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April 13, 2022

Amanda Baran,
Chief, Office of Policy and Strategy
United States Citizenship and Immigration Services
5900 Capital Gateway Drive
Camp Springs, MD 20588

VIA EMAIL

Dear Ms. Baran,

We are writing to share recommended priorities for improvements to the USCIS Policy Manual. We appreciate all of the steps USCIS has already taken to eliminate barriers to relief and to regain trust in the communities it serves to encourage more people to apply for benefits. In particular, we commend USCIS on its mission statement change and the new information about how to provide feedback to the USCIS Policy Manual. We are also grateful for the opportunity to continue to engage with USCIS regarding the USCIS Policy Manual.

The Immigrant Legal Resource Center (ILRC) writes this letter to follow up on our list of USCIS Policy Manual recommendations provided to USCIS on September 2, 2021 (available here: https://www.ilrc.org/sites/default/files/resources/ilrc_uscis_pm_suggestions.pdf), to suggest priorities for USCIS Policy Manual changes. While every change we suggested is important, a few have become more urgent as they are needed immediately to prevent further erroneous denials of benefits to immigrants and unnecessary chilling effects. The following priorities were gathered after conversations with partners across the country, and in direct response to requests from immigration practitioners and community members who are seeing benefits denied in the meantime. Furthermore, these changes will help rectify the previous administration's policies, increase access to immigration benefits, and reduce backlogs.

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

The ILRC also leads the New Americans Campaign, a national non-partisan effort that brings together private philanthropic funders, leading national immigration and service organizations, and over two hundred local services providers across more than 20 different regions to help prospective Americans apply for U.S. citizenship. Through our extensive networks with service providers, immigration practitioners, and naturalization applicants, we have developed a profound understanding of the barriers faced by low-income individuals seeking to obtain immigration benefits.

It is through this lens that we provide the following analysis and priorities for USCIS Policy Manual changes:

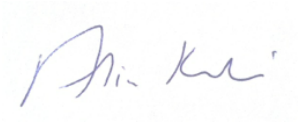
1. Withdraw the changes made regarding how to adjudicate discretionary determinations in 1 USCIS-PM E.8 and 7 USCIS-PM A.10 of the USCIS Policy Manual.
2. Withdraw the section on "extreme vetting" described in 12 USCIS-PM D.2(D) of the USCIS Policy Manual in its entirety.
3. Correct the legal error in 7 USCIS C.2(C)(2) and 7 USCIS C.2(D)(1)-(2) on grandfathering under INA § 245(i).
4. Withdraw naturalization good moral character guidance regarding DUIs and correct chart in 12 USCIS-PM F.5.

Additionally, we provide suggestions for areas where guidance is needed urgently to protect access to benefits:

5. Clarify that advance parole constitutes a "parole" entry for INA § 245(a) adjustment.
6. Clarify that INA § 212(a)(9)(B) unlawful presence bars can run inside the United States.

We spell out in the following pages the urgency behind these recommendations, with case denial examples where applicable. We respectfully request that USCIS take our recommendations into account and welcome the opportunity to discuss further. Please do reach out if you have any questions. I can be reached at 415-321-8552 or akamhi@ilrc.org.

Sincerely yours,



Alison Kamhi
Legal Program Director
Immigrant Legal Resource Center (ILRC)

CC:
Phyllis A. Coven, Citizenship and Immigration Services Ombudsman, phyllis.coven@hq.dhs.gov

1. Withdraw the changes made to the USCIS Policy Manual regarding the adjudication of discretionary determinations in 1 USCIS-PM E.8 and 7 USCIS-PM A.10.

We want to start by thanking USCIS for already removing the harmful language in Volume 10, Part A, Chapter 5, that laid out many discretionary factors that could be used to deny employment authorization. Having this language out of the Policy Manual is a much appreciated first step in addressing this issue. However, two other sections remain in the Policy Manual, and cases continue to be denied as a result.

It is our first priority to withdraw these sections on discretion at 1 USCIS-PM E.8 and 7 USCIS-PM A.10, which were implemented during the former administration. These sweeping changes to the definition of discretion added more than two dozen new factors for applicants to document and adjudicators to consider that fundamentally altered applicants' ability to qualify for a benefit—yet the affected public was not given an opportunity to review and respond to these changes before they went into effect.

These remaining discretion sections are a priority because they impact so many different benefit applications; create unnecessary barriers to benefits for those eligible; waste time and resources of adjudicators, applicants, and legal workers; exacerbate the backlog; and moreover, rely on erroneous legal authority.

According to the Policy Manual, all of the following benefits applications are impacted by this onerous discretion 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 and advance 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(a)(2)), 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) (with some exceptions);[1] and some applications to remove conditions on residence (I-751).[2]

Confusingly, the lengthy November 2020 list of discretionary considerations 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.[3] Both lists of discretionary factors apply to adjustment applicants.

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[1] Volume 1 of the Policy Manual contains a chart of applications subject to discretionary analysis. The chart includes employment authorization, I-765, annotated as "with some exceptions," but without further explanation. 1 USCIS-PM E.8(A). That section goes on to name a non-exhaustive list of 22 factors that adjudicators should apply in all discretionary adjudications, including employment authorization. We are grateful that the chapter on discretion within Volume 10 on employment authorization has been removed; however, the fact that the discretionary analysis in Volume 1 remains, and that employment authorization is a discretionary determination, means that these factors can still be seen to apply. In fact, in Volume 10 on employment authorization, footnote 8 specifically states that the categories of employment authorizations under 8 CFR 274a.12(c) (which lists 36 categories of employment authorization) are discretionary. 10 USCIS-PM A.4.

[2] 1 USCIS-PM E.8 has a "non-exhaustive overview of immigration benefits" that USCIS considers discretionary.

[3] 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.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.)" These factors are derived from criminal waiver law, not from adjustment.

