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September 2, 2021

Ur Jaddou
Director, USCIS
Department of Homeland Security
20 Massachusetts Ave NW
Washington, DC 20529

Dear Ms. Jaddou,

We are writing to share our recommendations for improvements to the USCIS Policy Manual. As you are aware, the previous administration created major barriers for immigrants and their families. Moving forward, USCIS needs to regain trust in the communities it serves to encourage more people to apply for benefits.

We are grateful to have had the opportunity to engage with your agency a few months ago regarding the USCIS Policy Manual. The Immigrant Legal Resource Center (ILRC) writes this letter to follow up on that conversation and to provide further recommendations for changes to the Policy Manual that USCIS can immediately implement to rectify the previous administration’s policies, 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.

Having clear and consistent policies that incorporate feedback from USCIS customers is critically important at this moment because many would-be USCIS customers refrained from interacting with the agency during the last Presidential administration. Regaining trust in the immigrant community is an important part of rebuilding USCIS. We believe that USCIS should be proactive in rescinding harmful policies that erode community trust.

In keeping with these goals and values, we recommend USCIS make the following changes to the USCIS Policy Manual in order to rebuild customer trust. We are available to answer any questions about these areas, and respectfully request a meeting to discuss further.

Sincerely,

/s/

Alison Kamhi

Supervising Attorney

Immigrant Legal Resource Center

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DISCRETION

1. Withdraw the changes made to 1 USCIS-PM E.8 and 10 USCIS-PM A.5 of the USCIS Policy Manual.

We ask USCIS to withdraw the changes made to 1 USCIS-PM E.8 and 10 USCIS-PM A.5, as described in the policy alert entitled “Applying Discretion in USCIS Adjudications” on July 15, 2020. These changes superseded the Adjudicator’s Field Manual (AFM) 10.15, which we encourage USCIS to reinstate (see below) for all sections affected by the 2020 and 2021 PM changes on discretion.

These changes impacted more than a dozen types of applications for immigration benefits, including I-485 Adjustment applications; waiver applications with I-601s, I-601As, and I-212 permission to reapply; employment authorization applications I-765s; fiancé petitions I-129s; and half a dozen more application types. As happened with the two subsequent policy manual releases on discretion in 2020 and 2021, no distinction is made between different types of immigration benefits and their different legal requirements. In addition, USCIS used as legal “support” a series of cases that concerned the particular legal requirements of criminal waiver applications under former INA § 212(c) and INA § 212(h), and then applies this narrow, very specific case law without justification to everything from adjustment to employment authorization.

The July 2020 changes, and subsequent changes to discretion in the policy manual on November 17, 2020, and on January 14, 2021, represent a radical departure from the prior interpretation of “discretion,” introduce vague and unnecessary adjudicatory factors, and are not required, nor supported, by law. The changes are so broad that they issue new eligibility requirements that are not supported by statute or regulation for the applications affected. These policy manual changes impose a secondary adjudication process on dozens of application forms requiring officers to multiply the amount of time USCIS adjudicators must spend determining eligibility, a move that will grind adjudications to an even slower pace and deny applicants relief for which they would otherwise be eligible. See more detailed comments in opposition to these changes at <https://www.ilrc.org/ilrc-opposes-uscis%E2%80%99s-changes-policy-manual-discretion>.

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 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.*

2. Withdraw the changes made to 7 USCIS-PM A.1 and 7 USCIS-PM A.10 of the USCIS Policy Manual.

We ask USCIS to withdraw the changes made to 7 USCIS-PM A.1 and 7 USCIS-PM A.10, as described in the policy alert entitled "Use of Discretion for Adjustment of Status" on November 17, 2020. Under this reading of INA § 245(a), USCIS adjudicators are given an extremely broad, amorphous set of factors to consider when determining whether a case warrants a "favorable exercise of discretion," a determination which is now given more weight than was previously typical. This increases the likelihood that an applicant is denied adjustment of status due to an officer finding them "undesirable," despite being fully eligible for lawful permanent resident (LPR) status on a statutory or regulatory basis. USCIS used as legal "support" a series of cases that concerned the particular legal requirements of criminal waiver applications under former INA § 212(c) and INA § 212(h), and then applies this narrow, very specific case law without justification to adjustment, which has completely different legal requirements.

