



**ADVISORY BOARD**

Hon. John Burton  
Hon. Nancy Pelosi  
Hon. Cruz Reynoso

**BOARD OF DIRECTORS**

Cynthia Alvarez  
Richard Boswell  
W. Hardy Callcott  
Eva Grove  
Bill Ong Hing  
Luca D. Mangini  
Anita Martinez  
Michelle Mercer  
Toni Rembe  
Rudy Ruano  
Guadalupe Siordia-Ortiz  
Lisa Spiegel  
Reginald D. Steer  
Alan Tafapolsky  
Mawuena Tendar  
Hon. James L. Warren (Ret.)  
Allen S. Weiner  
Roger Wu

**GENERAL COUNSEL**

Bill Ong Hing

**OF COUNSEL**

Don Ungar

**EXECUTIVE DIRECTOR**

Eric Cohen

**SAN FRANCISCO**

1458 Howard Street  
San Francisco, CA 94103

**WASHINGTON, D.C.**

1015 15th Street, NW  
Suite 600  
Washington, D.C. 20005

**SAN ANTONIO**

500 Sixth Street  
Suite 204  
San Antonio, TX 78215

**AUSTIN**

6633 East Hwy 290  
Suite 102  
Austin, TX 78723

ilrc@ilrc.org  
www.ilrc.org



August 13, 2020

Delivered via email to:

United States Citizenship and Immigration Services (USCIS)

[USCISPolicyManual@uscis.dhs.gov](mailto:USCISPolicyManual@uscis.dhs.gov).

cc: Joseph Edlow, USCIS Deputy Director for Policy

[Uscis.deputy.director@uscis.dhs.gov](mailto:Uscis.deputy.director@uscis.dhs.gov)

cc: Joseph V. Cuffari, DHS Inspector General

[dhs-oig.officepublicaffairs@oig.dhs.gov](mailto:dhs-oig.officepublicaffairs@oig.dhs.gov)

cc: Michael Dougherty

DHS Citizenship and Immigration Services Ombudsman

[Michael.dougherty@hq.dhs.gov](mailto:Michael.dougherty@hq.dhs.gov)

cc: [Betsy.Lawrence@mail.house.gov](mailto:Betsy.Lawrence@mail.house.gov)

cc: [David.Shahoulian@mail.house.gov](mailto:David.Shahoulian@mail.house.gov)

cc: [Ami.Shah@mail.house.gov](mailto:Ami.Shah@mail.house.gov)

RE: USCIS PM – Applying Discretion in USCIS Adjudications, Changes to 1 USCIS-PM E.8 and 10 USCIS-PM A.5, effective upon publication on July 15, 2020.

Dear USCIS,

I am writing on behalf of the Immigrant Legal Resource Center (ILRC) to oppose the policy manual changes, **Applying Discretion in USCIS Adjudications**, cited above,<sup>1</sup> which superseded the Adjudicator's Field Manual 10.15.<sup>2</sup>

ILRC is a national non-profit organization that provides legal trainings, educational materials, and legal support to thousands of legal practitioners and non-profit legal services providers. The ILRC's mission is to work with and educate immigrants, community organizations, and the legal sector to continue to build a democratic society that values diversity and the rights of all people. Since 1979, the ILRC has provided technical assistance on hundreds of thousands of immigration law issues, trained thousands of advocates and pro bono attorneys on immigration law, distributed thousands of practitioner guides, provided expertise to immigrant-led advocacy efforts across the country, and supported hundreds of immigration legal non-profit organizations in building their capacity.

The ILRC provides technical support for attorneys and non-profit programs that represent immigrants during the process of applying for a wide variety of immigration benefits, as well as producing webinars, trainings, manuals, and practice advisories. Through our extensive networks with service providers and immigration practitioners we have developed a profound understanding of the barriers low-income individuals face when seeking to obtain an immigration benefit.

The immigrants and their representatives whom we serve are profoundly impacted by the policy manual changes on discretion. The changes harm this population by encouraging the denial of status or relief to applicants who would otherwise be eligible for thirty-six categories of affected applications, ranging from adjustment of status to permanent residence, refugee status, deferred action, humanitarian parole, temporary protected status, waivers, consent to reapply, and employment authorization.<sup>3</sup> 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.

