



USCIS POLICY MANUAL MAKES SWEEPING CHANGES TO DISCRETION

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I. Introduction

In 2020 and 2021, USCIS changed its interpretation of discretion in adjudication of immigration benefits in three separate releases of policy manual guidance.¹ These chapters add voluminous positive and negative discretionary factors that adjudicators are instructed to analyze in more than a dozen types of immigration benefits, including many categories of employment authorization, adjustment to permanent residence, temporary protected status and change of status applications.

The changes represent an attempt to impose new substantive eligibility requirements on applicants that do not exist in the governing statutes or regulations. The changes became effective immediately upon date of publication of each of the sections with no public input.² While the legal basis for these changes is fundamentally flawed, they remain in effect.³ As a result, practitioners need to be prepared to document specific factors and challenge discretionary analyses when needed.

These sweeping changes to the application of discretion are a radical departure from the former guidance on discretion from the Adjudicator's Field Manual (AFM) 10.15, which was two paragraphs long and urged adjudicators to consult pertinent case law for the particular benefit sought and to avoid arbitrary or inconsistent decisions based on discretion.⁴

The new, complex policy manual guidance on discretion lists dozens of discretionary factors that should be considered in any discretionary application.⁵ In setting up multiple specific factors for analyses, the guidance ignores the admonishment of the BIA to avoid such formulas. As the BIA stated in *Matter of Araj*, "It is difficult and probably inadvisable to set up restrictive guidelines for the exercise of discretion."⁶ The detailed formulas for assessing discretion also contradict the Supreme Court's observation on the nature of discretion: "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."⁷

While discretion has always been an element of the decision making, the new guidance places new emphasis on the ability of officers to deny a benefit where an applicant meets the statutory requirements.

Discretion is an important concept in immigration law. Some benefits are mandatory, meaning that USCIS must grant the application if the person meets the requirements. For example, if you prove that your client is the unmarried son of a lawful permanent resident, USCIS must approve your second preference visa petition. In contrast, if a benefit is discretionary, USCIS has the choice to decide whether or not to grant the benefit. Thus, it is best to present facts that will convince USCIS that the applicant deserves the discretionary application so that it will be approved. Much more is therefore required in terms of proof and documentation in a discretionary application than in an application for a mandatory benefit.

This practice advisory will summarize the new guidance on discretion, begin to prepare practitioners to respond to the requirements, and offer a basis to challenge them by pointing out the legal errors.

Section II covers the July 2020 policy manual additions at 1 USCIS-PM E.8 outlining USCIS's interpretation of when it can apply discretionary formulas, and which factors it will weigh as positive and negative across all impacted application types. This section also describes the new guidance in 10 USCIS-PM A.5 for the

discretionary formula USCIS will apply to all employment authorization applications made under 8 CFR 274a.12(c).

Section III covers the November 2020 additions to the policy manual at 7 USCIS-PM A.1 and 7 USCISPM A.10 for discretionary considerations for applicants for adjustment of status (I-485).

Section IV discusses the January 2021 policy manual additions at 10 USCIS-PM A. and 10 USCIS-PM B. regarding discretionary decisions on work permits for persons with deferred action and adjustment applicants.

II. July 2020 Policy Manual Additions on Discretion

A. Benefits Applications Impacted by the Changes

The July 2020 policy manual changes added guidance in two separate parts of the policy manual. 1 USCIS-PM E.8 outlines USCIS's interpretation of when it can apply discretionary formulas, and details which factors it will weigh as positive and negative across all application types. In 10 USCIS-PM A.5 the agency states that it will apply this complex discretionary formula to all employment authorization applications made under 8 CFR 274a.12(c),⁸ with the exception of employment authorization for some asylum applicants.⁹

According to the policy manual, all of the following applications for benefits are subject to this lengthy analysis: fiancé petitions (Form I-129F), applications to change or extend nonimmigrant status (I-539), advance permission to enter as a nonimmigrant (I-192), humanitarian parole (I-131), temporary protected status (I-821), adjustment of status (I-485) (with some exceptions where statutory language prohibits discretion, such as adjustment under the Liberian Refugee Immigration Fairness Act, or refugee-based adjustment under INA § 209, refugee status (with some exceptions, such as the I-730 refugee/asylee relative petition), asylum (I-589), petition to classify an alien as an employment-based immigrant (I-140), petitions to classify as an immigrant investor (I-526), waivers of inadmissibility (I-601, I-601A, I-602), consent to reapply for admission (I-212), employment authorization (I-765) for all categories under 8 CFR 274a.12 (c); and some applications to remove conditions on residence (I-751).¹⁰

The policy manual merely cites to the form for each of these benefits as authority that they are discretionary and cites to case law overturned by the BIA in describing how discretion is to be exercised.¹¹

The complete list of applications that USCIS deems discretionary and those that are non-discretionary are included as Attachment 1 and are found in a chart in the policy manual.¹²

B. Discretionary Analysis

In all of the benefits applications specified in the policy manual, officers are directed to perform a comprehensive analysis and weigh all factors. The policy manual adopts discretion formulas derived from BIA cases adjudicating former INA §212(c)¹³ and INA §212(h)¹⁴ criminal waivers and applies them indiscriminately to the very different benefits applications described above. USCIS instructs officers to apply the kind of discretionary analysis outlined by the BIA in former INA § 212(c) criminal waiver cases: "balancing of the negative factors evidencing an alien's undesirability as a permanent resident with the social and humane considerations presented on his or her behalf to determine whether relief appears in the best interests of the country."¹⁵

USCIS instructs adjudicators that while all threshold eligibility requirements must exist before there is discretion to grant a benefit, “it is legally permissible to deny an application as a matter of discretion without determining whether the requestor is otherwise eligible for the benefit,” relying on a series of cases that dealt with the legal issues around motions to reopen, not an application for an immigration benefit.¹⁶ Officers are encouraged to make an eligibility determination when denying on the basis of discretion for the purpose of making the record complete,¹⁷ but are no longer required to based on this guidance.

