AMERICAN IMMIGRATION LAWYERS ASSOCIATION

Policy Brief: USCIS's New Policy Weaponizes Discretion to Make It Harder to Get a Green Card

May 28, 2026

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On the campaign trail, President Trump vowed to curb unlawful migration and stop criminals from abusing the system. However, since taking office, his Administration has also systematically made it much harder for individuals, especially those from "poorer countries," to pursue legal immigration pathways. These policy changes—including travel bans, adjudication pauses, extreme vetting, and the upending of decades of settled law and policy—have undermined national security and public safety and threatened lawful immigration processing for families, workers, and businesses.

On May 21, 2026, USCIS released a policy memorandum (PM) changing how individuals can become lawful permanent residents (LPRs or green card holders), negating more than 70 years of law that has permitted individuals living in the United States to become LPRs without leaving the United States through a process known as adjustment of status (AOS).

Although framed as a clarification of congressional intent and discretionary authority, the USCIS memorandum fundamentally recharacterizes adjustment of status as an exceptional form of relief rather than a routine statutory pathway, ignoring decades of law and policy. This new policy raises significant legal, policy, and practical concerns and leaves applicants, their families, and their employers uncertain of the future.

What is Adjustment of Status?

There are two main ways to process an application for lawful permanent residence—an individual can either apply at a U.S. consulate overseas (consular processing) or at a USCIS office in the United States (adjustment of status). In 1952, Congress first enacted section 245 of the Immigration and Nationality Act (INA), establishing adjustment of status as a routine alternative for qualifying immigrants to process their green card applications. It applies to nonimmigrants across family-based, employment-based, and humanitarian classifications to avoid the burden, delay, and risk of departure for consular processing. Subsequently, Congress has repeatedly expanded the use[1] of adjustment of status, while also making it clear who was not eligible for AOS. For several decades, adjustment has been the primary path for eligible applicants who are already present in the United States to obtain lawful permanent residence, subject to statutory eligibility criteria and discretionary adjudication. Since FY 2016, on average more than a half-million individuals have adjusted their status annually. Contrary to USCIS's recent assertion, neither current law nor decades of practice treat AOS as an "extraordinary" remedy.

Populations Likely Impacted by the New Policy Memorandum

USCIS emphasizes that AOS applicants risk discretionary denials where consular processing is available. The PM applies only to applicants who seek adjustment under discretionary INA § 245(a), which applies to individuals who have been "inspected and admitted or paroled into the United States" or have an

AILA Doc. No. 26052832. (Posted 5/28/26)

approved VAWA petition and who (1) apply for adjustment, (2) are eligible to receive an immigrant visa and are admissible and (3) have an immigrant visa that is immediately available. This includes:

- Immediate relatives (including spouses, parents, and children) of U.S. citizens and lawful permanent residents
- Individuals with approved family petitions adjusting from nonimmigrant or parole status
- Employees with approved employment-based petitions adjusting from nonimmigrant status
- Diversity visa selectees
- Some special immigrants, such as religious workers
- Individuals adjusting under INA § 245 following TPS designation or who were paroled into the U.S. such as Afghan and Ukrainian parolees or DACA recipients who traveled on advance parole.

Given the significant volume of AOS applications filed annually, USCIS will likely need to target specific populations to implement this memo. To date, AILA members have reported receiving requests for evidence and new questions, primarily during interviews for family-based petitions filed by LPRs and U.S. citizens. Questions seem to indicate that the initial focus may be on those who failed to depart once their period of authorized stay ended, even though legal exceptions may allow certain individuals to adjust status.[2]

Populations That Should Not Be Impacted

Certain adjustment categories are statutorily nondiscretionary, including:

- Refugees and asylees adjusting under INA § 209
- Other statutory programs where discretion is limited or removed, including:
    - Nicaraguan Adjustment and Central American Relief Act of 1997 (NACARA), Pub. L. 105-100, Title II
    - Haitian Refugee Immigration Fairness Act of 1998 (HRIFA), Pub. L. 105-277, Div. A, § 902
    - Liberian Refugee Immigration Fairness (LRIF), Pub. L. 116-92, § 7611

These distinct adjustment classifications are not within INA § 245 and are therefore not presumptively subject to consular processing.

Implementation Raises More Questions than Answers

The memorandum raises many questions about how this new policy will be implemented and to whom it will apply. Without listing specific classifications, the PM mentions that immigrant categories that cannot obtain permanent resident status through consular processing and individuals who have nonimmigrant status that recognizes dual intent, like H-1B or L-1, may be eligible to adjust status.[3] After release of the PM, USCIS stated that "people who present applications that provide an economic benefit or otherwise are in the national interest will likely be able to continue on their current path…" However, USCIS has not provided detailed guidance on how this will be implemented, whether it applies to all employment-based cases, or whether a new test will be imposed.

Despite not having all necessary guidance, USCIS began implementing the memo on the day of publication. AILA members report that USCIS is already issuing requests for evidence based on the new memo and asking questions during adjustment interviews about why individuals are not pursuing consular processing, their ties to their home country, and why they did not return home if their status had expired.

