracterizes existing regulations and case law on discretion in adjustment adjudications. USCIS makes no distinction between different application types in the case law cited to support it, despite entirely different legal requirements.

The citations in the policy manual are often to BIA cases which do not support the proposition asserted. The policy manual cites to BIA decisions which are very specific to the relief discussed in the particular case, and then applies the discussion of discretionary factors to adjustment applications which have different legal requirements.

For example, the policy manual cites to BIA cases that concern former INA §212 (c) criminal waivers to support the assertion that numerous specific factors are justified in the consideration of adjustment discretion, with no discussion whatsoever of how entirely separate applications with different eligibility requirements should somehow be conflated. The policy manual cites *Matter of Buscemi, Matter of Marin* and *Matter of Edwards* a total of thirty-three times[9] to support its requirement of specific discretionary factors and the higher burden on applicants for adjustment discretion. All three cases concerned former INA § 212 (c) criminal waivers, a waiver which by design was established to waive criminal issues. These cases thus presume a burden on the applicant to overcome a negative criminal factor that rendered the applicant removable. Adjustment, on the other hand, has eligibility factors related to having the appropriate petition approved based on family ties, employment, or humanitarian considerations, and requires a showing of admissibility. Thus the discretionary considerations, as articulated in *Arai*, are notably distinct from the showing required to overcome a criminal bar to admissibility or deportability.[10]

The policy manual relies on other irrelevant case law, such as the INA § 212(h) criminal waiver case, *Matter of Mendez-Morales,*[11] to support its new requirement of certain discretionary factors for adjustment as well. The case is cited fourteen times in footnotes as support for specific discretionary factors for adjustment, without discussion of the fact that it concerned an entirely different application with different legal requirements. As noted by the BIA in that case, "For

[9] *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 at footnotes 10, 20, 25, 26, 27, 28, 30, 33, 35, 38, 39, 40, 41, 42, 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 the evidence of rehabilitation was key to the BIA's findings, and to whether unusual or outstanding equities would be required to favorably exercise discretion. These cases are entirely distinguishable from an adjustment of status where discretion is concerned because the underlying law it completely different.

[10] Former INA §212 (c) provided for a waiver of inadmissibility or deportability for lawful permanent residents who had been lawfully domiciled in the U.S. for 7 consecutive years and who had not served an aggregate of more than 5 years imprisonment for an aggravated felony. The waiver was eliminated effective April 1, 1997, except for certain grandfathered applicants, USCIS, https://www.uscis.gov/i-191.

[11] *Matter of Mendez-Moralez,* 21 I&N Dec. 296 (BIA 1996) concerned a criminal waiver under INA § 212 (h)(1)(b) for an applicant who was convicted of sexual assault. The waiver requires a showing of rehabilitation and a showing that admission would not be contrary to the national welfare of the United States. The Board specifically notes that *Matter of Arai*, 13 I&N Dec. 494 (BIA 1970) controls adjustment applications and holds that "where there are no adverse factors present, favorable factors such as family ties, hardship, length of residence in the United States, etc., will be considered as countervailing factors meriting favorable exercise of discretion…" . The BIA noted that a waiver under INA §212(h) does not follow the same approach as an adjustment application because there is a criminal ground to be waived, and, unlike adjustment, "…there can be no presumption that relief is warranted." *Matter of Mendez-Moralez* 21 I&N Dec. 296, 300 (BIA 1996).

the most part, it is prudent to avoid cross application, as between different types of relief, of particular principles or standards for the exercise of discretion"[12] yet that is exactly what the policy manual does here.