These changes represent a radical departure from prior interpretation of "discretion," introduce vague and unnecessary adjudicatory factors, and are not required, nor supported, by law. For more detail in the arguments against these changes to discretion see our comments submitted to the agency at

https://www.ilrc.org/sites/default/files/resources/ilrc_opposes_november_2020_uscis_changes_to_the_policy_manual_on_discretion_in_adjustment.pdf.

For these reasons, the changes were improvidently issued and should be withdrawn in their entirety and the two-paragraph instruction of the AFM 10.15 on discretion reproduced in Section (1) above should be restored.

3. Withdraw the changes made to 10 USCIS-PM B of the USCIS Policy Manual.

We ask USCIS to withdraw the changes made to 10 USCIS-PM B, as described in the policy alert entitled “Applications for Discretionary Employment Authorization Involving Certain Adjustment Applications or Deferred Action” on January 14, 2021. We commend USCIS for altering this section of the policy manual on June 9, 2021, to restore a two-year period of employment authorization instead of one for adjustment applicants. We also applaud the agency for rescinding the guidance on August 12, 2021, related to discretionary EADs for parolees.

Nevertheless, Volume 10, Chapter B of the policy manual still cites back to the earlier release on discretion from July 2020 in 1 USCIS-PM E.8, urging officers to consider numerous amorphous factors in adjudicating employment authorization documents (EADs) that are not justified by law and pose undue burdens on both applicants and adjudicators. As with the above changes, USCIS adjudicators are given an extensive but non-exhaustive list of factors to consider when determining whether a case warrants a “favorable exercise of discretion,” superseding previous policy simply to issue an EAD if the underlying benefit application was a valid one in a category which allowed employment authorization. The changes dramatically restrict employment authorization for deferred action recipients in excess of the statute. These changes represent a radical departure from prior interpretation of “discretion,” introduce vague and unnecessary adjudicatory factors, and are not required, nor supported, by law. USCIS relied in error on case law concerning criminal waivers and applied it to employment authorization and its discretionary element.

These changes were improvidently issued and should be withdrawn, and the two-paragraph instruction of the AFM 10.15 reproduced in Section (1) above on discretion should be restored.

LRIF

4. Edit the changes made to 7 USCIS-PM P.5(d)(1) of the USCIS Policy Manual.

We ask USCIS to edit the changes made to 7 USCIS-PM P.5 as described in the policy alert entitled “Liberian Refugee Immigration Fairness” on April 7, 2020, in order for USCIS guidance to comply with the Liberian Refugee Immigration Fairness (LRIF) statutory intent and requirements. The language under this policy manual change contradicts the statute by imposing restrictions that go beyond statutory language and require excessive documentation from LRIF applicants and their family members.

We commend USCIS for modifying this section of the policy manual on June 11, 2021, to specify that certain documents could constitute secondary proof of nationality.

However, the changes do not go far enough to comport with the intent of the statute. The existing restrictions in the policy manual continue to disqualify eligible Liberians from accessing LRIF, in contravention to Congress' mandate. The LRIF statute requires that the Department of Homeland Security "shall adjust" anyone who meets the criteria. The policy manual should be modified to reflect this congressional mandate and the liberal eligibility intent of the statute, particularly with regard to proof of nationality at 7 USCIS PM P.5(d)(1). The suggestions that ILRC and a coalition of advocates have submitted to USCIS are found in a letter sent to USCIS earlier this year,

https://www.ilrc.org/sites/default/files/resources/lrif_strat_group_recs_and_engagement_request_march_2021.pdf.

5. Edit the changes made to 7 USCIS-PM P.5(c)(4) of the USCIS Policy Manual.

We ask USCIS to edit the changes made to 7 USCIS-PM P.5 as described in the policy alert entitled "Liberian Refugee Immigration Fairness" on April 7, 2020, in order for USCIS guidance to comply with the Liberian Refugee Immigration Fairness (LRIF) statutory intent and requirements. The requirement that family members be ineligible to adjust unless the Liberian applicant (spouse or parent) remains a pending LRIF applicant or an LPR should be removed, as the statute does not require this. The statute backdates eligibility for naturalization to 2014 by establishing residency of Liberian applicants to that year in an effort to encourage naturalization of the Liberian applicants: yet the USCIS interpretation would discourage applicants from doing just that as it would make their family members ineligible.