The prior guidance on discretion was a half-page instruction in the Adjudicators Field Manual (AFM) that urged adjudicators to review difficult discretionary issues with supervisors and to consult precedent case law. The new guidance has voluminous instructions directing adjudicators to consider more than twenty-four factors[4] as well as "other indicators of an applicant or beneficiary's character,"[5] creating enormous discretion for adjudicators to find almost any factor relevant.

The undue burden on applicants and adjudicators that these guidelines pose is not supported by law and instead mischaracterizes existing regulations and case law on discretion. The Policy Manual cites BIA decisions which are extremely specific to the relief discussed in the particular case, such as INA § 212(c) criminal waivers,[6] and then applies the discussion of discretionary factors to adjustment and other applications which the BIA never considered in those decisions.[7]

No justification was provided to support these massive changes to discretion in the Policy Manual. The prior guidance in the Adjudicator's Field Manual (AFM 10.15) for all discretionary considerations was succinct and clear. The AFM emphasized consistency, fairness, following pertinent case law, and consulting with supervisors and peers in difficult cases. This guidance should be re-instated immediately to prevent further harm to applicants.

Example: A 19-year old U visa derivative entered the United States lawfully on his U visa. He was denied adjustment based on a DUI arrest, which resulted in a conviction for reckless driving. "Reckless driving" in a DUI case in California is almost never allowed by prosecutors if the blood alcohol content is high or if there are other aggravating factors. In fact, it is an even lesser offense than "wet reckless," which is sometimes negotiated for a very low blood alcohol content. In this case, the conviction was the only negative factor in the individual's case, and a large amount of countervailing positive equities were submitted, along with proof of the fact that the applicant took responsibility, expressed extreme remorse, and demonstrated rehabilitation. The positive equities were not carefully considered by the Vermont Service Center, but rather summarily dismissed, and his adjustment was denied as a matter of discretion.

Example: A U visa adjustment applicant was denied adjustment due to being arrested and charged with child molestation. However, it turned out that law enforcement had arrested the wrong person. The district attorney provided him with a finding of factual innocence which was submitted to USCIS, but the applicant was denied adjustment anyway as a matter of discretion.

Example: Within the past two years, immigration attorneys have reported the denial of advance parole travel permission to applicants for family-based adjustment of status. The denial notices are unclear and not based on the individual's circumstances, but rather appear to be boilerplate templates. Several that ILRC has viewed state the

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[4] 1 USCIS-PM E.8(C).

[5] 1 USCIS-PM E.8(C)(2).

[6] 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).

[7] *Matter of Buscemi*, 19 I&N Dec. 628 (BIA 1988), *Matter of Marin*, 16 I&N 581 (BIA 1978), and *Matter of Edwards*, 20 I&N 191 (BIA 1990) are cited in the Policy Manual 33 times, at footnotes 10, 20, 25, 26, 27, 28, 30, 33, 35, 38, 39, 40, 41, 42, and 44, to justify the increased burden of proof on applicants and inclusion of particular discretionary factor analyses in adjustment. In these cases, the severity of the conviction and evidence of rehabilitation were key to the BIA's findings, and to whether unusual or outstanding equities would be required to exercise discretion favorably. These cases are entirely distinguishable from an adjustment of status adjudication where discretion is concerned because the underlying law is completely different.

same thing, that discretion for advance parole is generally exercised for those that have a pending Form I-485, filed Form I–131, are present in the U.S. after being inspected and admitted or paroled, and are not in immigration proceedings or under a final order of removal, deportation, or exclusion. The denials go on to state the basic eligibility requirements for adjustment under INA § 245(a) and § 245(i). There is no individualized allegation that any of these applicants are somehow ineligible for adjustment of status in the denials of their applications for advance parole, and these denials appear to be a result of overly scrutinized discretionary determinations. These denials have resulted in great hardship for the adjustment applicants, including the inability of an elderly applicant to travel to see family members.

Example: Under the current Policy Manual guidance, an applicant for family-based adjustment of status through a U.S. citizen spouse may be found not to qualify for favorable discretion because there is "likelihood that permanent resident status will ensue soon,"[8] or because they had a finding of juvenile delinquency for a minor charge many years ago,[9] or a host of amorphous reasons that an adjudicator might deem to be the undefined category of "other indicators adversely reflecting on applicant's character and undesirability as an LPR."[10]

For these reasons, the changes should be withdrawn in their entirety and the two-paragraph instruction of the AFM on discretion re-produced below should be restored.

USCIS Adjudicator's Field Manual (AFM) 10.15: Exercise of Discretion; Uniformity of Decisions.
Although all types of adjudications involve proper application of laws and regulations, a few also involve an exercise of discretion: adjustment of status under section 245 of the Act, change of status under section 248 of the Act and various waivers of inadmissibility are all discretionary applications, requiring both an application of law and a consideration of the specific facts relevant to the case. An exercise of discretion does not mean the decision can be arbitrary, inconsistent or dependent upon intangible or imagined circumstances. Although regulations can provide guidelines for many of the types of factors which are appropriate for consideration, a regulation cannot dictate the outcome of a discretionary application. [See, for example, HHS Poverty Guidelines in Appendix 10-3.] For each type of adjudication, there is also a body of precedent case law which is intended to provide guidance on how to consider evidence and weigh the favorable and adverse factors present in a case. The adjudicator must be familiar with the common factors and how much weight is given to each factor in the body of precedent case law. The case law and regulatory guidelines provide a framework to assist in arriving at decisions which are consistent and fair, regardless of where the case is adjudicated or by whom. It will be useful, particularly for inexperienced adjudicators, to discuss unusual fact patterns and novel cases requiring an exercise of discretion with peers and supervisors. In particularly difficult or unusual cases, the decision may be certified for review to the Administrative Appeals Office. Such certifications may ultimately result in expansion of the body of precedent case law. Discretionary decisions or those involving complex facts, whether the outcome is favorable or unfavorable to the petitioner or applicant, require supervisory review. NOTE: Even in non-discretionary cases, the consideration of evidence is somewhat subjective. For example, in considering an employment-based petition, the adjudicator must examine the beneficiary's employment experience and determine if the experience meets or exceeds, in quality and quantity, the experience requirement stated on the labor certification by the employer. However, a subjective consideration of facts should not be confused with an exercise of discretion. Like an exercise of discretion, a subjective consideration of facts does not mean the decision can be arbitrary, inconsistent or dependent upon intangible or imagined circumstances.