### **The Policy Manual Changes Have No Legal Basis and are a Radical Departure from Prior USCIS Guidance on Discretion in Adjudications, Yet No Meaningful Opportunity for Public Review or Comment was Provided**

The changes to 1 USCIS-PM E.8 and 10 USCIS-PM A.5 represent a radical departure from prior USCIS guidance and policy found in the Adjudicator's Field Manual (AFM) 10.15.<sup>4</sup> The AFM, unlike the policy manual, does not have more than two dozen specific discretionary factors to apply to dozens of applications.<sup>5</sup>

The policy manual mischaracterizes existing regulations and case law on discretion in adjudications. USCIS creates many new interpretations of discretion and the factors that adjudicators should apply, and it makes no distinction between different application types despite differing underlying case law and regulations. The changes fundamentally alter applicants' ability to qualify for numerous benefits, yet the affected public was not given a meaningful opportunity to review or comment before they took effect. Instead, these major changes appeared in an unannounced change, effective immediately, to administrative guidance in the policy manual.

### **What the Policy Manual Changed**

#### **Prior Guidance**

The AFM guidance on discretion was two paragraphs long, applied mainly to adjustment of status, changes of status and waivers, and did not state specific factors that adjudicators must review to determine discretionary eligibility. Instead, the AFM encouraged officers to consult precedent case law, regulatory guidelines, and their supervisors when weighing discretionary factors identified in that case law.<sup>6</sup> The AFM urged adjudicators to exercise caution in applying discretion to adjudications and emphasized the importance of consistency and uniformity of decisions.<sup>7</sup>

#### **The Policy Manual**

The lengthy discretion guidance in the policy manual expands discretionary determinations to more than two dozen specific factors that amount to a separate adjudication for a long list of benefits applications. Adjudicators will perform this complex analysis in addition to reviewing legal eligibility grounds.<sup>8</sup> Unlike the AFM, the policy manual does not confine itself to adjustment, change of status and waivers, but instead imposes the new, complex discretion formula to no fewer than a dozen types of applications.<sup>9</sup> The policy manual also imposes the discretionary factors on eligibility for employment authorization for many more types of applications.<sup>10</sup>

The long list of discretionary factors that adjudicators must consider are attached.<sup>11</sup> According to the policy manual, all these factors are relevant to consideration of all types of applications, which they are not. For example, the policy manual fails to establish the relevance or legal basis for considering the "likelihood that LPR status will ensue soon," (no authority cited) as a relevant factor for parole, temporary protected status, or employment authorization. Another factor listed is "whether the alien has an unexecuted administratively final removal," with no cite to caselaw or any authority except the policy manual itself. Since the regulations at 8 CFR 274 a.12(c)(18) specifically allow employment authorization for persons with final orders who are released under supervision by permission of the government, the policy manual inappropriately contradicts regulation by making it a discretionary factor. These are among the many legal puzzles in the policy manual changes.

The discretionary factors and formulas created here are a hodge-podge, some taken out of context from case law on specific forms of relief (for example motions to reopen and waivers of criminal grounds under former INA 212(c), eliminated by IIRIRA effective April 1, 1997) and then applied across the board to a dozen types of applications with completely different underlying law. Other factors listed are cited to no authority whatsoever, except to the policy manual itself.

Some factors listed are so vague as to invite improper denials including: “moral depravity or criminal tendencies,” (citing to *Matter of Edwards (20 I&N 191)* (BIA 1990), a BIA case on former INA 212(c) waiver of criminal grounds, eliminated by IIRIRA, and irrelevant to other types applications that it is applied to here); “findings of juvenile delinquency,” (no case law cited); “community service beyond any imposed by the courts,” (no cite); and “evidence regarding respect for law and order, good character, and intent to hold family responsibilities (for example, affidavits from family, friends and responsible community members),” (citing to three cases that concerned the former INA 212(c) waiver of criminal grounds). These vague, unsupported factors will invite improper denials.