We recommend making changes to 7 USCIS-PM P.5(C)(4) to remedy this. The suggestions that ILRC and a coalition of advocates have submitted to USCIS are found in more detail in a letter sent to USCIS earlier this year,

https://www.ilrc.org/sites/default/files/resources/lrif_strat_group_recs_and_engagement_request_march_2021.pdf.

NATURALIZATION & CITIZENSHIP

6. Withdraw the section on "extreme vetting" described in 12 USCIS-PM D.2(d) of the USCIS Policy Manual in its entirety.

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 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.¹

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:

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[74] that formed the basis of the adjustment of status or admission as an immigrant to the United States.[75]

7. Correct guidance on “abandonment” in 12 USCIS-PM D.2(b).

We ask that USCIS correct all accompanying guidance 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 their lawful permanent residence, the applicant is still eligible to naturalize because an immigration judge has not made a legal finding of abandonment. Someone whom the USCIS suspects has abandoned their 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 issues an order of removal and the order becomes final [23] 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~~

¹ 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>.

~~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]~~

FN 23. See 8 CFR 1241.1

8. Withdraw the changes made to 12 USCIS-PM E.3.

We ask USCIS to withdraw the changes made to 12 USCIS-PM E.3 of the USCIS Policy Manual, described in the policy alerts entitled “Sufficiency of Medical Certification for Disability Exceptions (Form N-648)” on December 12, 2018, and “Properly Completed Medical Certification For Disability Exception (N-648)” on December 4, 2020. and revert to the prior language.

Form N-648 adjudication must accord with the purpose and intent of the underlying statute and regulations, which are designed to allow applicants with physical, mental, and developmental disabilities to qualify for naturalization. The conditions added in 12 USCIS-PM E.3 in the USCIS Policy Manual in the abovementioned policy alerts go beyond the statutory requirements for demonstrating eligibility for a disability waiver and must be eliminated.

9. Clarify guidance in 12 USCIS-PM D.3 regarding the continuous residence requirement for periods of less than 6 months.

We ask USCIS to clarify guidance in 12 USCIS-PM D.3 regarding breaks in continuous residence 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.*~~

10. Update 12 USCIS-PM K.3 and 12 USCIS-PM K.4 to authorize recognition of common law 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.

Name changes are engrained in the narrative of American immigration, as indicated by the practice’s prominence among European migrants who underwent immigration procedure on Ellis Island in the late-nineteenth century. An immigrant’s purpose in adopting an Anglicized name remains largely the same today as it did then: maximizing employment opportunity and minimizing confusion. Given the longstanding prominence of common law name changes among immigrants in the United States, it is vital that the USCIS Policy Manual both expressly recognize and accommodate for the practice through allowing for an inclusive range of records when determining the validity of a name changed through common law.

The USCIS Policy Manual currently requires state-issued documentation to prove a name’s continued usage, 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.3(b)(3) accordingly:

Change of Legal Name on Certificate of Naturalization

In general, a Certificate of Naturalization includes an applicant’s full legal name as the name appears on the applicant’s Form N-400.[5] Before naturalization, the applicant may present a

valid court order or other proof, *including common law usage*, that the applicant has legally changed his or her name in the manner authorized by the law of the applicant’s place of residence. If the applicant submits such evidence, then USCIS will issue the Certificate of Naturalization in the new name.

Similarly, we ask USCIS to recognize common law name changes and amend the following language in 12 USCIS-PM K.4 accordingly:

Basis for Requests of Replacement Certificate of Citizenship or Naturalization Form N-565					
Certificate	Correct USCIS Clerical Error	Date of Birth Correction No clerical error	Legal Name Change	Lost or Mutilated Certificate	Legal Gender Change
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, <i>including common law usage</i> (fee required)	Permitted (fee required)	
Certificate of Naturalization	Permitted; no fee required	Not permitted (8 CFR 338.5)		Permitted (fee required)	

11. Withdraw the section 12 USCIS-PM F.5(c)(2) on “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 policy 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 as a cynical entrapment of people who reasonably believe that they are obeying all laws.

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.