The one BIA case cited in the policy manual that actually concerned adjustment of status is cited for propositions that it does not represent.[13] *Matter of Arai* stands for a principle that is ignored in the current policy manual, that is, that in INA § 245 adjustment, "favorable factors such as family ties, hardship, length of residence in the United States, etc. will be considered as countervailing factors meriting favorable exercise of administrative discretion. In the absence of adverse factors, adjustment will ordinarily be granted."[14] The BIA's holding in *Arai* recognized the dangers of listing specific factors for discretion in adjustment: "It is difficult and probably inadvisable to set up restrictive guidelines for the exercise of discretion. Problems which arise in applications for adjustment must of necessity be resolved on an individual basis."[15] *Arai* stands for the presumption that adjustment will ordinarily be granted absent adverse circumstances.[16]

The new policy manual instead states, "if there is no evidence that the applicant has negative factors present in his or her case, or if the officer finds that the applicant's positive factors outweigh the negative factors such that the applicant's adjustment is warranted and in the interest of the United States, the officer generally may exercise favorable discretion and approve the application." and changes to burden of proof to clearly and beyond doubt, disfavoring applicants.[17]

2. The New Guidance Requires Officers to Misapply the Standard and Burden of Proof

The new policy manual guidance violates the presumption of eligibility principle in *Arai* by requiring a showing of specific factors in each adjustment application and erroneously extending the applicant's burden of proof to a showing of specific factual discretionary factors.

While the new policy instruction distinguishes the burden of proof from the standard of evidence, the guidance erroneously conflates the two standards in discussing evidence in support of a favorable discretionary decision. While an applicant must prove their admissibility, a preponderance of evidence showing the applicant warrants a grant of lawful permanent residence meets this burden. The guidance encourages officers to commit legal error by elevating the potential factors outlined in consideration of a discretionary decision to the status of required legal elements that must be shown by evidence that is "clearly and beyond doubt" supporting admissibility. This is an incorrect application of discretion and contravenes years of case law explaining the adjudicator's role in exercising discretion. Absent a negative factor, the applicant will generally merit favorable discretion.

B. The Change in Policy Amounts to a Rule Change Requiring Notice and Comment

The changes imposed by the policy fundamentally alter applicant's ability to qualify for adjustment, yet they were published only in the policy manual, effective immediately on November 17, 2020. The comment period allowed until December 17, 2020 is a disingenuous show of compliance with the APA's requirement of notice and comment.[18] Unlike comments to proposed regulations, the comments submitted to the policy manual are not visible to anyone in the public,

[12] *Matter of Mendez-Moralez,* 21 I&N Dec. 296, 300 (BIA 1996).
[13] *Matter of Arai*, 13 I&N Dec. 494 (BIA 1970) is cited in the policy manual in footnotes 18, 21, 25, 26, 27 and 46.
[14] *Matter of Arai*, 13 I&N Dec. 494 (BIA 1970).
[15] *Id*.
[16] *See* discussion of *Arai*, distinguishing adjustment from criminal waivers, in *Matter of Mendez-Moralez,* 21 I&N Dec. 296, 300 (BIA 1996).
[17] 7 USCIS-PM 10. A.1.
[18] APA, 5 USC §553, *see also* Federal Register, *A Guide to the Rulemaking Process,* https://www.federalregister.gov/uploads/2011/01/the_rulemaking_process.pdf.

nor does the agency respond to them. The opaque process is insufficient to comply with the intent of the APA to provide an explanation of the government's purpose, notice in advance of changes, and a due consideration of the public's comments regarding the effect of the changes.

Altering legal standards and burdens through a policy manual notification and change circumvents the rule making process, evading public comment. In addition, the nature of the changes outstrips the statutory provisions controlling adjustment of status and go against fifty years of court precedent. Without a formal rule making, the agency has provided no justification for this highly burdensome change to adjustment adjudications. The policy manual provides no rationale for relying on criminal waiver case law or the need for new standards.

IV. Burden Imposed on Applicants and USCIS Adjudicators

The policy manual changes place an extremely heavy and unnecessary burden on both applicants and adjudicators by requiring more evidence, conflating legal standards, and muddying the adjudicative process by requiring a balancing of specific factors with no assigned weight. The discretionary factors identified are vague and overbroad, inviting confusion and inconsistent adjudications. The changes require applicants to supply voluminous documentation, and adjudicators to review the evidence of the more than thirty factors, in what amounts to a separate adjudication entailing many additional hours of work. Interviews will necessarily take longer to address the required factors and the USCIS's backlogs will increase.