As happens throughout the policy manual changes, where authority is cited, the case law specific to a particular kind of relief (such as 212(c) waivers) is then applied to justify the application of those same discretionary factors to a dozen types of applications that have completely different statutory and regulatory requirements.<sup>12</sup> The lengthy discretionary analysis is also applied to an additional list of employment authorization applications,<sup>13</sup> none of which have had this discretionary barrier imposed prior to this policy manual change.

This expansion of application types subject to exhaustive discretionary analysis and the imposition of a score of new discretionary factors is not supported by the caselaw and regulations. The citations in the policy manual are most often to the policy manual itself, or on other occasions to cases which do not support the proposition asserted. The policy manual cites to a series of U.S. Supreme Court decisions on motions to reopen,<sup>14</sup> which have entirely separate statutory and regulatory provisions on discretion, and purports to apply this standard to the many types of immigration benefits named in the policy manual.<sup>15</sup> The policy manual also cites to BIA decisions which are very specific to the relief discussed in the particular case, and then applies the discussion of discretionary factors to dozens of application types that the BIA never considered in those decisions.<sup>16</sup>

### **Changes to Employment Authorization**

We also oppose the changes to 10 USCIS-PM A.5 as applied to adjudications of employment authorization under 8 CFR 274a.12(c). The policy manual misinterprets the breadth of USCIS discretion in adjudicating employment authorization for persons who already have qualified pending applications. In addition, USCIS ignores more than three decades of public reliance on its formerly narrow interpretation of discretion in this category of employment authorization applications, and the change will have a catastrophic impact on many individuals who have properly filed applications and are awaiting government resolution on their application. Both USCIS and applicants in these categories have relied on relatively speedy adjudications of employment authorization to date, and the changes will turn these into unnecessarily time-consuming adjudications that may result in denials even when the underlying application is in place.

According to the changes in 10 USCIS-PM A.5, the complex adjudication and evaluation of evidence of 22 plus discretionary factors also applies to all employment authorization applications under 8 CFR 274a.12(c). This means that immigrants awaiting adjudication of benefits applications that are pending – and delayed for years – by USCIS, will no longer be able to support themselves through authorized work during the many years it may take the government to resolve their case. The policy manual changes are a vast departure from how the regulations have been applied since 1987, which has been to grant employment authorization upon proper filing of the I-765 with fee after verifying that the individual actually has an application pending that is specified in the regulation.

The many categories of persons seeking employment authorization who are impacted include, among others, persons with pending applications for permanent residence, students, exchange visitors, applicants for cancellation of removal before the immigration courts, parolees, persons with temporary protected status, trafficking victims (T-2 –T-6 visa holders), individuals granted deferred action, persons who have final orders of removal who are released under supervision by permission of the government, and certain persons enlisted in the Armed Forces.<sup>17</sup>

Discretion in employment authorization adjudications under 8 CFR 274a.12(c) is not unfettered, as USCIS presumes. Discretion is referred to in the regulations when describing the period of time for which USCIS may grant authorization,<sup>18</sup> and with a few application types, it specifically refers to a requirement that applicants show evidence related to economic necessity to qualify for authorization.<sup>19</sup>

The policy manual changes go beyond the discretion described in the regulations, which refer only to two factors, length of time for which employment authorization is granted, and a review of factors related to economic necessity, and those factors are only relevant to deferred action and individuals under final order of removal who are released under supervision. Nowhere are 22 other discretionary factors named for consideration.<sup>20</sup>

Despite this absence in the regulations, USCIS has decided to transform what has been for the three-decade existence of this regulation essentially an automatic adjudication into a complex waiver-type adjudication of dozens of factors. Until now, an individual with a pending application could rely on being able to work to support themselves while the government decided their application. That will no longer be possible.

### **Burden Imposed on Applicants and USCIS Adjudicators**

Under the policy manual changes, adjudicators are encouraged to perform a time-consuming and unnecessarily detailed discretionary analysis and to document the discretionary decision, whether positive or negative. The policy manual encourages detailed discretionary records to support denials on appeal, even where applicants meet legal eligibility requirements:

“If the officer finds the requestor meets the eligibility requirements...the officer must then determine whether the request should be granted as a matter of discretion. If the officer finds that the requestor does not meet all applicable requirements, the officer can still include a discretionary analysis in the denial...Adding a discretionary analysis to a denial is useful if an appellate body on review disagrees with the officer’s conclusion that the requestor failed to meet the threshold eligibility requirements. In such a situation, the discretionary denial may still stand.”<sup>21</sup> This approach is targeted to deny relief and successful appeals to applicants.