Moreover, evidence of equities such as family hardship, humanitarian factors, or employment history is being sought. It is unclear how stringently USCIS will apply these negative factors and how many AOS cases could be denied.

More broadly, the policy reflects a shift towards more officer discretion, even in cases where statutory eligibility is otherwise established. This PM follows a line of policy memoranda attacking discretion,[4] reflecting a coordinated pivot toward treating discretion as a substantive bar rather than a balancing test, whereby officers first determine whether an applicant meets eligibility criteria in statute, then they identify any adverse factors (e.g., overstays, unauthorized employment, or fraud) and positive factors (e.g., family ties in the U.S., humanitarian considerations, and contributions in the national interest). Officers then qualitatively weigh these factors to decide whether any negative considerations outweigh the positive factors and preclude a finding of favorable exercise of discretion. Taken together, USCIS has created a standard that has not been authorized by Congress, disclosed through rulemaking, or subjected to public comment.

Practical Consequences of Increased Consular Processing

Promoting consular processing as the expected pathway for eligible individuals to secure their residency raises key concerns because Department of State (DOS) is already under considerable strain and fraught with processing delays. Since January 2025, stakeholders have faced exceptionally long visa processing delays, lack of availability to schedule appointments, repeated government technology systems breakdowns, arbitrary social media vetting, and a lack of clarity on visa availability. These delays and backlogs are compounded by the fact that in January 2026, DOS paused the adjudication of green card applications for nationals of 75 countries. By also closing AOS for these nationals, their path to green cards has hit an indefinite roadblock.

Consular processing is not just a quick trip back home to complete some paperwork. Even without the possibility of adding hundreds of thousands of new cases to DOS's workload, immigrant visa processing could take months, if not years. We can expect an increased risk of family separation, workforce disruptions, an economic downturn, and greater uncertainty for applicants integrated into U.S. communities. Individuals with pending adjustment applications or those who are eligible to file may now be forced to reckon with difficult consular delays, becoming subject to the three- and ten-year bars under INA § 212(a)(9)(B) and (C), country-specific risks, and the loss of employment authorization and advance parole during the period of departure. For these individuals with U.S. citizen children, deep community ties, and years of lawful residence, the practical consequences of this policy could be severe.

Conclusion

The May 21, 2026, USCIS policy memorandum is not a routine policy update. It is a structural reconfiguration of how USCIS conceptualizes and adjudicates adjustment of status applications, and how applicants access their pathway to permanent residence. While grounded in longstanding language regarding discretion, the PM's prioritization of consular processing may materially alter adjudications across multiple immigration categories. It creates uncertainty where Congress created clarity. It deters filings that Congress expressly authorized. It replaces transparent standards with informal officer discretion. And it imposes the consequences of departure on individuals who Congress said need not depart. We must all monitor implementation, engage with USCIS and Congress, and ensure that USCIS's policies remain consistent with the rule of law.

Combined with an unprecedented enforcement machine, the consequences are clear: expanded enforcement targeting noncriminal populations led to overcrowded detention facilities, rising deaths and unsafe detention conditions, community disruption and declining public confidence, and a destabilized economy threatening key industries.

For a true "America First" approach, we need a modernized immigration system: one that celebrates immigration as a strategic and economic asset that strengthens national security and advances U.S. economic and global interests.

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[1] *See e.g.,* P.L. 85-700 (1958)(eliminating maintenance of status requirement); P.L. 86-648 (1960)(removing bona fide nonimmigrant" requirement and adding "inspected and admitted or paroled"); P.L. 97-116 (1981)(expanding carveout from unauthorized employment bar); P.L. 99-603 (1986)(adding more bars to AOS and added 245A); P.L. 101-649 (1990)(allowing TPS to be considered lawful status for AOS purposes); P.L. 103-317(1994)(added INA 245(i) which allowed AOS for unlawfully present individuals); P.L 104-208 (1996)(added 3/10 year bars and made AOS unavailable to crewman, those who worked without authorization or failed to maintain lawful status, with certain exceptions) P.L 106-313 (2000)(enacted provisions to allow foreign workers facing lengthy delays to adjust status).

[2] *See e.g., INA 245(a); INA 245(i); INA 212(a)(9)(B).*

[3] However, footnote 20 of the PM states that standing alone, dual intent is insufficient to warrant a favorable exercise of discretion, which may impact the ability for individuals in these categories to adjust status.

[4] *See, e.g.,* "Issuance of Notices to Appear (NTAs) in Cases Involving Inadmissible and Deportable Aliens" (February 28, 2025), "Restoring Rigorous, Holistic, and Comprehensive Good Moral Character Evaluation Standard or Aliens Applying for Naturalization" (August 15, 2025), "Resumption of Personal Investigations of Aliens Applying for Naturalization (INA 335(a))" (August 22, 2025), "Special Immigrant Juvenile Classification and Deferred Action" (April 10, 2026), "Hold and Review of USCIS Benefit Applications Filed by Aliens from Additional High-Risk Countries" (January 1, 2026).