1. Fact Finding

During interviews, officers are directed to question applicants on a myriad of factors to perform the discretionary analysis. The guidance provides that applicants have the burden to establish that they deserve favorable discretion, and directs officers to inquire about background such as:

- Immigration history;
- Family ties in the United States;
- Any serious medical conditions;
- Any criminal history;
- Other connections to the community, or
- Information indicating a public safety or national security concern.¹⁸

If any negative factors are discovered, officers are directed to quiz applicants on why they deserve the benefit sought.

2. July 2020 Discretionary Factors Identified in the Policy Manual

USCIS directs adjudicators to consider more than twenty-two specific factors in the analysis of discretion, and that is a non-exhaustive list. These specific factors are listed as factors that may be considered, in addition to the fact-finding directions given above. Because the list is not exhaustive, officers may inquire into any facet that seems relevant to a discretionary decision about whether to grant or deny a case.

The policy manual gives broad direction to inquire into all aspects of an applicant’s life:

“Any facts related to the alien’s conduct, character, family ties, other lawful ties to the United States, immigration status, or any other humanitarian concerns may be appropriate factors to consider in the exercise of discretion. An alien’s conduct can include how he or she entered the United States and what he or she has done since arrival, such as employment, schooling, or any evidence of criminal activity. Whether the alien has family members living in the United States also is relevant to the discretionary analysis. Ties to the United States may include owning real estate or a business; the conduct of that business (including maintenance of such business in compliance with the law) may also be relevant to the discretionary analysis. Humanitarian concerns may include, but are not limited to, health issues.”¹⁹

USCIS instructs officers that to consider these specific discretionary factors as well as “other indicators of an applicant or beneficiary’s character,”²⁰ creating enormous discretion for adjudicators to find almost any factor relevant.

3. Weighing Factors to Reach a Decision

As stated, the policy manual cites to case law on criminal waivers to support this deep consideration and exploration of all factors for all types of immigration benefits deemed discretionary.²¹

The specific factors for discretionary consideration are:

- Whether the requestor is eligible for the benefit sought;
- The applicant or beneficiary's ties to family members in the United States and the closeness of the underlying relationships;
- Hardship due to an adverse decision;
- The applicant or beneficiary's value and service to the community;
- Length of the applicant or beneficiary's lawful residence in the United States and status held during that residence, including the age at which the alien began residing in the United States;
- Service in the U.S. armed forces;
- History of employment;
- Property or business ties in the United States;
- History of taxes paid;
- Nature and underlying circumstances of any inadmissibility grounds at issue, the seriousness of the violations, and whether the applicant or beneficiary is eligible for a waiver of inadmissibility or other form of relief;
- Likelihood that lawful permanent resident (LPR) status will ensue soon;
- Evidence regarding respect for law and order, good character, and intent to hold family responsibilities (for example, affidavits from family, friends, and responsible community representatives);
- Criminal history (in the United States and abroad) and whether the applicant or beneficiary has rehabilitated and reformed;
- Community service beyond any imposed by the courts;
- Whether the alien is under an unexecuted administratively final removal, deportation, or exclusion order;
- Public safety or national security concerns;
- Moral depravity or criminal tendencies reflected by a single serious crime or an ongoing or continuing criminal record, with attention to the nature, scope, seriousness, and recent occurrence of criminal activity;

- Findings of juvenile delinquency;
- Compliance with immigration laws;
- Previous instances of fraud or false testimony in dealings with USCIS or any government agency;
- Marriage to a U.S. citizen or LPR for the primary purpose of circumventing immigration laws;
- Other indicators of an applicant or beneficiary's character.

C. Challenges to Discretionary Decisions

One fundamental flaw with the policy manual material on discretion is that USCIS makes no distinction between different types of applications for immigration benefits and their very distinct statutory and regulatory requirements. Further, USCIS relies on case law that is not relevant to the immigration benefit being adjudicated in applying the new complex discretion formula to all application types. In some instances, USCIS even relies upon BIA cases that have been reversed.²²

Criminal waivers by statute and relevant case law carry a heavier evidentiary and discretionary burden than all the other applications for immigration benefits that USCIS applies those standards to in the policy manual, yet there is no discussion of this reality in the manual. There is a negative presumption against applicants' eligibility for immigration benefits that pervades the policy manual material on discretion.²³ The overall impact of this approach is to create an erroneously heightened standard for discretion.

1. Arguments Against Negative Discretionary Decisions

To challenge the harsh results that policy manual additions can have, these are some preliminary arguments:

- The policy manual relies on criminal waiver caselaw that is irrelevant to other types of applications for immigration benefits.
- USCIS erroneously applied a heightened standard for discretion, contrary to existing precedent.
- Barring a negative factor presented in the application or in records, officers should presume the applicant who otherwise meets the eligibility requirements, merits a grant of the benefit, following *Matter of Arai*, 13 I&N Dec. 494 (BIA 1970).
- The BIA decisions on INA § 212 (c) criminal waivers are irrelevant to other applications for immigration benefits and the policy manual misapplies these cases. The § 212 (c) waiver 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.
- The regulations for employment authorization in all categories under 8 CFR 274a.12 (c) do not support the dozens of discretionary factors permitted by the policy manual. Particular categories of employment authorization in this section specify that economic necessity or the presence of dependent family members

may be relevant. The language of the policy manual far exceeds the regulations by adding an array of discretionary factors to these employment authorization applications.²⁴

- Even under the policy manual guidance, applicant has sufficient positive factors to overcome a negative determination.
- The policy manual additions on discretion were fundamental changes to eligibility for benefits that require a formal notice and comment rulemaking process under the Administrative Procedures Act, not a mere release of administrative guidance in the policy manual that had no public input. The adjudication of employment authorization applications is ancillary to the primary immigration benefit application and until now has only required a showing that a benefit application has been filed in the proper category to allow employment authorization eligibility. The policy manual creates a complex formula for discretion that requires extensive documentation and will be overly burdensome on applicants and on USCIS adjudicators. The discretionary factors listed in the policy manual are not in the regulations at 8 CFR 274a.12 (c) and are contrary to law.