[8] 1 USCIS-P.M. E.8.
[9] 1 USCIS-PM E.8(C).
[10] 7 USCIS-PM A.10.

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

We ask USCIS to withdraw the section on "extreme vetting," as announced in the policy alert entitled "Prerequisite of Lawful Admission for Permanent Residence under All Applicable Provisions for Purposes of Naturalization," issued November 18, 2020. This section requires officers to engage in unnecessary, time-intensive, and burdensome re-adjudication of prior immigration applications. Officers must "verify" the underlying lawful permanent residence (LPR) status in all naturalization cases, even where no question about eligibility is raised, in essence re-adjudicating an individual's LPR status. In the process of this "re-adjudication," officers are requesting documentation "proving" eligibility that in many cases is no longer available, or should be in the possession of USCIS, such as an alleged prior "deportation order" from the 1970s when the applicant had indicated they received "voluntary departure." This disproportionately affects low-income, vulnerable, and unrepresented naturalization applicants, as they may not have resources to obtain verification for various filings and information provided at the original application for LPR status, sometimes decades in the past.[11]

Moreover, in these re-adjudications, USCIS sometimes re-interprets facts and comes to different conclusions than it did previously, leaving an applicant no recourse for having relied on the agency's prior interpretation, such as regarding whether certain facts triggered a ground of inadmissibility requiring a waiver. We request that USCIS refrain from re-adjudicating decisions and defer to determinations it and other agencies have already made, particularly with regards to alien smuggling and discretionary waivers.

ILRC distributed a survey to naturalization practitioners in December 2021-January 2022 to assess the extent to which naturalization applicants were experiencing RFEs as a result of extreme vetting. The following are some examples:

Example: Naturalization applicant was interviewed in 2020 and was issued an RFE for a police report relating to a misdemeanor conviction from 2007. This conviction had been fully disclosed in his consular processing DS-260 application in 2016. He had been approved for an immigrant visa by the U.S. consulate and immigrated as the spouse of a U.S. citizen that year and was still married to the same U.S. citizen. Nevertheless, he was asked to provide documentation of a police report for a conviction from 13 years prior that had already been disclosed and taken into consideration in his adjustment application.

Example: Naturalization applicant was married twice. She submitted the marriage certificates and divorce decrees, with English translation. After the interview, the adjudicator asked her to resubmit the divorce decree from her first marriage again. She re-submitted it the following day, but it took seven months before she was able to go to the naturalization oath ceremony.

Example: Naturalization applicant was granted lawful permanent residence through a spousal petition. She was issued an RFE for proof of her petitioner's U.S. citizenship, a completed I-130A, and copy of the marriage certificate. All of this had already been submitted with the initial filing and was re-submitted.

[11] Randy Capps & Carlos Echeverría-Estrada, Migr. Pol'y Inst., *A Rockier Road to U.S. Citizenship? Findings of a Survey on Changing Naturalization Procedures* (2020), available at https://www.migrationpolicy.org/research/changing-uscis-naturalization-procedures.

For these reasons, we ask USCIS to withdraw 12 USCIS-PM D.2(d) in its entirety and replace it with the existing first paragraph with the following edit:

D. Underlying Basis of Admission
To adjust status to that of an LPR or be admitted as an LPR, an applicant must first be eligible for one of the immigrant visa categories established under the law. During a naturalization proceeding, the officer can ~~must~~ verify the underlying immigrant visa petition or other basis for immigrating[74] that formed the basis of the adjustment of status or admission as an immigrant to the United States.[75]

3. Correct the legal error in 7 USCIS C.2(C)(2) and 7 USCIS C.2(D)(1)-(2) on grandfathering under INA § 245(i).

The current version of the USCIS Policy Manual implies a new, additional condition for derivative beneficiaries to qualify as independently grandfathered under INA § 245(i) that upends longstanding policy and diverges from established legal interpretation. A derivative is independently grandfathered under 245(i) so long as the qualifying derivative relationship (i.e. birth, with a child; or marriage, with a spouse) came into existence on or before the law's sunset date of April 30, 2001, such that they could have been included on that petition, whether or not they actually were.[12] At present, the Policy Manual implies that the qualifying relationship must also have come into existence *on or before the date the petition happened to be filed*, not just on or before April 30, 2001.

For example, if a qualifying petition was filed on February 12, 2000, and subsequently the principal beneficiary had a child on August 15, 2000, according to the current version of the Policy Manual this child would not be independently grandfathered even though they automatically qualified as a derivative beneficiary (when they were born) well before the law's sunset date. Under longstanding previous policy, this child *would* be independently grandfathered as a derivative beneficiary. As a result of this abrupt policy change, numerous adjustment applicants have been erroneously denied on the basis that they are "after acquired," rather than independently grandfathered.

