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December 18, 2020

Delivered via email to:
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RE: USCIS PM – Prerequisite of Lawful Admission for Permanent Residence under All Applicable Provisions for Purposes of Naturalization, Changes to 12 USCIS-PM B.4, 10 USCIS-PM D.2, 12 USCIS-PM F.2, effective upon publication on November 18, 2020.

Dear USCIS:

I am writing on behalf of the Immigrant Legal Resource Center (ILRC) to oppose the USCIS Policy Manual changes, entitled “Prerequisite of Lawful Admission for Permanent Residence under All Applicable Provisions for Purposes of Naturalization,” issued November 18, 2020 and effective immediately. We urge USCIS to withdraw 12 USCIS-PM D.2(d) in its entirety.

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 naturalization.

The immigrants and their representatives whom we serve are profoundly impacted by the USCIS Policy Manual changes on naturalization adjudications. The changes harm this population by encouraging extreme vetting, denials, and the initiation of deportation proceedings for noncitizens who come forward to naturalize. The changes will also impact immigrants by vastly increasing USCIS's workload and processing delays at a time when the agency is already in crisis.

I. The Policy Manual Changes Require Officers to Engage in Unnecessary, Time-Intensive, and Burdensome Re-Adjudication of Prior Immigration Applications

The Policy Manual changes dramatically expand the USCIS guidance on how to assess whether someone has a "lawful admission" for purposes of naturalization eligibility under INA § 318. The prior guidance on this eligibility requirement was three pages. The "updated" version is a completely re-written twenty-page directive to officers to engage in extreme vetting and unnecessary scrutiny of all naturalization applicants. Although the applicants before them are applying for citizenship, officers are directed to review in excruciating detail the applicant's eligibility for their underlying green card, amounting to a full re-adjudication of the applicant's green card. As an indication of how thorough USCIS expects this re-adjudication to be, the *naturalization* policy manual changes list out eligibility criteria for green cards obtained through fiancée visas, Cuban Adjustment Act, refugee adjustment, and more. 12 USCIS-PM D.2(d)(1)-(8). The Policy Manual also provides a table of inadmissibility grounds that officers need to ensure did not render applicants inadmissible at the time of their green card. 12 USCIS-PM D.2(d)(2). If that were not enough of an order to re-adjudicate inadmissibility after the fact, the Policy Manual further includes separate sections to call officers' attention to certain inadmissibility grounds in particular – fraud and public charge.[1] 12 USCIS-PM D.2(d)(3)-(4). The inadmissibility grounds do not apply per se at naturalization; this directive is wholly to re-adjudicate prior immigration cases.

The re-adjudication goes beyond inadmissibility grounds—a lengthy and substantive analysis in and of itself—and touches on technical documentation requirements for certain forms of relief, timing, and family history. For example, officers are instructed that a "consular certificate alone is not legally sufficient to demonstrate Cuban citizenship for persons born outside of Cuba to at least one Cuban parent" for applicants who adjusted under the Cuban Adjustment Act. See 12 USCIS-PM D.2(d)(6). There is also a whole table depicting when early filing for adjustment was permitted for refugees, see 12 USCIS-PM D.2(d)(7), and a separate subsection on when and how a derivative's green card process might have been impacted by a family member's immigration case. See 12 USCIS-PM D.2(d)(8).

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[1] The public charge section was added February 5, 2020 before the new public charge rule was set to go into effect. See USCIS, *Policy Alert: Public Charge Ground of Inadmissibility* (Feb. 5, 2020), https://www.uscis.gov/sites/default/files/document/policy-manual-updates/20200205-PublicCharge.pdf. The public charge rule has since been enjoined in eighteen states and Washington D.C., and thus this part of the Policy Manual is out of date. See *City and County of San Francisco, et al v. Dep't of Homeland Sec.*, No. 19-17213 (9th Cir. Dec. 2, 2020).

Moreover, by requiring such detailed scrutiny, the Policy Manual is asking USCIS to second guess not only its own agency decisions of whether an applicant lawfully adjusted status, but also the decisions of Customs and Border Protection (CBP) in determining whether an applicant was admitted lawfully, and of the immigration courts where the applicant obtained a green card before an immigration judge. USCIS is thereby second guessing decisions made at a different time, with different evidence, and sometimes by a different adjudicatory body.