Given the change in administration since the policy manual additions to discretion were made, there may be less emphasis on these factors and the agency may eventually change them. But knowing that they could potentially be used to make a negative discretionary decision for now, advocates should prepare applicants to respond with a showing of favorable factors when requested.

Practitioners can prepare applicants with a packet of documentation demonstrating favorable discretionary factors such as family in the United States, a police clearance, community involvement, and the many specific factors named in the policy manual. Where there is an interview, practice with applicants so that they are prepared to recite these favorable factors and state why they should be granted to benefit sought. The applicant's statements in favor of discretion, or lack thereof, are going to be noted by the interviewing officer, according to the policy manual. Where there is no interview, as with temporary protected status (TPS) or employment authorization in the applicable categories, and where negative factors might present a potential negative discretionary decision, or there is a request for evidence or a notice of intent to deny, a written statement should accompany the application reciting the favorable factors that would show the person merits a grant, the lesser impact of the of negative ones, and the applicant's statement as to why they deserve favorable discretion.

III. November 2020 Policy Manual Additions on Use of for Discretion in Adjustment Status

A. Overview of Changes

On November 17, 2020, USCIS published more material on discretion in the policy manual, effective on publication. These new sections – 7 USCIS-PM A.1 and 7 USCISPM A.10 - delineated discretionary considerations for applicants for adjustment of status (I-485), outlined burden and standards of proof, and provided a list of specific negative and positive factors.

Confusingly, the lengthy list of discretionary considerations here contains some of the same factors named in the July 2020 policy manual release, rewords others that are similar to the July 2020 guidance, and adds new factors, as well.²⁵ Both lists of discretionary factors apply to adjustment applicants.

The July factors apply not just to adjustment applicants but to all application benefit types that USCIS deems discretionary. In the November release, instead of just listing factors that can impact discretion, USCIS creates a new detailed formula where USCIS adjudicators must weigh a specific (but non-exhaustive) list of positive factors against specific negative factors for adjustment applicants. This formula resembles the complex test for public charge that DHS published in the now withdrawn 2019 public charge rule.²⁶

Since the earlier policy manual material from July 2020 also included guidance for adjustment applications, both sections need to be consulted to see what adjudicators might apply.

Some adjustment applications do not involve discretion because of specific statutory language, such as the Nicaraguan Adjustment and Central American Relief Act of 1997 (NACARA), Refugee adjustment, Haitian Refugee Immigration Fairness Act (HRIFA), and the Liberian Refugee Immigration Fairness Act (LRIF).²⁷ But USCIS's non-exhaustive list of adjustment applications which will require an applicant to demonstrate that they warrant a favorable exercise of discretion include: family, employment, and diversity-based adjustment; special immigrant (EB-4) adjustment; trafficking victims (T) adjustment; crime victim (U) adjustment; asylee adjustment; Cuban Adjustment Act, Lautenberg parolees, and INA § 13 diplomat adjustment.²⁸

The guidance delineates specific factors that adjudicators must analyze in their totality as to positive and negative impacts to determine if discretion is warranted in favor of applicant. "Given the significant privileges, rights, and responsibilities granted to LPRs, an officer must consider and weigh all relevant evidence in the record, taking into account the totality of the circumstances to determine whether or not an approval of an applicant's adjustment of status application is in the best interest of the United States."²⁹ This standard prejudices applicants, and is a far cry from the holding in *Matter of Arai* that absent negative factors, discretionary adjustment applications should normally be granted.³⁰

B. Specific Factors to Consider in Discretionary Adjustment Applications

USCIS provides a table in the policy manual identifying positive and negative factors to consider in adjustment.

Positive factors include:

- Meeting the eligibility requirements for adjustment of status;
- Family ties to the United States and the closeness of the underlying relationships;
- Hardship to the applicant or close relatives if the adjustment application is denied;
- 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;
- Approved humanitarian-based immigrant or nonimmigrant petition, waiver of inadmissibility, or other form of relief and the underlying humanitarian, hardship, or other factors that resulted in the approval;

- Property, investment, or business ties in the United States;
- employment history, including type, length, and stability of the employment;
- 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;
- 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;
- Compliance with tax laws;
- Current or past cooperation with law enforcement authorities;
- Demonstration of reformed or rehabilitated criminal conduct, where applicable;
- Community service beyond any imposed by the courts;
- Absence of significant undesirable or negative factors and other indicators of good moral character in the United States and abroad.

The positive factors above are to be weighed against the presence of any negative factors, such as:

- Absence of close family, community, and residence ties;
- Violations of immigration laws and the conditions of any immigration status held;
- Current or previous instances of fraud or false testimony in dealings with USCIS or any government agency;
- Unexecuted exclusion, deportation, or removal orders;
- History of unemployment or underemployment;
- Unauthorized employment in the United States;
- 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;
- 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;
- Lack of reformation of character or rehabilitation;
- Public safety or national security concerns;

- Failure to meet tax obligations;
- Failure to pay child support;
- Failure to comply with any applicable civil court orders;
- Other indicators adversely reflecting the applicant’s character and undesirability as an LPR of this country.

C. Adjustment and Discretion: *Matter of Arai*, I&N Dec. 494 (BIA 1970)

The policy manual cites various times to this foundational BIA decision on adjustment and discretion to support various propositions, but it does not truly follow nor fully explain the holding in *Arai*.

Arai overturned a previous BIA decision *Matter of Ortiz-Prieto*,³¹ in which the Board had found that adjustment was a form of extraordinary relief that should only be granted in meritorious cases that had outstanding equities. In *Arai*, the BIA found that the language of *Ortiz-Prieto* was “too broad in its impact and probably more demanding than necessary. Accordingly, the language of the instant decision will supersede that contained in *Ortiz-Prieto*.” *Arai* at 495.