The discretionary factors identified are vague and overbroad, inviting confusion and inconsistent adjudications. The changes require applicants to supply voluminous documentation, and adjudicators to review the evidence of the more than 22 factors,<sup>22</sup> in what amounts to a separate adjudication entailing many additional hours of work. This increases agency inefficiency at a time when the agency has crisis level backlogs, has been closed to the public for four months, is still only a partially reopened, and is threatening to temporarily lay off 70 percent of its staff nationwide within a month.<sup>23</sup> The policy manual changes place an extremely heavy and unnecessary burden on both applicants and adjudicators.

## Conclusion

We recommend that the changes to 1 USCIS-PM E.8 and 10 USCIS-PM A.5 of the policy manual be stricken because they are *ultra vires*, lack legal support, and will exacerbate USCIS's current crisis. The policy manual changes compound agency inefficiency, waste, and mismanagement at a time when the agency has crisis-level backlogs and is seeking a bailout from Congress.<sup>24</sup>

Instead of looking for ways to streamline adjudications, the policy manual imposes a secondary adjudication process on dozens of application types that will require adjudicators to multiply the amount of time that they 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.

In addition, the agency failed to provide any meaningful opportunity for public comment to these drastic changes in adjudications that will negatively impact scores of applicants.

Sincerely,

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

## ENDNOTES

<sup>1</sup> See USCIS [policy manual changes on discretion/alert](https://www.uscis.gov/policy-manual/volume-1-part-e-chapter-8). The new material in the policy manual is found here: <https://www.uscis.gov/policy-manual/volume-10-part-a-chapter-5>.

<sup>2</sup> The Adjudicator's Field Manual (AFM) 10.15 that it superseded by the policy manual is Attachment 1.

<sup>3</sup> The complete list of application types subject to the policy manual changes is listed in Attachment 2, and the employment authorization categories affected are in 8 CFR 274a.12(c)(1)-(36).

<sup>4</sup> See AFM 10.15, Attachment 1.

<sup>5</sup> See Attachment 3 for the list of discretionary factors that the policy manual states are relevant to all applications in Attachment 2.

<sup>6</sup> Attachment 1.

<sup>7</sup> *Id.*

<sup>8</sup> See Attachment 2 for the complete list of applications impacted. According to the policy manual, the following applications will be subject to the described discretionary analysis: Fiancé petitions (I-129F); Applications to extend or change status (I-539); Advance permission to enter as a nonimmigrant (I-192); humanitarian parole (I-131); temporary protected status (TPS) (I-821); asylum and refugee status, with some exceptions; employment-based alien petitions (I-140); immigrant investor petitions (I-526); employment authorization (I-765); adjustment of status (I-485); waivers (I-601, I-601A); consent to reapply for admission after removal (I-212); and some applications to remove conditions on permanent residence (I-751), among others.

<sup>9</sup> *Id.*

<sup>10</sup> 10 USCIS PM-A.5 imposes this exhaustive discretionary analysis on employment authorization applications under INA 274a.12(c), which includes adjustment applicants, students, applicants for cancellation of removal, parolees, those granted deferred action, persons granted TPS, and aliens released under supervision with a final order of removal, among others.

<sup>11</sup> See Attachment 3.

<sup>12</sup> See Attachment 2 for the list of applications that this analysis will apply to. The prior guidance in the Adjudicator's Field Manual listed only INA 245 adjustment of status, changes of status under INA 248 and waivers as requiring discretion. See Attachment 1.

<sup>13</sup> 10 USCIS-PM A.5 states that this analysis of voluminous discretionary factors also applies to the categories of employment authorization under 8 CFR 274a.12(c), which includes, among others, applicants for adjustment of status, students, applicants for cancellation of removal, parolees and persons released under order of supervision seeking work authorization.