By adding such exhaustive vetting, the USCIS Policy Manual unnecessarily requires officers to re-adjudicate the green card process, even when nothing in the applicant's immigration history appears erroneous or raises suspicion. This required re-adjudication, even for straightforward cases, places an onerous and unnecessary burden on USCIS. The Policy Manual changes compound agency inefficiency, waste, and mismanagement at a time when the agency has crisis-level backlogs and sought a bailout from Congress.[2]

II. The Policy Manual Changes Will Disproportionately Affect Low-Income, Vulnerable, and Unrepresented Naturalization Applicants

The USCIS Policy Manual changes require officers to engage in extreme vetting and unnecessary scrutiny of each applicant's absences, family history, and immigration history. This re-adjudication will disproportionately affect low-income, vulnerable, and unrepresented applicants, who may not have the resources to come to interviews prepared with detailed justifications for legal issues that were resolved in the past, sometimes decades ago. Similarly, low-income and unrepresented naturalization applicants may not have the resources to file numerous record requests to ensure they have back-up documentation for any issue that might come up in the re-adjudication of their green card. Although these applicants may have the requisite prior lawful admission as a permanent resident and be eligible for naturalization, they may face denial of their naturalization application, and referral to removal proceedings, under the new guidance simply because they do not remember the details of their legal case. These erroneous denials will lead to time-consuming and unnecessary removal proceedings, and re-filings, in the best of cases, and erroneous deportations in less fortunate ones.

Survivors of domestic violence, trafficking, and other serious crimes may have a particularly difficult time accessing prior documents and re-proving eligibility. These vulnerable populations may also have unknowingly omitted information at the time of applying for a green card because they did not have access to certain documents due to abuse or other danger. Under the new USCIS Policy Manual changes, officers seem to lack discretion to deny these applicants without placing them in removal proceedings. See 12 USCIS-PM D.2(f)(4).

By adding such exhaustive vetting, the USCIS Policy Manual changes encourage unwarranted enforcement against citizenship applicants, seizing the citizenship process as an opportunity to "get" applicants by checking, sometimes decades afterwards and under new interpretations, whether their old immigration cases still pass muster.

III. No Meaningful Opportunity for Public Review or Comment Was Provided

The Policy Manual changes dramatically expand USCIS guidance on how to determine whether a naturalization applicant has satisfied the "lawful admission" eligibility requirement under INA § 318. These changes replace a brief three-page summary, mostly instructing officers on the effective date of lawful permanent residence and the

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[2] See, e.g., H.R. 8089: The Emergency Stopgap USCIS Stabilization Act (introduced Aug. 22, 2020), which was incorporated into H.R. 8337, The Continuing Appropriations Act, 2021 and Other Extensions Act (signed Sept. 30, 2020).

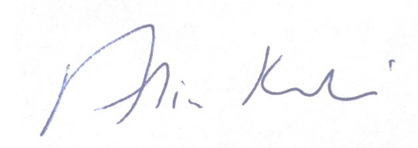
exceptions to this requirement, such as for nationals and certain members of the U.S. Armed Forces. 12 USCIS-PM D.2 (Oct. 2020 version), attached as Appendix A. These "updates" are not merely legal updates; rather, the new additions re-frame, re-organize, and re-write the guidance on what an officer must do to assess whether an applicant has a "lawful admission for permanent residence." The additions are substantial, and require officers to engage in extreme vetting and unnecessary scrutiny of all naturalization applicants, yet the affected public was not given a meaningful opportunity to review or comment before the new guidance took effect. Instead, this new guidance appeared as changes to administrative guidance in the policy manual, effective immediately.

IV. Conclusion

We recommend that the changes to 12 USCIS-PM D.2(d) of the policy manual be stricken. The changes increase agency inefficiency at a time when the agency has crisis level backlogs and many offices remain closed to the public. The policy manual changes place an extremely heavy and unnecessary burden on both applicants and adjudicators.