This additional requirement does not appear in case law or the law itself and has never before been imposed. Further, such a policy contravenes the intent of 245(i), which is to allow individuals who qualified as beneficiaries (whether as principals or derivatives) of petitions filed on or before the 245(i) sunset date to adjust status within the United States if otherwise eligible, notwithstanding having entered without inspection or being barred under 245(c). Instead, USCIS is arbitrarily narrowing the class of people who can benefit based on another date—when exactly the petition was filed—that is irrelevant for 245(i) purposes as long as on or before April 30, 2001. USCIS should return to prior policy, which is consistent with controlling case law, see, e.g., *Matter of Estrada*, 26 I&N Dec. 180 (BIA 2013), and how immigrant visa petitions work under the INA. A derivative spouse or child is considered an eligible derivative of a visa petition if acquired at any time up until the principal petition beneficiary has immigrated. In this situation, the relevant date of derivative grandfathering eligibility is either the immigration by the principal beneficiary or the sunset date for 245(i), whichever occurs first.

Example: "The record shows that the petition was filed on February 24, 1997, on behalf of your spouse. However, your relationship with the principal beneficiary was not established until September 4, 1999. Therefore, the relationship did not exist on the date the immigrant visa petition was filed. As a result, you are not grandfathered by the immigrant visa petition filed on your spouse's behalf." (Denial, Nov. 8, 2021, by the National Benefits Center)

We recommend USCIS change the language in 7 USCIS-PM C.2(C)(2) as follows:

2. Special Considerations for Derivative Beneficiaries
Grandfathering Eligibility
A qualifying immigrant visa petition or labor certification application may serve to grandfather the principal beneficiary's immediate family members ~~at the time the visa petition or labor certification application was filed (his or her spouse and child(ren))~~ as grandfathered derivative beneficiaries if they qualified as derivatives (principal beneficiary's spouse and child(ren)) on or before April 30, 2001. [29] The spouse or child does not have to be named in the qualifying petition or application and does not have to continue to be the principal beneficiary's spouse or

[12] 245(i) does not require that the derivative beneficiary was actually listed on the petition. *See, e.g.*, 7 USCIS-PM C.2(C)(2) ("The spouse or child does not have to be named in the qualifying petition or application…").

child. As long as an applicant can demonstrate that he or she was the spouse or child (unmarried and under 21 years of age) of a grandfathered principal beneficiary ~~on the date the qualifying petition or application was properly filed~~ on or before April 30, 2001, the applicant is grandfathered and eligible to seek INA 245(i) adjustment in his or her own right.[30] A derivative beneficiary who qualifies as a grandfathered noncitizen may benefit from INA 245(i) in the same way as a principal beneficiary. If the derivative beneficiary meets all eligibility requirements, the beneficiary may adjust despite an entry without inspection or being subject to the specified adjustment bars.[31]

Underlying Basis for Adjustment
If a grandfathered derivative beneficiary[32] remains the spouse or child of the grandfathered principal beneficiary, the derivative beneficiary may accompany or follow to join the principal beneficiary, provided the principal beneficiary is adjusting status under INA 245(i). In this case, the grandfathered principal beneficiary is the principal adjustment applicant and the grandfathered derivative beneficiary is the derivative applicant.[33] A grandfathered derivative beneficiary may also adjust under INA 245(i) in his or her own right, on some basis completely independent of the grandfathered principal beneficiary.[34] This is true whether or not the grandfathered derivative beneficiary remains the grandfathered principal beneficiary's spouse or child. For instance, a grandfathered derivative beneficiary spouse who becomes divorced from the grandfathered principal beneficiary after the qualifying petition or application is filed is still a grandfathered noncitizen eligible to seek adjustment independently under 245(i). Similarly, a grandfathered derivative beneficiary child who marries or reaches 21 years of age after the qualifying petition or application is filed is still grandfathered and eligible to seek INA 245(i) adjustment on his or her own basis through a different petition.

Example: Derivative Beneficiary Eligible After Divorce from Principal Beneficiary	
Date	*Event*
January 1, 2000	*An employer files a permanent labor certification application on behalf of a married employee. The married employee is the principal beneficiary of the permanent labor certification application. The application is determined to be approvable when filed and the married employee noncitizen is a grandfathered noncitizen. As the employee was married at the time the labor certification application was filed, on or before April 30, 2001, the employee's spouse is the derivative beneficiary and is also a grandfathered noncitizen.*
January 1, 2003	*The employee and spouse divorce.*
Today	*The employee's former spouse is selected in the diversity visa program.*

In this example, the employee is the grandfathered principal beneficiary for INA 245(i) adjustment because the qualifying permanent labor certification application was filed directly on the employee's behalf on or before April 30, 2001. The employee's former spouse is a grandfathered derivative beneficiary because they were also married ~~at the time the qualifying permanent labor certification application was filed~~ on or before April 30, 2001. The qualifying application serves to grandfather both the principal and derivative beneficiaries. Therefore, as a grandfathered derivative beneficiary, the former spouse may apply for adjustment under 245(i) based on being selected in the diversity visa program, regardless of the grandfathered principal beneficiary's basis for adjustment and regardless of the fact that their marital relationship no longer exists.
If a grandfathered derivative beneficiary is adjusting on a separate basis from the grandfathered principal beneficiary, the grandfathered derivative beneficiary becomes the principal adjustment applicant. As the principal

applicant, the grandfathered derivative beneficiary's current spouse and child(ren) may accompany (or follow-to-join) the applicant.[35]