12. Withdraw naturalization good moral character guidance regarding DUIs and correct chart in 12 USCIS-PM F.5.

Despite no language regarding driving under the influence (DUI) offenses in the statute, *Matter of Castillo-Perez*, 27 I&N Dec. 664 (A.G. 2019), created a new rebuttable presumption that a naturalization applicant who has been convicted of two or more DUIs during the statutory period for naturalization lacks good moral character. This presumption is ultra vires. USCIS should eliminate the provision in 12 USCIS-PM F.5 of the USCIS Policy Manual that allows for two DUI convictions to be considered a conditional bar for good moral character and encourage the DOJ to recertify *Matter Castillo-Perez*. To that end, USCIS should also withdraw the changes made to 12 USCIS-PM F.5 of the USCIS Policy Manual, described in the policy alert entitled “Conditional Bar to Good Moral Character for Unlawful Acts” on December 13, 2019.

Moreover, the current table in 12 USCIS-PM F.5, entitled “Conditional Bars to GMC for Acts Committed in Statutory Period” is misleading. Good moral character statutory bars, such as alien smuggling (INA 101(f)(3)) and false testimony (INA 101(f)(6)), are listed in the same manner as

two DUI convictions, with no distinction made. But the acts have different legal consequences. The good moral character statutory bars are absolute bars to naturalization if they occur during the good moral character time period. By contrast, having two DUIs raises a rebuttable presumption that the person lacks good moral character as a discretionary matter. As written, the chart encourages adjudicators to apply a bright line rule of denying cases where the person has two or more DUI convictions, which even *Matter of Castillo-Perez* held would be inappropriate. See *Matter of Castillo-Perez*, 27 I&N Dec. at 671. (“Multiple DUI convictions during the relevant period are thus strong evidence that the alien was not a person of good moral character during that time But I do not hold that they are conclusive evidence.”).

Similarly, regulatory, discretionary factors, are also listed in the same manner in the chart as statutory good moral character bars. These, too, should be distinguished, as they will not cause a lack of good moral character if the applicant demonstrates extenuating circumstances. 8 CFR 316.10(b)(3).

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

Offense	Citation	Description
<p>One or More Crimes Involving Moral Turpitude (CIMTs)</p>	<ul style="list-style-type: none"> • INA 101(f)(3) • 8 CFR 316.10(b)(2)(i), (iv) 	<p>Conviction or admission of one or more CIMTs (other than political offense), except for one petty offense</p>
<p>Aggregate Sentence of 5 Years or More</p>	<ul style="list-style-type: none"> • INA 101(f)(3) • 8 CFR 316.10(b)(2)(ii), (iv) 	<p>Conviction of two or more offenses with combined sentence of 5 years or more (other than political offense)</p>
<p>Controlled Substance Violation</p>	<ul style="list-style-type: none"> • INA 101(f)(3) • 8 CFR 316.10(b)(2)(iii), (iv) 	<p>Violation of any law on controlled substances, except for simple possession of 30g or less of marijuana</p>

Offense	Citation	Description
Incarceration for 180 Days	<ul style="list-style-type: none"> • INA 101(f)(7) • 8 CFR 316.10(b)(2)(v) 	Incarceration for a total period of 180 days or more, except political offense and ensuing confinement abroad
False Testimony under Oath	<ul style="list-style-type: none"> • INA 101(f)(6) • 8 CFR 316.10(b)(2)(vi) 	False testimony for the purpose of obtaining any immigration benefit
Prostitution Offenses	<ul style="list-style-type: none"> • INA 101(f)(3) • 8 CFR 316.10(b)(2)(vii) 	Engaged in prostitution, attempted or procured to import prostitution, or received proceeds from prostitution
Smuggling of a Person	<ul style="list-style-type: none"> • INA 101(f)(3) • 8 CFR 316.10(b)(2)(viii) 	Involved in smuggling of a person to enter or try to enter the United States in violation of law
Polygamy	<ul style="list-style-type: none"> • INA 101(f)(3) • 8 CFR 316.10(b)(2)(ix) 	Practiced or is practicing polygamy (the custom of having more than one spouse at the same time)
Gambling Offenses	<ul style="list-style-type: none"> • INA 101(f)(4)–(5) • 8 CFR 316.10(b)(2)(x)–(xi) 	Two or more gambling offenses or derives income principally from illegal gambling activities