The applicant for adjustment in *Arai* had arrived in the United States as a visitor and overstayed his visa. He began working in a Japanese restaurant, gained experience, and later had a labor certification application approved on his behalf. He was in deportation proceedings and applied for adjustment to permanent residence based on the labor certification. He was denied because the special inquiry office (at that time, the equivalent of an immigration judge) found that he had worked in violation of his visa before his trainee status was approved. Based on *Ortiz-Prieto*, he denied the adjustment application because the applicant presented no unusual or outstanding equities. The BIA reversed and approved the adjustment, finding that unusual equities are not required: “The record in the instant case presents no adverse factors affecting respondent’s application. He is a young man, in good health and of good moral character. His employment is such that a labor certification has been issued. The employment could be of potential benefit to this country. The respondent has no dependents.” *Arai* at 495.

Further, on the nature of discretion in adjustment, the BIA stated, “It is difficult and probably inadvisable to set up restrictive guidelines for the exercise of discretion. Problems which may arise in applications for adjustment must of necessity be resolved on an individual basis. 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 495-496.

Instead of following *Arai*, the policy manual repeatedly revives the standard found in the overruled *Matter of Ortiz-Prieto*, and in a series of criminal waiver cases which cite to the need for unusual and outstanding equities for adjustment and that require a determination that adjustment is in the best interest of the United States. In *Arai*, the BIA discourages the listing of specific factors to be considered in discretion, yet that is precisely what USCIS has done with the policy manual.

D. Challenges to the Policy Manual on Discretion in Adjustment

To argue against discretionary denials for adjustment under the policy manual guidance, the following are some arguments to present:

- The BIA decisions on INA § 212 (c) criminal waivers are irrelevant to other applications for immigration benefits and the policy manual misapplies these cases. The § 212 (c) waiver 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 sets out a set of eligibility factors related to having the appropriate petition approved based on family ties, employment, or humanitarian considerations, and importantly 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.
- BIA Precedent in *Matter of Arai* does not require heightened showing for a typical adjustment case.
- Even when there are some negative factors, adjustment does not require a showing of outstanding equities, such as in *Arai*.
- To the extent that the policy manual instructs officers to undergo a deep investigation into all factors and a heightened showing, it is contrary to law.
- The policy manual additions on discretion were fundamental changes to eligibility for benefits that require a formal notice and comment rulemaking process under the Administrative Procedures Act, not a mere release of administrative guidance in the policy manual that had no public input.

Practice Tip:

While it is still unclear how the new discretion guidance will be carried out by adjudicators in practice, advocates should be prepared to provide documentary evidence of as many positive discretionary factors as possible when requested, or where negative factors are present. Advocates should be creative, and consider all facts related to their client, beyond what is listed in the guidance.

In addition, in cases where negative factors might support a potentially negative decision or in response to a request for evidence, a letter challenging the legal authority of the policy manual could also present the legal flaws in the guidance described in the advisory and argue that a separate adjudication of dozens of discretionary factors exceeds the statutory and regulatory provisions governing the particular benefit application.

IV. January 2021 Policy Manual on Discretion for Employment Authorization for Adjustment Applicants and Persons with Deferred Action

In the closing days of the prior administration, USCIS published a third release on discretion in the policy manual.³² Effective upon publication on January 15, 2021, this release specified that applicants for employment authorization (I-765) under the categories listed in 8 CFR 274a.12(c) are also subject to the

discretionary analysis. This had already been stated in the July 2020 changes to the policy manual but is reiterated in this release.

In particular, applicants who are granted deferred action and are applying for employment authorization will be subject to the detailed review of positive and negative factors for discretion, with exemptions for those who have deferred action under a trafficking (T visa) or crime victim (U visa), those with status under the Violence Against Women Act (VAWA), and persons with S nonimmigrant status who assist law enforcement.³³ There is a specific exemption for Deferred Action for Childhood Arrivals individuals who also receive deferred action, thus they are not subject to the extensive discretion analysis when applying for employment authorization.³⁴

A different list of specific negative and positive factors is listed for consideration of employment authorization for those with deferred action. Because the regulation on employment authorization for persons with deferred action specifies a demonstration of economic necessity, the policy manual requires that, but also adds on five other favorable factors to consider: whether the applicant is the primary financial support for a U.S. citizen or lawful permanent resident spouse, parent or child; medical conditions of immediate relatives; absence of criminal history; a need to stay in the United States to assist law enforcement; or if the applicant is the spouse, parent or child of a U.S. Citizen, or is a member of the U.S. armed forces.³⁵

To challenge these new complex positive and negative factors for employment authorization, advocates can argue that none of these factors besides economic necessity or support of family members are found in the underlying regulation at 8 CFR 274a.12(c)(14). Thus it can be argued that they are *ultra vires* and unlawful policy requirements. Similarly, the list of thirteen possible unfavorable discretionary factors for persons with deferred action are listed nowhere in the regulations but have been added to the policy manual and may be challenged as *ultra vires*.

Officers can consider the following in adjudicating employment authorization for persons with deferred action:

- Any criminal history, with any of the following constituting a serious negative factor:¹
 - The alien has been convicted of an aggravated felony;
 - The alien has been convicted of any felony;
 - The alien has been charged with or convicted of any offense involving domestic violence or assault;
 - The alien has been charged with or convicted of any criminal offense involving child abuse, neglect, or sexual assault;
 - The alien has been charged with, arrested, or convicted of any criminal offense involving illegal drugs or controlled substances;
 - The alien has been charged with or convicted of driving under the influence or driving while intoxicated.
- The nature, frequency, and severity of any prior violations of the immigration laws, including illegal entries and unauthorized employment;

- The length of time the alien was or has been in the United States without lawful presence;
- The alien has knowingly aided or abetted any person in violating U.S. immigration law;
- The alien has committed fraud in order to obtain an immigration benefit;
- The alien has lied or made a material misrepresentation to any immigration or consular officer or employee while such officer or employee is performing his or her official duties under the law;
- The alien is a national security or public safety risk as evidenced by arrests and criminal convictions.