[29] See INA 203(d). See INA 245(i)(1)(B). See 8 CFR 245.10(a)(1)(i). Under INA 245(i), spouses and children are only included as grandfathered derivative beneficiaries if they are "eligible to receive a visa under section 203(d)." Immediate relatives of U.S. citizens are not included. See Matter of Estrada and Estrada (PDF), 26 I&N Dec. 180, 184 (BIA 2013) ("aliens who became the spouse or child of . . . principal grandfathered aliens on or before April 30, 2001, and who met the requirements of section 203(d) of the Act qualify as derivative grandfathered aliens.").
[30] Where the relationship was created after ~~the qualifying petition or application was filed~~ April 30, 2001, the grandfathered principal beneficiary's current spouse or child may still adjust under INA 245(i) as an accompanying (or following-to-join) adjustment applicant. See Section D, Current Family Members of Grandfathered Noncitizens, Subsection 1, Grandfathered Principal Beneficiary's Spouse and Children [7 USCIS-PM C.2(D)(1)]. Such child or spouse would not be a grandfathered noncitizen in his or her own right but would be eligible to use INA 245(i) as the derivative spouse or child of a grandfathered noncitizen. See Matter of Estrada and Estrada (PDF), 26 I&N Dec. 180, 184-85 (BIA 2013) ("the spouses or children of principal grandfathered aliens . . . where the spouse or child relationship was established after April 30, 2001 . . . do not qualify as grandfathered aliens for purposes of section 245(i) adjustment.").
[31] See Chapter 1, Purpose and Background, Section C, Overcoming INA 245(a) Adjustment Ineligibility [7 USCIS-PM C.1(C)].
[32] For information about derivative family members acquired after ~~the qualifying petition or labor certification application~~ April 30, 2001, see Section D, Current Family Members of Grandfathered Noncitizens [7 USCIS-PM C.2(D)]. See Matter of Estrada (PDF), 26 I&N Dec. 180, 186 (BIA 2013) ("A subsequent change in circumstances cannot confer grandfathered status on an alien who did not meet the grandfathering requirements prior to or on the April 30, 2001, sunset date. Thus, an alien who was not grandfathered as of April 30, 2001, but subsequently married a principal grandfathered alien does not, by virtue of that marriage, become a derivative grandfathered alien.").
[33] See INA 203(d).
[34] The derivative beneficiary is still required to seek adjustment under a family-based, employment-based, special immigrant, or diversity visa immigrant category. See Chapter 3, Eligibility and Filing Requirements, Section A, Adjustment Eligibility under INA 245(i) [7 USCIS-PM C.3(A)], and Chapter 4, Documentation and Evidence, Section D, Demonstrating Underlying Basis for Adjustment [7 USCIS-PM C.4(D)].
[35] See Section D, Current Family Members of Grandfathered Noncitizens [7 USCIS-PM C.2(D)].

Similarly, we ask USCIS to re-word 7 USCIS C.2(D)(1)-(2) as follows on grandfathered derivative beneficiaries so that it comports with *Matter of Estrada* and does NOT imply an additional requirement that the qualifying derivative relationship have come into existence before the petition was filed as well as on or before April 30, 2001:

D. Current Family Members of Grandfathered Noncitizens
In general, today's principal adjustment applicant's spouse or child(ren)[43] *may also adjust status if "accompanying" or "following-to-join" the principal.*[44] *A spouse or child is "accompanying" the principal when seeking to adjust status together with the principal or within 6 months of when the principal became a permanent resident; the spouse or child is considered to be following-to-join if seeking to adjust more than 6 months after the principal became a permanent resident.*[45]
The spouse and child(ren) as of the date of adjustment accompanying (or following-to-join) a principal INA 245(i) applicant (who is a grandfathered noncitizen) are eligible to seek adjustment under 245(i) even though they are not grandfathered noncitizens in their own right. The spouse and child(ren) may also benefit from INA 245(i) provisions allowing applicants to adjust despite an entry without inspection or being subject to the specified adjustment bars.[46] *If the spouse and child(ren) were properly inspected and admitted or inspected and paroled (and are not subject to the INA 245(c) bars) they do not need to file a Supplement A. The spouse and child(ren) may simply seek adjustment under INA 245(a) by filing only the Application to Register Permanent Residence or Adjust Status (Form I-485).*
1. Grandfathered Principal Beneficiary's Spouse and Children

A noncitizen may be eligible to adjust as a grandfathered derivative beneficiary under INA 245(i) in his or her own right or as an accompanying (or following-to-join) spouse or child if:

- *The noncitizen demonstrates that he or she was the spouse or child (unmarried and under 21 years of age) of a grandfathered principal beneficiary on or before April 30, 2001 and the ~~at the time a~~ qualifying petition or application was properly filed on or before April 30, 2001; ~~and~~ or*
- *The noncitizen is ~~still~~ currently the spouse or child of the grandfathered principal beneficiary.[47]*

A noncitizen who became the spouse or child of a grandfathered principal beneficiary after ~~the qualifying petition or application was filed~~ April 30, 2001 may only seek INA 245(i) adjustment through the principal beneficiary as an accompanying (or following-to-join) immigrant.[48] These applicants do not qualify as grandfathered derivative beneficiaries who may adjust in their own right under INA 245(i).[49]

Example: Spouse and Child Acquired After Filing of Principal Beneficiary's Qualifying Application	
Date	*Event*
January 1, 1998	*A noncitizen enters the United States without inspection.*
January 1, 2000	*An employer files a permanent labor certification application on behalf of the noncitizen. The noncitizen is unmarried at time of filing.*
January 1, 2002	*The noncitizen marries a noncitizen and has a child.*
January 1, 2004	*The employment-based immigrant visa petition filed on the noncitizen's behalf is approved. The noncitizen applies for adjustment of status, as do the spouse and child.*

As a principal beneficiary of the qualifying permanent labor certification application, the noncitizen is grandfathered and eligible to file for adjustment under INA 245(i). Because the noncitizen married and had the child after ~~the qualifying application was filed~~ April 30, 2001, the spouse and child are not grandfathered derivative beneficiaries and may not adjust in their own right under 245(i). The spouse and child, however, may still seek INA 245(i) adjustment (or INA 245(a) adjustment, if eligible) as the principal beneficiary's accompanying (or following-to-join) spouse and child under INA 203(d).

Eligibility of Grandfathered Principal Beneficiary's Spouse or Child

The following chart provides a summary of whether the spouse or child of a grandfathered principal beneficiary may be grandfathered in his or her own right or eligible to accompany or follow to join the grandfathered principal beneficiary.