Offense	Citation	Description
Habitual Drunkard	<ul style="list-style-type: none"> INA 101(f)(1) 8 CFR 316.10(b)(2)(xii) 	Is or was a habitual drunkard
Two or More Convictions for Driving Under the Influence (DUI)	INA 101(f)	Two or more convictions for driving under the influence during the statutory period

13. 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 U.S. 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 is 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><i>On or After</i></p> <p>Nov. 14, 1986</p> <p><i>and Prior To</i></p> <p>June 12, 2017</p>	<p><i>Citizenship through U.S. Citizen Mother</i></p> <ul style="list-style-type: none"> 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. <p><i>Citizenship through U.S. Citizen Father</i></p> <ul style="list-style-type: none"> 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); A blood relationship between the child and father was established; The father, unless deceased, has agreed in writing to provide financial support until child reaches age 18;^[9] The child must be unmarried; and Either parent resided in the United States at any time prior to the child’s birth. <p><i>*A child age 18 or over on Nov. 14, 1986 could use the old law.^[10] A child at least age 15, but under 18, could use either law (date of birth on or after Nov. 15, 1968).</i></p>
<p><i>On or After</i></p> <p>June 12, 2017</p>	<p><i>Citizenship through U.S. Citizen Mother</i></p> <ul style="list-style-type: none"> One parent had resided in the U.S. or its outlying possessions at any time prior to the child’s birth. <p><i>Citizenship through U.S. Citizen Father</i></p> <ul style="list-style-type: none"> 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); A blood relationship between child and father was established;

	<ul style="list-style-type: none"> • The father, unless deceased, has agreed in writing to provide financial support until child reaches age 18;¹¹¹ • The child must be unmarried; and • Either parent resided in the United States at any time prior to the child’s birth. <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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14. Incorporate *Cheneau* Decision in 12 USCIS-PM H.4(d).

ILRC asks USCIS to incorporate guidance and implementation of recent derivation caselaw in the USCIS Policy Manual. On May 13, 2021, the Ninth Circuit En Banc Court issued a decision, *Cheneau v. Garland*, 997 F.3d 916 (9th Cir. 2021) (en banc), 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” include 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 without a fee to the applicant and 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.^[1] In those circuits, any individual who has the United States as their principal, actual dwelling place^[2] for a continuing or lasting nature^[3] 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 without fee and 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.*

^[1] *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).*

^[2] *INA § 101(a)(33).*

^[3] *INA § 101(a)(31).*

15. 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.²²¹ 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.²³¹ **Adjudicators should give immediate priority to § 322 applications for children approaching their eighteenth birthdays.***

FAMILY-BASED IMMIGRATION

16. 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 213), INA § 245(i) derivative beneficiaries are considered independently grandfathered for purposes of 245(i) as long as two conditions are met: 1) the relationship (a derivative spouse's marriage to the principal beneficiary or birth of child) occurred on or before the 245(i) sunset date of April 30, 2001, and 2) there is a properly filed petition (Form I-130) on file 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 on or before April 30, 2001, because such a person would be properly included before the sunset date.

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 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.^[29] 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.^[30] 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.^[31]

Underlying Basis for Adjustment

If a grandfathered derivative beneficiary^[32] 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.^[33]

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.^[34] 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

<i>Date</i>	<i>Event</i>
<i>January 1, 2000</i>	<i>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 at the time the labor certification application was filed, <u>on or before April 30, 2001,</u> the employee's spouse is the derivative beneficiary and is also a grandfathered noncitizen.</i>
<i>January 1, 2003</i>	<i>The employee and spouse divorce.</i>

Today	The employee's former spouse is selected in the diversity visa program.
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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 also married at the time the qualifying permanent labor certification application was filed 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.^[35]

[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)^[43] may also adjust status if "accompanying" or "following-to-join" the principal.^[44] 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.^[45]

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.^[46] 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.^[47]*

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.^[48] These applicants do not qualify as grandfathered derivative beneficiaries who may adjust in their own right under [INA 245\(i\)](#).^[49]

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

When Was Relationship Established?	Eligible as an Accompanying or Following-to-Join Applicant?	Eligible as a Grandfathered Derivative Beneficiary Who May Apply to Adjust Under INA 245(i) Independently from Principal?
Before On or before the qualifying petition or application was filed (on or before April 30, 2001)	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 ⁵⁰¹

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.^[51]

[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](#)].