<sup>14</sup> 1 USCIS-PM E.8 cites in footnote 36, 41 to *INS v. Doherty* (502 U.S. 314) (1992) (motion to reopen denied in discretion to asylum applicant who was convicted of murder); *INS v. Abudu*, 485 U.S. 94 (1988) (motion to reopen); and to *INS v. Rios-Pineda*, 471 U.S. 444 (1985) (motion to reopen) to support its expansive views of discretion, and its view that USCIS can deny an application on discretion without determining whether the individual is otherwise eligible for the benefit.

<sup>15</sup> Motions to reopen have specific statutory and regulatory requirements that are irrelevant to the applications for benefits being impacted by the changes in the policy manual. See INA 240(c)(7)(B) and 8 CFR 1003.2(c)(1).

<sup>16</sup> The policy manual cites repeatedly to *Matter of Marin*, 16 I&N 581, *Matter of Buscemi*, 19 I&N 628, and *Matter of Edwards*, 20 I&N 191 to support its expansive view of discretionary factors and its place in determination of eligibility. See I USCIS-PM E.8 fns. 31, 41, 46, 47, 49, 50, 51, 52, 53, 54, 55, 57, 58, and 61. These were cases where the BIA specifically considered discretion as it related to the criminal waiver under former INA 212(c). This discussion is not relevant to the application of discretion in the dozen other categories where the policy manual now applies it, and it is based on a section of the INA that was removed effective April 1, 1997 by IIRIRA.

<sup>17</sup> See Attachment 2 and 8 CFR 274a.12(c).

<sup>18</sup> 8 CFR 274 a.12 (c) states, "USCIS may, in its discretion, determine the validity period assigned to any document issued evidencing an alien's authorization to work...". Applications for employment authorization

under INA 274a.12(c) must be applied for and are “subject to any restrictions stated in the regulations... USCIS, in its discretion, may establish a specific validity period for an employment authorization document...”. Some subsections of 8 CFR 274 a.12 (c) specify additional factors to be considered in discretion, when referring to (c)(14) persons with deferred action, who must show economic necessity, or under (c)(18) for persons under a final order of removal who are released under supervision. They have discretionary factors including economic necessity, the existence of dependent family, and a showing of the anticipated length of time before the person can be removed from the United States. No other discretionary factors are listed by the regulations.

<sup>19</sup> *Id.*

<sup>20</sup> See 8 CFR 274a.12(a) and (c) and 8 CFR 274a.13.

<sup>21</sup> USCIS-PM E.8.4. C.

<sup>22</sup> Appendix 3.

<sup>23</sup> Alyssa Aquino, LAW 360, *USCIS Delays Furlough Plans After Finances Improve* (July 24, 2020) ; Eric Katz, Government Executive, *Furlough Notices in Hand Citizenship and Immigration Employees Look for New Jobs* (June 30, 2020).

<sup>24</sup> See, e.g., *ILRC-DHS Watch letter to Congress*, signed by over 100 groups, on USCIS’s appropriations request (June 4, 2020), available at <https://www.ilrc.org/ilrc-letter-uscis-appropriations>.

## **Attachment 1: Prior USCIS Guidance, superseded by the current policy manual changes**

### **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.



<b>ATTACHMENT 2: Benefits Subject to new Policy Manual Discretion Analysis: Source</b> USCIS <a href="https://www.uscis.gov/policy-manual/volume-1-part-e-chapter-8">https://www.uscis.gov/policy-manual/volume-1-part-e-chapter-8</a>	<b>Discretion Involved (Yes or No)</b>
Petition to classify an alien as a nonimmigrant worker <sup>[8]</sup>	No (with some exceptions)
Petition to classify an alien as a fiancé(e) of a U.S. citizen <sup>[9]</sup>	Yes
Application to extend or change nonimmigrant status <sup>[10]</sup>	Yes
Advance permission to enter as a nonimmigrant <sup>[11]</sup>	Yes
Humanitarian parole <sup>[12]</sup>	Yes
Temporary protected status <sup>[13]</sup>	Yes
Refugee status <sup>[14]</sup>	Yes (with some exceptions) <sup>[15]</sup>
Asylum <sup>[16]</sup>	Yes
Petition to classify an alien as a family-based immigrant <sup>[17]</sup>	No (with some exceptions)
Petition to classify an alien as an employment-based immigrant <sup>[18]</sup>	Yes
Petition to classify an alien as an immigrant investor <sup>[19]</sup>	Yes