245(i) Adjustment Eligibility of Grandfathered Principal Beneficiary's Spouse or Child		
When Was Relationship Established?	*Eligible as an Accompanying or Following-to-Join Applicant?*	*Eligible as a Grandfathered Derivative Beneficiary Who May Apply to Adjust Under INA 245(i) Independently from Principal?*

~~Before~~ On or before ~~the qualifying petition or application was filed (on or before~~ April 30, 2001~~)~~	*Yes, if relationship continues to exist and principal beneficiary is granted LPR status (and remains an LPR)*	*Yes, on a different basis, whether or not relationship to principal beneficiary continues to exist*[50]
After April 30, 2001 but before principal beneficiary adjusts status	*Yes, if relationship continues to exist and principal beneficiary is granted LPR status (and remains an LPR)*	*No*
After principal beneficiary adjusts status	*No*	*No*

. . .

[51] See 8 CFR 103.2(b)(1). See 9 FAM 502.1-1(C)(2)(b)(2)(A), Basis for Following-to-Join. In contrast, grandfathered derivative beneficiaries only need to establish the qualifying relationship existed on or before April 30, 2001 and in relation to a properly filed ~~at the time the~~ qualifying petition or labor certification application~~was properly filed~~. This is a unique aspect of INA 245(i) adjustment. Grandfathered derivative beneficiaries do not need to show the qualifying relationship continues to exist at the time they seek adjustment unless they are adjusting as an accompanying or following-to-join spouse or child of the principal beneficiary. For more information on qualifying to adjust status as a principal applicant's accompanying or following-to-join spouse or child, see Part A, Adjustment of Status Policies and Procedures, Chapter 6, Adjudicative Review [7 USCIS-PM A.6].

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

We ask that USCIS remove harmful language from the USCIS Policy Manual implementing former Attorney General's October 25, 2019, decision in *Matter of Castillo-Perez* to USCIS adjudications and continue to advocate with the DOJ to reverse this decision.

Despite the INA already containing bars to good moral character that do not include driving under the influence (DUI) convictions, *Matter of Castillo-Perez* created an ultra vires presumption that individuals with two or more DUI convictions within the statutory period lack good moral character. Further, although the former Attorney General issued *Matter of Castillo-Perez* in the context of non-lawful permanent resident (LPR) cancellation of removal, USCIS has interpreted the decision much more broadly and has extended it beyond this context to other immigration benefits that require a showing of good moral character. Naturalization applicants and VAWA petitioners are therefore now susceptible to extra scrutiny and vulnerable to being denied benefits based on a presumptive lack of good moral character. Naturalization applicants and VAWA petitioners of color are especially susceptible to denial pursuant to *Matter of Castillo-Perez* because local law enforcement tend to target drivers of color at higher rates than white drivers, and drivers of color are convicted of DUIs at a higher rate than white drivers.

While we believe that *Matter of Castillo-Perez* was wrongly decided by the former Attorney General, we believe that USCIS was not required to, nor should have, extended the holding of *Castillo-Perez* to the affirmative adjudication context. The language of the decision itself emphasizes the unique nature of cancellation of removal, stating, "[c]ancellation of removal is a coveted and scarce form of relief," and emphasizing that Congress only authorized 4,000 cancellation grants per year. There is no similar congressional intent to limit the number of naturalization, or VAWA, applications that can be granted per year, and USCIS should not have imported this very stringent standard into the affirmative application context.[13]

Example: Practitioners report that due to USCIS Policy Manual guidance, they are not filing naturalization cases where the applicant has two or more DUIs during the good moral character time period, regardless of the mitigating circumstances and positive equities.

Example: In an unpublished Administrative Appeals Office decision from July 7, 2021, USCIS dismissed the VAWA petitioner's appeal because the petitioner had two DUI convictions within the three-year statutory period, citing *Matter of Castillo-Perez.* This VAWA petitioner had the resources to appeal the Vermont Service Center's denial of his VAWA petition, but many VAWA petitioners lack the resources necessary to retain legal counsel for an appeal.

We ask USCIS to edit USCIS-PM F.5, and the table entitled "Conditional Bars to GMC for Acts Committed in Statutory Period," as follows:

K. Certain Acts in Statutory Period
Although the INA provides a list of specific bars to good moral character,[48] the INA also allows a finding that "for other reasons" a person lacks good moral character, even if none of the specific statutory bars applies.[49] The following sections provide examples of acts that may lead to a finding that an applicant lacks GMC "for other reasons."[50]

[13] For more arguments and examples on this issue, please see National Immigration Project's (NIPNLG) Letter to Amanda Baran and Ashley Tabbador, Re: Follow up to meeting on suggested USCIS actions regarding Matter of Castillo-Perez, (Jan. 19, 2022), joined by ILRC, NIJC, NILA, NILC, and the Public Defender Coalition for Immigrant Justice.

~~*1. Driving Under the Influence The term "driving under the influence" (DUI) includes all state and federal impaired driving offenses, including "driving while intoxicated," "operating under the influence," and other offenses that make it unlawful for a person to operate a motor vehicle while impaired. This term does not include lesser included offenses, such as negligent driving, that do not require proof of impairment. Evidence of two or more DUI convictions during the statutory period establishes a rebuttable presumption that an applicant lacks GMC.[51] The rebuttable presumption may be overcome[52] if the applicant is able to provide "substantial relevant and credible contrary evidence" that he or she "had good moral character even during the period within which he [or she] committed the DUI offenses," and that the "convictions were an aberration."[53] An applicant's efforts to reform or rehabilitate himself or herself after multiple DUI convictions do not in and of themselves demonstrate GMC during the period that includes the convictions.*~~