SIJS

17. Revise 6 USCIS-PM J.2(d) to remove burdensome requirements for SIJS applicants.

We ask USCIS to revise 6 USCIS-PM J.2(d) to remove burdensome and unnecessary conditions that limit access to special immigrant juvenile status (SIJS). USCIS announced these policy changes to SIJS in 2019, which heighten the standards for state juvenile court findings required for SIJS eligibility. These conditions were imposed by 2019 Adopted Administrative Appeals Office (AAO) decisions. In particular, USCIS should rescind the guidance in these decisions on USCIS's "consent" function that requires petitioners for SIJS to demonstrate that the state court granted some type of relief from parental maltreatment—a new, amorphous standard not previously imposed.

For these reasons, we ask USCIS to make the following changes to 6 USCIS-PM J.2(d). To make these changes to the Policy Manual more meaningful, we further suggest that USCIS rescind the adopted AAO decisions to the extent that they create additional barriers by way of USCIS's consent function for children seeking SIJS.

D. USCIS Consent

The Trafficking Victims Protection and Reauthorization Act (TVPRA 2008) simplified but did not remove the DHS consent requirement.²⁹¹ In order to consent to the grant of SIJ classification, USCIS must review the juvenile court order and any supporting evidence submitted to conclude that the request for SIJ classification is bona fide, which means that the juvenile court order was sought to protect the child and provide relief from abuse, neglect, abandonment, or a similar basis under state law, and not primarily to obtain an immigration benefit.³⁰¹ ~~USCIS therefore looks to the nature and purpose of the juvenile court proceedings and whether the court order was sought in proceedings granting relief from abuse, neglect, or abandonment beyond an order with factual findings to enable a person to file a petition for SIJ classification.²⁹²~~ Generally, the court-ordered dependency or custodial placement of the child is the relief being sought from the juvenile court, and the factual basis of each of the required determinations is evidence that the request for SIJ classification is bona fide.

We also suggest deleting references to the Adopted AAO decisions in the following footnotes:

6 USCIS-PM J.2(C)(1), footnote 11, as follows:

See 8 CFR 204.11(c)(3). ~~See Matter of E-A-L-O (PDF, 304.17 KB), Adopted Decision 2019-04 (AAO Oct. 11, 2019) (clarifying the requirement that a juvenile court dependency declaration is~~

~~not sufficient for USCIS' to consent to SIJ classification absent evidence that the dependency declaration actually granted relief from parental abuse, neglect, abandonment, or a similar basis under state law). For an example of state law governing declarations of dependency, see California Welfare and Institutions Code Section 300, et seq.~~

6 USCIS-PM J.2(D), footnote 31, as follows:

~~See INA 101(a)(27)(J)(iii) (consent requirement). See H.R. Rep. 105-405 (PDF), p. 130 (1997). See Matter of D-Y-S-C- (PDF, 305.57 KB), Adopted Decision 2019-02 (AAO Oct. 11, 2019) (clarifying SIJ classification may only be granted upon USCIS' consent to juveniles who meet all other eligibility criteria and establish that they sought the requisite juvenile court or administrative determinations in order to gain relief from parental abuse, neglect, abandonment, or similar basis under state law, and not primarily to obtain an immigration benefit).~~

6 USCIS-PM J.3(A)(3), footnote 10, as follows:

~~See INA 101(a)(27)(J)(iii) (consent requirement). See H.R. Rep. 105-405 (PDF), p. 130 (1997); see also Matter of D-Y-S-C- (PDF, 305.57 KB), Adopted Decision 2019-02 (AAO Oct. 11, 2019) (requiring that, for USCIS' consent to be warranted, the judicial determination to find that the juvenile was subjected to such maltreatment by one or both parents under state law); Matter of E-A-L-O- (PDF, 304.17 KB), Adopted Decision 2019-04 (AAO Oct. 11, 2019) (clarifying that, for USCIS' to consent to SIJ classification, a juvenile court dependency declaration must be issued in juvenile court proceedings which actually granted relief from parental abuse, neglect, abandonment, or a similar basis under state law).~~