Practice Tip: As with the positive factors listed in the policy manual, none of these negative factors have any grounding in the statute or regulations, and therefore, it can be argued that they should not be considered. Those arguments should be presented in a case where negative factors might result in a potential denial, or where a request for evidence or notice of intent to deny has been issued for the application for employment authorization for an individual with deferred action.

The January 2021 changes also impacted adjustment applicants who apply for employment authorization. The policy manual now limits the validity period of employment authorization to one year for these applicants.³⁶ This section of the policy manual reiterates earlier releases in stating that adjustment applicants' employment authorization is subject to the full complex discretionary analysis of favorable and unfavorable factors. However, it clarifies that certain adjustment applicants will not have discretion applied to the adjudication of their employment authorization. Those exempted are T visa holders and their derivatives; VAWA self-petitioners and their derivatives; U visa holders and their derivatives; and S nonimmigrants who assisted law enforcement.³⁷

V. Conclusion

The three updates to the USCIS policy manual on discretion from 2020 and 2021 represent a major shift in focus for adjudications of dozens of applications. While being aware of the guidance, advocates should argue that the legal basis for these new criteria is fundamentally flawed and advocate for their repeal. In the meantime, immigrants and USCIS adjudicators will be laboring under a burdensome and unnecessary test for dozens of applications that will require presentation of additional material beyond that which proves statutory or regulatory eligibility.

VI. Attachment 1 from USCIS Policy Manual | USCIS-PM E.8

Immigration Benefits Involving Discretionary Review

Benefit Type	Discretion Involved (Yes or No)
Petition to classify an alien as a nonimmigrant worker ^[8]	No (with some exceptions)
Petition to classify an alien as a fiancé(e) of a U.S. citizen ^[9]	Yes
Application to extend or change nonimmigrant status ^[10]	Yes
Advance permission to enter as a nonimmigrant ^[11]	Yes
Humanitarian parole ^[12]	Yes
Application to extend or change nonimmigrant status ^[10]	Yes
Advance permission to enter as a nonimmigrant ^[11]	Yes
Humanitarian parole ^[12]	Yes
Temporary protected status ^[13]	Yes
Refugee status ^[14]	Yes (with some exceptions) ^[15]
Asylum ^[16]	Yes
Petition to classify an alien as a family-based immigrant ^[17]	No (with some exceptions)
Petition to classify an alien as an employment-based immigrant ^[18]	Yes
Petition to classify an alien as an immigrant investor ^[19]	Yes
Adjustment of status ^[20]	Yes (with some exceptions) ^[21]
Registration ^[22]	No
Recognition as an American Indian born in Canada ^[23]	No
Waivers of inadmissibility ^[24]	Yes
Consent to reapply for admission after deportation or removal ^[25]	Yes
Employment authorization ^[26]	Yes (with some exceptions)
Removal of conditions on permanent residence ^[27]	No (with some exceptions) ^[28]
Naturalization ^[29]	No
Application for a Certificate of Citizenship ^[30]	No

VII. Attachment 2: Employment Authorization Categories Under 8 CFR 274a.12(c)

c) *Aliens who must apply for employment authorization.* An alien within a class of aliens described in this section must apply for work authorization. If authorized, such an alien may accept employment subject to any restrictions stated in the regulations or cited on the employment authorization document. USCIS, in its discretion, may establish a specific validity period for an employment authorization document, which may include any period when an administrative appeal or judicial review of an application or petition is pending, unless otherwise provided in this chapter.

(1) An alien spouse or unmarried dependent child; son or daughter of a foreign government official (A-1 or A-2) pursuant to 8 CFR 214.2(a)(2) and who presents an endorsement from an authorized representative of the Department of State;

(2) An alien spouse or unmarried dependent son or daughter of an alien employee of the Coordination Council for North American Affairs (E-1) pursuant to §214.2(e) of this chapter;

(3) A nonimmigrant (F-1) student who:

(i)(A) Is seeking pre-completion practical training pursuant to 8 CFR 214.2(f)(10)(ii)(A)(1) and (2);

(B) Is seeking authorization to engage in up to 12 months of post-completion Optional Practical Training (OPT) pursuant to 8 CFR 214.2(f)(10)(ii)(A)(3); or

(C) Is seeking a 24-month OPT extension pursuant to 8 CFR 214.2(f)(10)(ii)(C);

(ii) Has been offered employment under the sponsorship of an international organization within the meaning of the International Organization Immunities Act (59 Stat. 669) and who presents a written certification from the international organization that the proposed employment is within the scope of the organization's sponsorship. The F-1 student must also present a Form I-20 ID or SEVIS Form I-20 with employment page completed by DSO certifying eligibility for employment; or

(iii) Is seeking employment because of severe economic hardship pursuant to 8 CFR 214.2(f)(9)(ii)(C) and has filed the Form I-20 ID and Form I-538 (for non-SEVIS schools), or SEVIS Form I-20 with employment page completed by the DSO certifying eligibility, and any other supporting materials such as affidavits which further detail the unforeseen economic circumstances that require the student to seek employment authorization.

(4) An alien spouse or unmarried dependent child; son or daughter of a foreign government official (G-1, G-3 or G-4) pursuant to 8 CFR 214.2(g) and who presents an endorsement from an authorized representative of the Department of State;

(5) An alien spouse or minor child of an exchange visitor (J-2) pursuant to §214.2(j) of this chapter;

(6) A nonimmigrant (M-1) student seeking employment for practical training pursuant to 8 CFR 214.2(m) following completion of studies. The alien may be employed only in an occupation or vocation directly related to his or her course of study as recommended by the endorsement of the designated school official on the I-20 ID;

(7) A dependent of an alien classified as NATO-1 through NATO-7 pursuant to §214.2(n) of this chapter;

(8) An alien who has filed a complete application for asylum or withholding of deportation or removal pursuant to 8 CFR parts 103 and 208, whose application has not been decided, and who is eligible to apply for employment authorization under 8 CFR 208.7 because the 365-day period set forth in that section has expired. Employment authorization may be granted according to the provisions of 8 CFR 208.7 of this chapter in increments to be determined by USCIS but not to exceed increments of two years.