In addition, advocates will necessarily face difficulty preparing applications and advising applicants. An ambiguous adjudicative framework makes it nearly impossible to advise clients on eligibility and likelihood of success. The preparation required to make a heightened showing of discretionary factors will create a heavy burden on advocates, applicants, and their families. There is no legal justification for this change in burden.

Conclusion

We implore the agency to rescind the policy manual changes based on the foregoing.

Sincerely,

Peggy Gleason
Senior Staff Attorney on behalf of Immigrant Legal Resource Center

Appendix 1: Policy Manual Discretion Factors

2. Issues and Factors to Consider in the Totality of the Circumstances
The following table provides a non-exhaustive list of factors or factual circumstances that officers generally should consider in exercising discretion with respect to an application for adjustment of status to that of LPR.

Non-Exhaustive List of Issues and Factors to Consider Related to the Exercise of Discretion in Adjustment Applications		
Issue	**Positive Factors**	**Negative Factors**
Eligibility Requirements	• Meeting the eligibility requirements for adjustment of status.[23]	• Not meeting the eligibility requirements may still be considered as part of a discretionary analysis.[24]
Family and Community Ties	• Family ties to the United States and the closeness of the underlying relationships.[25] • Hardship to the applicant or close relatives if the adjustment application is denied.[26] • Length of lawful residence in the United States, status held and conduct during that residence, particularly if the applicant began his or her residency at a young age.[27]	• Absence of close family, community, and residence ties.[28]
Immigration Status and History	• Compliance with immigration laws and the conditions of any immigration status held. • Approved humanitarian-based immigrant or nonimmigrant petition, waiver of inadmissibility, or other form of relief	• Violations of immigration laws and the conditions of any immigration status held.[30] • Current or previous instances of fraud or false testimony in dealings with USCIS or any government agency.[31]

Non-Exhaustive List of Issues and Factors to Consider Related to the Exercise of Discretion in Adjustment Applications		
Issue	Positive Factors	Negative Factors
	and the underlying humanitarian, hardship, or other factors that resulted in the approval.[29]	• Unexecuted exclusion, deportation, or removal orders.[32]
Business, Employment, and Skills	• Property, investment, or business ties in the United States.[33] • Employment history, including type, length, and stability of the employment.[34] • Education, specialized skills, and training obtained from an educational institution in the United States relevant to current or prospective employment and earning potential in the United States.	• History of unemployment or underemployment.[35] • Unauthorized employment in the United States.[36] • Employment or income from illegal activity or sources, including, but not limited to, income gained illegally from drug sales, illegal gambling, prostitution, or alien smuggling.[37]
Community Standing and Moral Character	• Respect for law and order, and good moral character (in the United States and abroad) demonstrated by a lack of a criminal record and evidence of good standing in the community. • Honorable service in the U.S. armed forces or other evidence of value and service to the community.[38]	• Moral depravity or criminal tendencies (in the United States and abroad) reflected by a single serious crime or an active or long criminal record, including the nature, seriousness, and recent occurrence of criminal violations.[40] • Lack of reformation of character or rehabilitation.[41] • Public safety or national security concerns.[42] • Failure to meet tax obligations. • Failure to pay child support.

Non-Exhaustive List of Issues and Factors to Consider Related to the Exercise of Discretion in Adjustment Applications		
Issue	**Positive Factors**	**Negative Factors**
	• Compliance with tax laws. • Current or past cooperation with law enforcement authorities. • Demonstration of reformed or rehabilitated criminal conduct, where applicable.[39] • Community service beyond any imposed by the courts.	• Failure to comply with any applicable civil court orders.
Other	• Absence of significant undesirable or negative factors and other indicators of good moral character in the United States and abroad.[43]	• Other indicators adversely reflecting the applicant's character and undesirability as an LPR of this country.[44]

Appendix 2

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 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.