ASYLUM

18. Withdraw the changes made to 7 USCIS-PM A.5, 7 USCIS-PM L.5, and 7 USCIS-PM M.5

We ask USCIS to withdraw the changes made to 7 USCIS-PM A.5, 7 USCIS-PM L.5, and 7 USCIS-PM M.5 of the USCIS Policy Manual, described in the policy alert entitled “Refugee and Asylee Adjustment of Status Interview Criteria and Guidelines” on December 15, 2020. The expansion of the adjustment of status interview criteria is ineffectual and imposes an onerous burden on adjusting asylees and refugees as well as USCIS. Though the policy alert cites the importance of detecting “fraud, misrepresentation, national security threats, and public safety risks,” these concerns are already addressed during the underlying asylum adjudication or refugee resettlement process. The interview criteria listed in the affected policy manual sections are overly broad. USCIS should revert to its prior guidance and instruct officers that they should generally only schedule an interview when the officer cannot verify the applicant’s identity or they are claiming a new identity, the officer cannot determine whether they have asylee or refugee status, the applicant is the beneficiary of an approved Form I-730 but was not interviewed as part of the derivative asylee or refugee process, the FBI fingerprint results indicate that further processing is needed, or admissibility cannot be determined without an interview. USCIS’s guidance should ensure that officers determine on a case by case basis that

an interview is necessary as required by 8 CFR §§ 209.1(d), 209.1(e) rather than prescribing interviews for broad categories of adjusting asylees and refugees.

U VISA

19. Edit 3 USCIS-PM C.5(b) to comport with U Nonimmigrant Status Eligibility.

We welcome the bona fide determination (BFD) guidance and process implemented by USCIS on June 14, 2021, for U nonimmigrant status petitioners and their family members. We feel this process will provide critical protection for immigrant survivors of crime while their petitions are pending. We are also grateful that USCIS provided instructive and thorough guidance in the Policy Manual about what the requirements and process for BFD determinations. However, we feel that the crime bars put in place for the BFD are unnecessary and conflict with the intent and requirements of U nonimmigrant status.

U nonimmigrant status has one of the most generous waivers in all of the Immigration and Nationality Act. See INA § 212(d)(14) (allowing DHS to waive all grounds of inadmissibility for U nonimmigrants except for Nazi persecution, genocide, and torture/extrajudicial killing as outlined in INA § 212(a)(3)(E)). While a waiver grant is a discretionary determination, Congressional intent behind allowing such a broad waiver is clearly to afford humanitarian protection to survivors who have come forward, cooperated with law enforcement, and suffered substantial abuse, even despite immigration and criminal violations.

Nevertheless, the BFD guidance lays out crime bars in 3 USCIS-PM C.5(b) for arrests and convictions, loosely based on certain inadmissibility grounds. U petitioners may well be eligible for, and receive, U nonimmigrant status despite immigration and criminal violations. It is odd for the BFD determination, which provides only interim relief, to be barred by arrests and convictions that do not necessarily disqualify someone from ultimately obtaining U nonimmigrant status. We thus ask USCIS to remove the crime bars from the BFD review process, particularly given that any criminal or immigration violation will be addressed when the case is fully adjudicated.

We are concerned about the criminal bars overall for the reasons mentioned. But we want to call specific attention to the alarming language in the guidance authorizing a BFD bar for *arrests* as well as convictions. Arrests do not *per se* make petitioners inadmissible. Moreover, due to dual arrest and mandatory arrest laws, victims are oftentimes arrested for the very domestic violence they suffered.²

For these reasons, we ask USCIS to rescind the criminal bars section at 3 USCIS-PM C.5(b). At a minimum, we ask USCIS to make the following edits and refrain from barring a BFD grant solely on account of an arrest record:

² Annie O'Dell, *Why Do Police Arrest Victims of Domestic Violence? The Need for Comprehensive Training and Investigative Protocols*, 15 J. Aggression, Maltreatment, & Trauma 3-4 (2007).

USCIS may choose not to exercise its discretion to grant a BFD EAD and deferred action where a petitioner appears to pose a risk to national security or public safety. For example, where a principal petitioner or qualifying family member has been convicted of ~~or arrested for~~ any of the following acts, USCIS ~~may choose not to~~ ~~generally does not~~ issue a BFD EAD and deferred action and instead proceeds to a full adjudication to assess eligibility for waiting list placement. The following categories generally overlap with inadmissibility grounds[16] and may include: . .

. .