Instead of looking for ways to streamline adjudications, the policy manual imposes a secondary adjudication process on naturalization applicants that require adjudicators to multiply the amount of time that they spend determining eligibility, even in straightforward cases. The added vetting will cause interviews to take significantly longer, leading to a further increase in backlogs at a time when naturalization processing times have already increased significantly,[3] and are consistently taking more than two years in some jurisdictions.[4] This is a move that will grind naturalization adjudications to an even slower pace. The burden of the additional vetting will fall disproportionately on low-income, unrepresented, and other vulnerable populations, leading to unjust results. Additionally, the agency failed to provide any meaningful opportunity for public comment to these changes.

Sincerely,



Alison Kamhi
Supervising Attorney for
Immigrant Legal Resource Center

[3] USCIS's own data shows that the average wait time for immigrants seeking to naturalize grew from an average of 5.6 months in 2016 to 10.3 months in 2018, 9.9 months in 2019 and an estimated 8.8 months in 2020. See USCIS, *Historical National Average Processing Time (in Months) for all USCIS Offices for Select Forms by Fiscal Year*, https://egov.uscis.gov/processing-times/historic-pt.

[4] Amy Taxin, Associated Press, *Wait Times for Citizenship Applications Stretch to Two Years* (Oct. 28, 2018), https://apnews.com/article/4b9ee4120c2c470eb3fdd6bc84b08b7e.

Chapter 2 - Lawful Permanent Resident Admission for Naturalization

Alert

On Sept. 11, 2020, the U.S. Court of Appeals for the Second Circuit issued a decision that allows DHS to resume implementing the Public Charge Ground of Inadmissibility final rule nationwide, including in New York, Connecticut and Vermont. The decision stays the July 29, 2020, injunction, issued during the coronavirus (COVID-19) pandemic, that prevented DHS from enforcing the public charge final rule during a national health emergency.

Therefore, we will apply the public charge final rule and related guidance in the USCIS Policy Manual, Volumes 2, 8 and 12, to all applications and petitions postmarked (or submitted electronically) on or after Feb. 24, 2020. If you send your application or petition by commercial courier (for example, UPS, FedEx, or DHL), we will use the date on the courier receipt as the postmark date.

For information about the relevant court decisions, please see the public charge injunction webpage.

A. Lawful Permanent Resident (LPR) at Time of Filing and Naturalization

1. Lawful Admission for Permanent Residence

In general, an applicant for naturalization must be at least 18 years old and must establish that he or she has been lawfully admitted to the United States for permanent residence at the time of filing the naturalization application.[1] An applicant is not lawfully admitted for permanent residence in accordance with all applicable provisions of the Immigration and Nationality Act (INA) if his or her lawful permanent resident (LPR) status was obtained by mistake or fraud, or if the admission was otherwise not in compliance with the law.[2]

In determining an applicant's eligibility for naturalization, USCIS must determine whether the LPR status was lawfully obtained, not just whether the applicant is in possession of a Permanent Resident Card (PRC). If the status was not lawfully obtained for any reason, the applicant is not lawfully admitted for permanent residence in accordance with all applicable provisions of the INA, and is ineligible for naturalization even though the applicant possesses a PRC.

An applicant must also reside continuously in the United States for at least five years as an LPR at the time of filing,[3] though the applicant may file his or her application up to 90 days before reaching the five-year continuous residence period.[4]

Public Charge Inadmissibility

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of public charge inadmissibility when adjudicating a naturalization application.

However, when determining the applicant's eligibility for naturalization, USCIS assesses whether the applicant was lawfully admitted as an LPR,[6] which includes an assessment of whether the naturalization applicant was inadmissible at the time the application that conveyed LPR status was granted,[7] at the time the applicant was granted adjustment of status, or at the time the applicant was admitted as an LPR.[8]

When reviewing a naturalization application in which the applicant's adjustment of status was postmarked on or after February 24, 2020, or in which the applicant was admitted into the United States with an immigrant visa on or after February 24, 2020, the officer determines whether the alien was lawfully admitted as an LPR, including that he or she was not inadmissible as a public charge.[9]