<b>ATTACHMENT 2: Benefits Subject to new Policy Manual Discretion Analysis: Source</b> USCIS <a href="https://www.uscis.gov/policy-manual/volume-1-part-e-chapter-8">https://www.uscis.gov/policy-manual/volume-1-part-e-chapter-8</a>	<b>Discretion Involved</b> <b>(Yes or No)</b>
Adjustment of status <sup>[20]</sup>	Yes (with some exceptions) <sup>[21]</sup>
Registration <sup>[22]</sup>	No
Recognition as an American Indian born in Canada <sup>[23]</sup>	No
Waivers of inadmissibility <sup>[24]</sup>	Yes
Consent to reapply for admission after deportation or removal <sup>[25]</sup>	Yes
Employment authorization <sup>[26]</sup>	Yes (with some exceptions)
Removal of conditions on permanent residence <sup>[27]</sup>	No (with some exceptions) <sup>[28]</sup>
Naturalization <sup>[29]</sup>	No
Application for a Certificate of Citizenship <sup>[30]</sup>	No

See footnotes at <https://www.uscis.gov/policy-manual/volume-1-part-e-chapter-8>.

## **ATTACHMENT 2: Benefits Subject to new Policy Manual Discretion Analysis: Source**

<https://www.uscis.gov/policy-manual/volume-10-part-a-chapter-5>

***In addition, all of the following employment authorization applications will be subject to the lengthy discretion analysis: See <https://www.uscis.gov/policy-manual/volume-10-part-a-chapter-5>***

8 CFR 274 a.12 (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.

(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 part 208, whose application:

(i) Has not been decided, and who is eligible to apply for employment authorization under §208.7 of this chapter because the 150-day period set forth in that section has expired. Employment authorization may be granted according to the provisions of §208.7 of this chapter in increments to be determined by the Commissioner and shall expire on a specified date; or

(ii) Has been recommended for approval, but who has not yet received a grant of asylum or withholding of deportation or removal;

(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 and §212.19(h)(4) of this chapter, 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.

[52 FR 16221, May 1, 1987]

### **Attachment 3: USCIS List of Discretion Factors - applicable to all applications listed in Attachment 1**

See <https://www.uscis.gov/policy-manual/volume-1-part-e-chapter-8>

- 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.

#### 2. Identifying Discretionary Factors

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.

##### *Factors That May Be Considered*

There are a number of factors or factual circumstances that are generally considered when conducting a discretionary analysis. Factors may include, but are not limited to:

- Whether the requestor is eligible for the benefit sought;<sup>[48]</sup>
- The applicant or beneficiary's ties to family members in the United States and the closeness of the underlying relationships;<sup>[49]</sup>
- Hardship due to an adverse decision;<sup>[50]</sup>
- The applicant or beneficiary's value and service to the community;<sup>[51]</sup>

- 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;<sup>[52]</sup>
- Service in the U.S. armed forces;<sup>[53]</sup>
- History of employment;<sup>[54]</sup>
- Property or business ties in the United States;<sup>[55]</sup>
- 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;<sup>[56]</sup>
- 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);<sup>[57]</sup>
- Criminal history (in the United States and abroad) and whether the applicant or beneficiary has rehabilitated and reformed;<sup>[58]</sup>
- Community service beyond any imposed by the courts;
- Whether the alien is under an unexecuted administratively final removal, deportation, or exclusion order;<sup>[59]</sup>
- Public safety or national security concerns;<sup>[60]</sup>
- 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.<sup>[61]</sup>
- Findings of juvenile delinquency;<sup>[62]</sup>
- Compliance with immigration laws;<sup>[63]</sup>
- 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;<sup>[64]</sup>



- Other indicators of an applicant or beneficiary's character.<sup>[65]</sup>

This is a non-exhaustive list of factors; the officer may consider any relevant fact in the discretionary analysis.

Footnotes at <https://www.uscis.gov/policy-manual/volume-1-part-e-chapter-8>.