Offense	*Citation*	*Description*
One or More Crimes Involving Moral Turpitude (CIMTs)	• *INA 101(f)(3)* • *8 CFR 316.10(b)(2)(i), (iv)*	*Conviction or admission of one or more CIMTs (other than political offense), except for one petty offense*
Aggregate Sentence of 5 Years or More	• *INA 101(f)(3)* • *8 CFR 316.10(b)(2)(ii), (iv)*	*Conviction of two or more offenses with combined sentence of 5 years or more (other than political offense)*
Controlled Substance Violation	• *INA 101(f)(3)* • *8 CFR 316.10(b)(2)(iii), (iv)*	*Violation of any law on controlled substances, except for simple possession of 30g or less of marijuana*
Incarceration for 180 Days	• *INA 101(f)(7)* • *8 CFR 316.10(b)(2)(v)*	*Incarceration for a total period of 180 days or more, except political offense and ensuing confinement abroad*
False Testimony under Oath	• *INA 101(f)(6)* • *8 CFR 316.10(b)(2)(vi)*	*False testimony for the purpose of obtaining any immigration benefit*

Offense	*Citation*	*Description*
Prostitution Offenses	• *INA 101(f)(3)* • *8 CFR 316.10(b)(2)(vii)*	*Engaged in prostitution, attempted or procured to import prostitution, or received proceeds from prostitution*
Smuggling of a Person	• *INA 101(f)(3)* • *8 CFR 316.10(b)(2)(viii)*	*Involved in smuggling of a person to enter or try to enter the United States in violation of law*
Polygamy	• *INA 101(f)(3)* • *8 CFR 316.10(b)(2)(ix)*	*Practiced or is practicing polygamy (the custom of having more than one spouse at the same time)*
Gambling Offenses	• *INA 101(f)(4)–(5)* • *8 CFR 316.10(b)(2)(x)–(xi)*	*Two or more gambling offenses or derives income principally from illegal gambling activities*
Habitual Drunkard	• *INA 101(f)(1)* • *8 CFR 316.10(b)(2)(xii)*	*Is or was a habitual drunkard*
~~Two or More Convictions for Driving Under the Influence (DUI)~~	• ~~INA 101(f)~~	~~Two or more convictions for driving under the influence during the statutory period~~

[. . .]

5. Clarify that advance parole constitutes a "parole" entry for INA § 245(a) adjustment.

The present Temporary Protected Status (TPS) advance parole policy—that TPS advance parole does not constitute either an "admission" or a "parole" for purposes of adjustment of status under INA § 245(a)—contravenes decades of USCIS policy benefiting vulnerable immigrants, and has no lawful basis. Contrary to the Administrative Appeals Office (AAO) decision in *Matter of Z-R-Z-C-*,[14] the plain language of the statutory TPS travel provision in the Miscellaneous and Technical Immigration and Naturalization Amendments Act of 1991 (MTINA) makes clear that upon return from authorized travel, a person with TPS is "inspected and admitted."[15] Alternatively, the TPS regulations state that such a person is "inspected and paroled" into the United States upon return from authorized travel.[16] Whether "admitted" pursuant to the MTINA statutory TPS travel provisions, or "paroled" pursuant to the TPS regulations, a TPS holder who is permitted to enter the United States following authorized travel abroad satisfies the threshold requirement for adjustment of status.

The AAO, in *Matter of Z-R-Z-C-,* conflated "admission" or manner of entry with "immigration status." It then erroneously claimed that TPS holders returning to the United States after a grant of advance parole and travel, would return to the "status" of being present without being admitted. However, "being present without being admitted" is an inadmissibility ground, not an immigration "status." As a consequence, immediate relatives of U.S. citizens, among others, who were previously eligible for adjustment, have been erroneously denied adjustment. TPS holders possess TPS status because the U.S. government has found their country of origin to be an untenable place for them to return. Yet, with adjustment newly barred, the only way to gain permanent status and remain unified with their U.S. citizen or permanent resident family members requires consular processing—which would take place in that very country from which they fled and to which they cannot safely return for any significant length of time, if at all.

We urge USCIS to reverse its decision to adopt *Matter of Z-R-Z-C* and update the Policy Manual to include clear guidance that advance parole of any kind, including TPS travel permission or advance parole, is sufficient to meet the requirements of being "inspected and admitted or paroled" for purposes of adjustment of status under INA § 245(a).

Example: Any TPS recipient who traveled after August 20, 2020, on advance parole is no longer eligible to adjust status in the United States based on that parole entry.

We suggest the following addition to Volume 7, Part B, Chapter 2, A.3.:

Advance Parole

DHS may grant advance parole to a noncitizen based on a pending application for immigration status, a current temporary immigration status, a grant of deferred action or to any other noncitizen where permission to travel is deemed appropriate for any reason. Any type of advance parole or travel permission through which the person is paroled back into the United States, meets the "paroled into the United States" requirement.

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[14] *Matter of Z-R-Z-C-*, Adopted Decision 2020-02 (AAO Aug. 20, 2020).

[15] [2] Miscellaneous and Technical Immigration and Naturalization Amendments of 1991 (MTINA) Pub. L. 102-232, § 304(c), 105 Stat. 1733, 1749 (codified at 8 U.S.C. § 1254a).

[16] [3] 8 C.F.R. § 244.15(a) (authorizing USCIS to grant TPS holders "[p]ermission to travel abroad . . . pursuant to the [agency's] advance parole provisions").