(9) An alien who has filed an application for adjustment of status to lawful permanent resident pursuant to part 245 of this chapter. For purposes of section 245(c)(8) of the Act, an alien will not be deemed to be an “unauthorized alien” as defined in section 274A(h)(3) of the Act while his or her properly filed Form I-485 application is pending final adjudication, if the alien has otherwise obtained permission from the Service pursuant to 8 CFR 274a.12 to engage in employment, or if the alien had been granted employment authorization prior to the filing of the adjustment application and such authorization does not expire during the pendency of the adjustment application. Upon meeting these conditions, the adjustment applicant need not file an application for employment authorization to continue employment during the period described in the preceding sentence;

(10) An alien who has filed an application for suspension of deportation under section 244 of the Act (as it existed prior to April 1, 1997), cancellation of removal pursuant to section 240A of the Act, or special rule cancellation of removal under section 309(f)(1) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, enacted as Pub. L. 104-208 (110 Stat. 3009-625) (as amended by the Nicaraguan Adjustment and Central American Relief Act (NACARA)), title II of Pub. L. 105-100 (111 Stat. 2160, 2193) and whose properly filed application has been accepted by the Service or EOIR.

(11) Except as provided in paragraphs (b)(37) and (c)(34) of this section, 8 CFR 212.19(h)(4), and except for aliens paroled from custody after having established a credible fear or reasonable fear of persecution or torture under 8 CFR 208.30, an alien paroled into the United States temporarily for urgent humanitarian reasons or significant public benefit pursuant to section 212(d)(5) of the Act.

(12) An alien spouse of a long-term investor in the Commonwealth of the Northern Mariana Islands (E-2 CNMI Investor) other than an E-2 CNMI investor who obtained such status based upon a Foreign Retiree Investment Certificate, pursuant to 8 CFR 214.2(e)(23). An alien spouse of an E-2 CNMI Investor is eligible for employment in the CNMI only;

(13) [Reserved]

(14) An alien who has been granted deferred action, an act of administrative convenience to the government which gives some cases lower priority, if the alien establishes an economic necessity for employment;

(15) [Reserved]

(16) Any alien who has filed an application for creation of record of lawful admission for permanent residence pursuant to part 249 of this chapter.

(17) A nonimmigrant visitor for business (B-1) who:

(i) Is a personal or domestic servant who is accompanying or following to join an employer who seeks admission into, or is already in, the United States as a nonimmigrant defined under sections 101(a)(15) (B), (E), (F), (H), (I), (J), (L) or section 214(e) of the Act. The personal or domestic servant shall have a residence abroad which he or she has no intention of abandoning and shall demonstrate at least one year's experience as a personal or domestic servant. The nonimmigrant's employer shall demonstrate that the employer/employee relationship has existed for at least one year prior to the employer's admission to the United States; or, if the employer/employee relationship existed for less than one year, that the employer has regularly employed (either year-round or seasonally) personal or domestic servants over a period of several years preceding the employer's admission to the United States;

(ii) Is a domestic servant of a United States citizen accompanying or following to join his or her United States citizen employer who has a permanent home or is stationed in a foreign country, and who is visiting temporarily in the United States. The employer/employee relationship shall have existed prior to the commencement of the employer's visit to the United States; or

(iii) Is an employee of a foreign airline engaged in international transportation of passengers freight, whose position with the foreign airline would otherwise entitle the employee to classification under section 101(a)(15)(E)(i) of the Immigration and Nationality Act, and who is precluded from such classification solely because the employee is not a national of the country of the airline's nationality or because there is no treaty of commerce and navigation in effect between the United States and the country of the airline's nationality.

(18) An alien against whom a final order of deportation or removal exists and who is released on an order of supervision under the authority contained in section 241(a)(3) of the Act may be granted employment authorization in the discretion of the district director only if the alien cannot be removed due to the refusal of all countries designated by the alien or under section 241 of the Act to receive the alien, or because the removal of the alien is otherwise impracticable or contrary to the public interest. Additional factors which may be considered by the district director in adjudicating the application for employment authorization include, but are not limited to, the following:

(i) The existence of economic necessity to be employed;

(ii) The existence of a dependent spouse and/or children in the United States who rely on the alien for support; and

(iii) The anticipated length of time before the alien can be removed from the United States.

(19) An alien applying for Temporary Protected Status pursuant to section 244 of the Act shall apply for employment authorization only in accordance with the procedures set forth in part 244 of this chapter.

(20) Any alien who has filed a completed legalization application pursuant to section 210 of the Act (and part 210 of this chapter).

(21) A principal nonimmigrant witness or informant in S classification, and qualified dependent family members.

(22) Any alien who has filed a completed legalization application pursuant to section 245A of the Act (and part 245a of this chapter). Employment authorization shall be granted in increments not exceeding 1 year during the period the application is pending (including any period when an administrative appeal is pending) and shall expire on a specified date.

(23) [Reserved]

(24) An alien who has filed an application for adjustment pursuant to section 1104 of the LIFE Act, Public Law 106-553, and the provisions of 8 CFR part 245a, Subpart B of this chapter.

(25) Any alien in T-2, T-3, T-4, T-5, or T-6 nonimmigrant status, pursuant to 8 CFR 214.11, for the period in that status, as evidenced by an employment authorization document issued by USCIS to the alien.

(26) An H-4 nonimmigrant spouse of an H-1B nonimmigrant described as eligible for employment authorization in 8 CFR 214.2(h)(9)(iv).

(27)-(33) [Reserved]

(34) A spouse of an entrepreneur parolee described as eligible for employment authorization in §212.19(h)(3) of this chapter.

(35) An alien who is the principal beneficiary of a valid immigrant petition under section 203(b)(1), 203(b)(2) or 203(b)(3) of the Act described as eligible for employment authorization in 8 CFR 204.5(p).