The determination of whether the applicant was lawfully admitted as a LPR must be made with the evidence available at the time the application that conveyed LPR status was granted, at the time the applicant was granted adjustment of status, or at the time the applicant was admitted as an LPR. If a naturalization applicant received public benefits after obtaining LPR status, or if the applicant is receiving public benefits at the time he or she applies for naturalization or before the approval of the naturalization,[10] officers should not assume that the applicant should have been found inadmissible on the public charge ground at the time the application that conveyed LPR status was granted, at the time the applicant was granted adjustment of status, or at the time the applicant was admitted as an LPR. Public benefits are generally only considered if received on or after February 24, 2020.[11]

For a naturalization application in which the applicant's adjustment of status application was postmarked before February 24, 2020, or in which the applicant was admitted into the United States with an immigrant visa before February 24, 2020, the officer reviews the 1999 Interim Field Guidance (PDF) when determining whether the alien was lawfully admitted as an LPR.[12]

2. Effective Date of Lawful Permanent Residence

A person is generally considered to be an LPR at the time USCIS approves the applicant's adjustment application or at the time the applicant enters and is admitted into the United States with an immigrant visa.[13] Most applicants applying for adjustment of status become LPRs on the date USCIS approves the application.[14]

For certain classifications, however, the effective date of becoming an LPR may be a date that is earlier than the actual approval of the status (commonly referred to as a "rollback" date). For example, a person admitted under the Cuban Adjustment Act is generally an LPR as of the date of the person's last arrival and admission into the United States or 30 months before the filing of the adjustment application, whichever is later.[15] A refugee is generally considered an LPR as of the date of entry into the United States.[16] A parolee granted adjustment of status pursuant to the Lautenberg Amendment is considered an LPR as of the date of parole into the United States.[17] In addition, USCIS generally considers an asylee's date of admission as an LPR to be one year prior to the date of approval of the adjustment application.[18]

B. Conditional Residence in the General Requirements (INA 316)

A conditional permanent resident (CPR) filing for naturalization under the general provision on the basis of his or her permanent resident status for five years[19] must have met all of the applicable requirements of the conditional residence provisions.[20] CPRs are not eligible for naturalization unless the conditions on their resident status have been removed because such CPRs have not been lawfully admitted for permanent residence in accordance with all applicable provisions of the INA.[21] Unless USCIS approves the applicant's Petition to Remove Conditions on Residence (Form I-751), the applicant remains ineligible for naturalization.[22]

C. Exceptions

1. Nationals of the United States

The law provides an exception to the LPR requirement for naturalization for non-citizen nationals of the United States. Currently, persons who are born in American Samoa or Swains Island, which are outlying possessions of the United States, are considered nationals of the United States.[23]

A non-citizen national of the United States may be naturalized without establishing lawful admission for permanent residence if he or she becomes a resident of any state[24] and complies with all other applicable requirements of the naturalization laws. These nationals are not "aliens" as defined in the INA and do not possess a PRC.[25]

2. Certain Members of the U.S. Armed Forces

Certain members of the U.S. armed forces with service under specified conditions are also exempt from the LPR requirement.[26]

D. Documentation and Evidence

USCIS issues a PRC to each person who has been lawfully admitted for permanent residence as evidence of his or her status. LPRs over 18 years of age are required to have their PRC in their possession as evidence of their status.[27] The PRC contains the date and the classification under which the person was accorded LPR status.

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Footnotes

1. [^] See INA 101(a)(20) and INA 334(b). See 8 CFR 316.2(a)(2).

2. [^] See INA 318. See *Matter of Koloamatangi (PDF)*, 23 I&N Dec. 548, 550 (BIA 2003). See *Estrada-Ramos v. Holder*, 611 F.3d 318 (7th Cir. 2010). See *Mejia-Orellana v. Gonzales*, 502 F.3d 13 (1st Cir. 2007). See *De La Rosa v. DHS*, 489 F.3d 551 (2nd Cir. 2007). See *Savoury v. U.S. Attorney General*, 449 F.3d 1307(11th Cir. 2006). See *Arellano-Garcia v. Gonzales*, 429 F.3d 1183 (8th Cir. 2005). See *Monet v. INS*, 791 F.2d 752 (9th Cir. 1986). See *Matter of Longstaff*, 716 F.2d 1439, 1441 (5th Cir. 1983).