This is an additional reason to delete the extreme vetting language described in #2 above, in particular Volume 12, Part D, Chapter 2, C.2:

Temporary Protected Status and Admission or Parole into the United States for Adjustment of Status

A grant of temporary protected status (TPS) is not an admission for purposes of adjustment of status under INA 245(a)[68] unless a circuit court has ruled otherwise.[69]

Therefore, a TPS recipient who was in the United States without having been inspected and admitted or inspected and paroled, and who was subsequently granted adjustment of status under INA 245(a), is not considered to be lawfully admitted for permanent residence for purposes of INA 318 unless:

- The circuit law where the person resided at the time of the adjustment of status considered TPS an admission for purposes of INA 245(a);
- The person was in TPS on the date he or she filed the adjustment of status application through the date USCIS approved the adjustment application; and
- The person was otherwise eligible for lawful permanent residence at the time of adjustment.[70]

A TPS recipient may travel outside of the United States temporarily with the prior consent of DHS based on INA 244(f)(3).[71] The Administrative Appeals Office (AAO) adopted decision in *Matter of Z-R-Z-C-* holds that a TPS recipient who travels outside the United States under INA 244(f)(3) using a DHS-issued travel document generally retains the same immigration status upon return as he or she had upon departure. In addition, the decision holds that a TPS recipient's return from such foreign travel does not satisfy the requirements of "inspected and admitted or paroled" into the United States for purposes of adjustment of status under INA 245(a).[72] *Matter of Z-R-Z-C-* applies only to TPS recipients who departed from and returned to the United States under INA 244(f)(3) after August 20, 2020 (the date of the AAO's Adopted Decision).

Therefore, a TPS recipient who was in the United States without inspection and admission or inspection and parole is generally not considered to be lawfully admitted for permanent residence for purposes of INA 318 in cases where the TPS recipient:

- Departed from and returned to the United States on or after August 20, 2020; and
- Adjusted status under INA 245(a) by claiming that he or she met the "inspected and admitted or paroled" eligibility requirement on the basis of that authorized foreign travel.[73]

However, a TPS recipient who was in the United States without inspection and admission or inspection and parole is generally considered lawfully admitted for permanent residence for purposes of INA 318, if he or she was otherwise eligible for lawful permanent residence at the time of adjustment, in cases where the TPS recipient:

- Departed from and returned to the United States before August 20, 2020; and
- Adjusted status under INA 245(a) by claiming that he or she met the "inspected and admitted or paroled" eligibility requirement on the basis of that authorized foreign travel.

6. Clarify that the INA § 212(a)(9)(B) unlawful presence bars can run inside the United States.

Over the past several years, USCIS adjudications involving the unlawful presence inadmissibility bars found at INA § 212(a)(9)(B) have been inconsistent. While it used to be general practice, and supported by the plain language of the statute, that the 3- and 10-year bars to inadmissibility based on unlawful presence can run while an individual is within the United States, practitioners report denials and requests for evidence from USCIS field offices requiring proof that the person remained *outside* the United States for the requisite 3 or 10 years of the bar.

The statute does not require the person to remain outside the United States (compare, for instance, with the bar at INA § 212(a)(9)(C) that requires the time to be spent outside the United States), and BIA and immigration court decisions support this. See, e.g., *In re: Jose Tapia-Cervantes*, A# 208-939-645 (BIA Dec. 21, 2018) (Tacoma, WA); *In re: Jose Armando Cruz, Evelia Don Gonzalez Cruz*, A# 087 241 021, A# 087 241 022 (BIA Apr. 9, 2014) (Houston, TX).

Nonetheless, absent clear guidance, ILRC sees inconsistency in adjudications from USCIS, and what seems to be reversal of years of policy from the AAO. See, e.g., *In Re: 11063814*, 2020 WL 9669622 (AAO Sept. 4, 2020) (Denver, CO); *Matter of G-G-M-*, 2018 WL 4069875 (AAO Aug. 14, 2018) (Phoenix, AZ). We request that USCIS issue policy guidance making it clear that the 3- and 10- year bars to admissibility based on unlawful presence continue to run regardless of whether the person is inside or outside the United States. Such guidance is in keeping with the statutory language, prior BIA decisions, and years of adjudications that followed this law.

This plain reading does not run afoul of any policy considerations—the permanent bar at INA § 212(a)(9)(C) addresses and penalizes those who illegally re-enter after a departure. That provision adequately discourages and penalizes illegal re-entry. Furthermore, the provision at INA § 212(a)(9)(C) proves that Congress can and does specify when it wants the bar to be passed only outside the United States. That language is notably absent from 212(a)(9)(B). Public policy and statutory interpretation thus require reading 212(a)(9)(B) plainly to allow the bar to run inside or outside of the United States. With clear guidance in the Policy Manual, USCIS can ensure consistent adjudications nationally.

We request that the following language be added to Volume 8, Part P:

The three- and ten-year bars for unlawful presence are found at INA § 212(a)(9)(B). These grounds of inadmissibility penalize people who stay too long in unlawful status in the United States, leave, and then apply for admission. These grounds are only triggered when the person physically departs the United States. They apply to people who originally were admitted or paroled but then stayed past the expiration of their authorization, those who entered without inspection, and those who knowingly made a false claim of U.S. citizenship to obtain permission to enter.

The unlawful presence bars are:

180 days unlawful presence: "Three-year bar." Noncitizens who (a) beginning on April 1, 1997 are unlawfully present in the United States for a continuous period of more than 180 days but less than one year, and (b) then voluntarily depart the United States before any immigration proceedings commence, and (c) then apply for admission to the United States, are inadmissible for a period of three years from the date of departure. INA § 212(a)(9)(B)(i)(I).

One year unlawful presence: "Ten-year bar." Noncitizens who (a) beginning on April 1, 1997 are unlawfully present in the United States for a continuous period of one year or more, (b) leave the United States voluntarily or by

deportation/removal, and (c) then apply for admission to the United States, are inadmissible for a period of ten years from the date of departure or removal. INA § 212(a)(9)(B)(i)(II).

These bars make someone inadmissible unless they qualify for and are granted a waiver. Once the bar has lapsed, the person is no longer inadmissible. The three years or ten years required before these bars lapse can run while the person is inside or outside of the United States.