(36) A spouse or child of a principal beneficiary of a valid immigrant petition under section 203(b)(1), 203(b)(2) or 203(b)(3) of the Act described as eligible for employment authorization in 8 CFR 204.5(p).

(d) An alien lawfully enlisted in one of the Armed Forces, or whose enlistment the Secretary with jurisdiction over such Armed Force has determined would be vital to the national interest under 10 U.S.C. 504(b)(2), is authorized to be employed by that Armed Force in military service, if such employment is not otherwise authorized under this section and the immigration laws. An alien described in this section is not issued an employment authorization document.

(e) *Basic criteria to establish economic necessity.* Title 45—Public Welfare, Poverty Guidelines, 45 CFR 1060.2 should be used as the basic criteria to establish eligibility for employment authorization when the alien's economic necessity is identified as a factor. The alien shall submit an application for employment authorization listing his or her assets, income, and expenses as evidence of his or her economic need to work. Permission to work granted on the basis of the alien's application for employment authorization may be revoked under §274a.14 of this chapter upon a showing that the information contained in the statement was not true and correct.

VIII. 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 circumstance.

End Notes

¹ On July 15, 2020, USCIS published new material on overall discretion analysis for more than a dozen types of applications for immigration benefits in 1 USCIS-PM E.8 and specific guidance for employment authorization adjudications at 10 USCIS-PM A.5. On November 17, 2020 new material was added on discretionary factors to consider in adjustment of status at 7 USCIS-PM A.1 and 7 USCIS-PM A.10. On January 14, 2021 new sections were added to the policy manual affecting discretion impacting employment authorization for adjustment applicants and persons with deferred action at 10 USCIS-PM A. and 10 USCIS-PM B.

² The discretion changes made in the policy manual were so fundamental to eligibility for immigration benefits that they merited a formal regulatory notice and comment process, not merely a policy manual release. The way the changes were made violated the Administrative Procedures Act (APA) because the formal regulatory notice and comment process is required for substantive changes that exceed technical corrections or emergency measures that may excuse the bypassing of a notice and comment process. As stated, these changes were published without any public input in the policy manual. Although USCIS will take “feedback” on the policy manual releases, none of the public feedback is responded to, and there is no public record of feedback sent by the public. The APA, 5 USC § 551 et seq, governs the federal rulemaking process. It includes requirements for first publishing notices of proposed rulemaking, accepting public comments, and responding to those comments prior to publishing a final rule. Rules cannot be finalized without first publishing a proposed rule unless the notice and comment process is “impracticable, unnecessary or contrary to the public interest,” such as when there is a health emergency or a rule presents no substantive change, as in a technical correction.

³ See *ILRC Opposes USCIS’s 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 (Aug. 13, 2020) and *ILRC Opposes November 2020 USCIS Changes to the Policy Manual on Discretion in Adjustment*, www.ilrc.org (Dec.15, 2020).

⁴ See AFM 10.15, Attachment 3.

⁵ One fundamental problem with the policy manual material on discretion is that USCIS makes no distinction between different types of applications for immigration benefits and their very distinct statutory and regulatory requirements. Further, USCIS relies on case law that is not relevant to the immigration benefit being adjudicated in applying the new complex discretion formula to all application types.

⁶ *Matter of Arai*, 13 I&N Dec. 494,495 (BIA 1970).

⁷ *United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260, 266 (1954).

⁸ See Attachment 2 for the categories listed in 8 CFR 274a.12(c). There are 36 different categories of employment authorization applications in this section of the regulations, ranging from students in F, J or M visas, adjustment applicants who have pending applications for permanent residence, registry applicants, persons who have pending applications for cancellation of removal, and those under a final order of supervision whose removal is impracticable from the United States, among others affected. The categories of employment authorization applications in this section of the regulations include a broad range of categories, which prior to this guidance have never been subject to any complex discretionary analysis such as is now described in the policy manual.

⁹ The policy manual notes that asylum applicants have separate regulatory provisions governing their employment authorization which limit USCIS’s discretion. USCIS published a final rule on August 25, 2020 that removed the exemption from discretion for applications for employment authorization by asylum applicants filed after August 25, 2020, 8 CFR 274a.12(c)(8). Litigation has enjoined the rule for some applicants, as noted on the USCIS web site, “On September 11, 2020, the U.S. District Court for the District of Maryland in *Casa de Maryland et al v. Chad Wolf* provided limited injunctive relief to members of two organizations, CASA de Maryland (CASA) and the Asylum Seeker Advocacy Project (ASAP), in the application of the [Asylum Application, Interview, and Employment Authorization for Applicants Rule](#) to Form I-589s and Form I-765s filed by asylum applicants who are also members of CASA or ASAP. Therefore, while the rule is preliminarily enjoined, we will continue to apply the prior regulatory language and exempt from discretion CASA and ASAP members who file a Form I-765 based on an asylum application.” USCIS, *Alert*, <https://www.uscis.gov/policy-manual/volume-10-part-a-chapter-5> (Mar. 10, 2021).

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

¹¹ 1 USCIS-PM E.8.fn.33 citing to *Matter of Ortiz-Prieto*, 11 I&N Dec. 317 (BIA 1965). *Ortiz-Prieto* was specifically superseded by the BIA in a case five years later that remains the bedrock of law on discretion in adjustment, *Matter of Arai*, 13 I&N Dec. 494 (BIA 1970). In *Arai*, the BIA found that absent adverse factors, no unusual or outstanding equities are needed to satisfy discretion for adjustment to permanent residence. The BIA in *Arai* states that adjustment will ordinarily be granted in discretion given satisfaction of the statutory eligibility as long as there are general favorable factors such as family ties, hardship, length of residence, etc. in the United States. The BIA discourages setting up restrictive guidelines for discretion in *Arai*, in contrast to what the USCIS has done in the current policy manual. The BIA held, “It is difficult and probably inadvisable to set up restrictive guidelines for the exercise of discretion. Problems which may arise in applications for adjustment must of necessity be resolved on an individual basis.” *Matter of Arai*, 13 I&N Dec. 494, 496 (BIA 1970).