3. [^] See Chapter 3, Continuous Residence [12 USCIS-PM D.3].

4. [^] See Chapter 6, Jurisdiction, Place of Residence, and Early Filing [12 USCIS-PM D.6].

5. [^] An applicant may become removable on account of the public charge ground of deportability while in LPR status, which may be assessed at the time of naturalization. However, assessing whether an alien is deportable on the public charge ground entails a different analysis than assessing whether an alien is inadmissible on public charge grounds. An alien is deportable from the United States under INA 237(a)(5) when the following conditions are met: (1) within 5 years after the date of entry, has become a public charge (2) from causes not affirmatively shown to have arisen since entry. The deportability ground, therefore, looks at past behavior, occurring after entry or adjustment. In contrast, the public ground charge of inadmissibility under INA 212(a)(4) is prospective and requires an analysis to determine whether there is a likelihood that an alien will become a public charge at any time. See Updated Guidance for the Referral of Cases and Issuance of Notices to Appear (NTAs) in Cases Involving Inadmissible and Deportable Aliens, PM-602-0050.1, issued June 28, 2018. (PDF) As necessary, consult with the Office of Chief Counsel for relevant public charge issues in any adjudication or for purposes of issuing a Notice to Appear.

6, [^] See INA 318.

7. [^] See 8 CFR 212.23. The public charge ground of inadmissibility generally does not apply to applications that convey LPR status other than adjustment of status and immigrant visas, such as cancellation of removal for certain nonpermanent residents pursuant to INA 240A(b).

8. [^] See *Inadmissibility on Public Charge Grounds*, 84 FR 41292 (PDF) (Aug. 14, 2019) (final rule), as amended by 84 FR 52357 (PDF) (Oct. 2, 2019) (final rule; correction).

9. [^] For applications and petitions that are sent by commercial courier (for example, UPS, FedEx, DHL), the postmark date is the date reflected on the courier receipt. See Volume 8, Admissibility, Part G, Public Charge Ground of Inadmissibility [8 USCIS-PM G].

10. [^] As defined in 8 CFR 212.21(b).

11. [^] See Volume 8, Admissibility Part G, Public Charge Ground of Inadmissibility, Chapter 10, Public Benefits [8 USCIS-PM G.10].

12. [^] See 64 FR 28689 (PDF) (May 26, 1999). For applications and petitions that are sent by commercial courier (for example, UPS, FedEx, DHL), the postmark date is the date reflected on the courier receipt.

13. [^] See INA 245(b).

14. [^] In general, a lawful permanent resident card should have the correct date of LPR status. For additional information on adjustment of status dates, see Volume 7, Adjustment of Status [7 USCIS-PM].

15. [^] See Section 1 of the Cuban Adjustment Act, Pub. L. 89-732 (PDF), 80 Stat. 1161, 1161 (November 2, 1966). See *Matter of Carrillo (PDF)*, 25 I&N Dec. 99 (BIA 2009).

16. [^] See INA 209(a)(2).

17. [^] See 8 CFR 1245.7(e).

18. [^] See INA 209(b). See Volume 7, Adjustment of Status [7 USCIS-PM].

19. [^] See INA 316(a).

20. [^] See INA 216.

21. [^] See INA 216 and INA 318.

22. [^] See Part G, Spouses of U.S. Citizens [12 USCIS-PM G]; Part H, Children of U.S. Citizens [12 USCIS-PM H]; and Part I, Military Members and their Families [12 USCIS-PM I], for special circumstances under which the applicant may not be required to have an approved petition to remove conditions prior to naturalization.

23. [^] See INA 101(a)(29) and INA 308.

24. [^] See INA 325. See 8 CFR 325.2. Non-citizen nationals may satisfy the residence and physical presence requirements through their residence and presence within any of the outlying possessions of the United States.

25. [^] See INA 101(a)(20).

26. [^] See Part I, Military Members and their Families, Chapter 3, Military Service during Hostilities (INA 329) [12 USCIS-PM I.3].

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