¹² 1 USCIS-PM E.8.A.

¹³ 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 seven consecutive years and who had not served an aggregate of more than five years imprisonment for an aggravated felony. The waiver was eliminated effective April 1, 1997, except for certain grandfathered applicants. See USCIS, <https://www.uscis.gov/i-191>.

¹⁴ Under INA §212(h) a few specific categories of crimes that would otherwise cause inadmissibility may be waived if they are more than fifteen years before the date of application for an immigrant visa or adjustment or where the applicant has a qualifying U.S. citizen or permanent resident relative who would suffer extreme hardship.

¹⁵ 1 USCIS-PM E.8.B.fn.31. *Overview of Discretion*, citing to the following criminal waiver cases: *Matter of Marin*, 16 I&N Dec. 581 (BIA 1978), *Matter of Buscemi*, 19 I&N Dec. 628 (BIA 1988), *Matter of Edwards*, 20 I&N Dec. 191 (BIA 1990), and *Matter of Mendez Morales*, 21 I&N Dec. 296 (BIA 1996).

¹⁶ 1 USCIS-PM E.8.B.4.fn.41. USCIS relies on a series of motion to reopen cases in pronouncing that discretionary denials can be legally permissible even where threshold eligibility has not been determined. *INS v. Abudu* (PDF), 485 U.S. 94, 105 (1988), *INS v. Bagamasbad* (PDF), 429 U.S. 24, 26 (1976), *INS v. Rios-Pineda* (PDF), 471 U.S. 444 (1985). The requirements for motions to reopen are legally distinct from immigration benefits applications and necessarily involve separate discretionary considerations.

¹⁷ 1 USCIS-PM E.8.

¹⁸ 1 USCIS-PM E.8.C.1.

¹⁹ 1 USCIS-PM E.8.C.2.

²⁰ 1 USCIS-PM E.8.C.2.

²¹ 1 USCIS-PM E.8.fns.46-67 cite dozens of times to a series of criminal waiver cases under former INA §212 (c) waivers for certain permanent residents. *Matter of Marin* 16 I&N Dec. 581 (BIA 1978), *Matter of Buscemi*, 19 I&N Dec. 628 (BIA 1988), *Matter of Edwards*, 20 I&N Dec. 191 (BIA 1990).

²² 1 USCIS-PM E.8.fn.33 citing to *Matter of Ortiz-Prieto*, 11 I&N Dec. 317 (BIA 1965). *Ortiz-Prieto* was specifically superseded by the BIA in a case five years later that remains the bedrock of law on discretion in adjustment, *Matter of Arai*, 13 I&N Dec. 494 (BIA 1970).

²³ The policy manual cites over two dozen times to cases in which the BIA had decided discretion as relevant to a criminal waiver for permanent residents under former INA §212(c) and applies that case law to all types of applications for immigration benefits despite entirely different legal requirements for those benefits. See citations to *Matter of Marin*, 16 I&N Dec. 581, (BIA 1978), *Matter of Buscemi*, 19 I&N Dec. 628 (BIA 1988) and *Matter of Edwards*, 20 I&N Dec. 191 (BIA 1990), 1 USCIS-PM E.8 at fns. 31, 46, 47, 49, 50, 51, 52, 53, 54, 55, 57, 58, 61, 63, 65, 66, and 67.

²⁴ See Attachment 2, 8 CFR 274a.12 (c).

²⁵ Compare the list of discretionary factors in 1 USCIS-PM E.8 (July 15, 2020) with the positive and negative list of factors found in 7 USCIS-PM A.1 and 7 USCIS-PM A.10 (Nov. 14, 2020). Some factors are similar but reworded. For example, the November policy manual additions require “compliance with tax laws” as a positive discretionary factor, whereas in July 2020, the discretionary factor was “history of taxes paid.” New factors added in November 2020 include: “other indicators adversely reflecting on applicant’s character and undesirability as an LPR,” “failure to pay child support,” “lack of reformation of character or rehabilitation,” whereas positive factors include “good moral character (in the United States and abroad.)”

²⁶ DHS, *Inadmissibility on Public Charge Grounds*, 84 Fed. Reg. 41,292 (Aug. 14, 2019). The public charge rule also listed a myriad of positive and negative factors that applicants had to present with extensive documentation, burdening both applicants and USCIS adjudicators. The Biden administration announced that they would no longer defend the litigation of this rule, thus DHS is reverting to the prior guidance on public charge. <https://www.dhs.gov/news/2021/03/09/dhs-statement-litigation-related-public-charge-ground-inadmissibility> (Mar. 9, 2021).

²⁷ 7 USCIS-PM A.10.A.

²⁸ 7 USCIS-PM A.10.B.

²⁹ 7 USCIS-PM A.10.B.fn.20 citing to three BIA cases that concerned criminal waivers under INA 212 (c);, [Matter of Buscemi \(PDF\)](#), 19 I&N Dec. 628, 633 (BIA 1988), [Matter of Edwards \(PDF\)](#), 20 I&N Dec. 191, 195 (BIA 1990), [Matter of Mendez-Moralez \(PDF\)](#), 21 I&N Dec. 296, 300 (BIA 1996).

³⁰ *Matter of Arai*, 13 I&N Dec. 494, 496 (BIA 1970).

³¹ *Matter of Ortiz-Prieto*, 11 I&N Dec. 317 (BIA, 1965).

³² USCIS, *Policy Alert* (Jan. 14, 2021) regarding discretion additions to 10 USCIS-PM A. and 10 USCIS-PM B.

³³ 10 USCIS-PM B.3.

³⁴ 10 USCIS-PM B.3.A.fn.1 “This chapter does not apply to applications for employment authorization that are properly filed under the Consideration of Deferred Action for Childhood Arrivals eligibility category (that is (c)(33)).”

³⁵ 10 USCIS-PM B.3.

³⁶ 10 USCIS-PM B.4.D.

³⁷ 10 USCIS-PM B.3.B.



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About the Immigrant Legal Resource Center

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