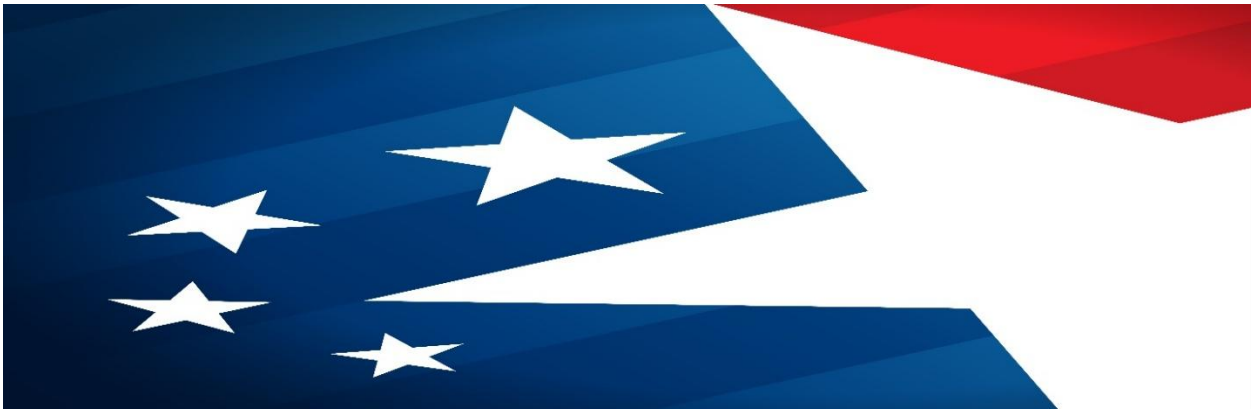

Adjustment of Status is a Matter of Discretion

On Friday, May 22, 2026, USCIS published a policy memo stating that adjustment of status is a matter of discretion and administrative grace, not intended to replace consular processing of immigrant visas. The memo directs adjudicators to apply a **totality-of-the-circumstances framework**, weighing all favorable and adverse factors, and to approve adjustment applications only where the applicant's equities justify a favorable **exercise of discretion**. In a related press release, USCIS spokesperson Zach Kahler stated, "From now on, an alien who is in the U.S. temporarily and wants a Green Card must return to their home country to apply, except in extraordinary circumstances."

This new policy is unexpected, causing much confusion, anxiety and needed clarification. This is what we know as of now:

- USCIS is directing its officers to consider all relevant factors and information in the totality of the circumstances to determine whether a favorable exercise of discretion is warranted or whether the applicant must follow the "regular" process of applying for an immigrant visa at a consular post abroad.
- It is important to note that the memo does not suggest that officers begin exercising discretion to categorically deny all I-485 applications filed. It does note future policy guidance may be issued to aid adjudicators in identifying applications for certain categories or discretion populations that may or may not warrant a positive exercise of discretion.
- The policy notes "maintaining lawful status in a dual intent nonimmigrant category is not sufficient, on its own, to warrant a favorable exercise of discretion."

- Totality of the Circumstances Analysis, RFEs, and asking questions during interviews about why applicants elected not to apply for an immigrant visa abroad may be commonplace moving forward. Officers are specifically instructed to weigh the following as:

  Adverse factors:

  - Violations of immigration law or conditions of prior status
  - Fraud or false testimony in dealings with USCIS or any government agency
  - Conduct inconsistent with the purpose of the nonimmigrant or parole status
  - Failure to depart when the purpose of admission or parole was accomplished
  - Applying for AOS in a category where consular processing is available
  - Intent to circumvent the ordinary consular process (preconceived intent)

  Positive factors:

  - Family ties in the United States (U.S. citizen or LPR spouse/children), particularly where separation would cause hardship
  - Applicant's moral character
  - National interest considerations, including applications that present an economic benefit
  - Long-term lawful presence and community integration (employment history, tax records, civic involvement, community letters)
  - Evidence of good moral character (no criminal history, charitable contributions, professional accomplishments)
  - Financial hardship and expense to travel home to consular process or to leave work for a period of time
  - CSPA age is frozen until final adjudication of the I-485 application. If the I-485 application is denied, then the child will likely lose CSPA protection and may age out depriving the child of the immigration benefit under their parent

- The new memo explicitly states that the mere absence of adverse factors does not establish sufficient equities. To overcome adverse factors (**such as overstay** or status violation), applicants must show "unusual or even outstanding equities."

- If you have an option to extend your H1B or L when filing an I-485, do so and do not rely solely on an EAD (work authorization) for employment based on a pending I-485.
- If an adjustment of status application is denied and underlying nonimmigrant status is not being maintained, removal proceedings may be initiated.
- If you are preparing to file an I-485, prepare a package documenting positive discretionary factors to include with the application.
- Be prepared at the interview for questions relating to the new policy. These may include:
    - Why did you apply for AOS instead of consular processing?
    - Are there any factors that would prevent you from consular processing?
    - Why did you remain in the United States after your nonimmigrant status/authorized period of stay expired?
    - What family or other ties do you have in your home country?

Other Legal Considerations

• Consider filing the I-130 relative petition or I-140 immigrant petition indicating "immigrant visa processing" even if you later decide to file for AOS in the United States. This avoids having to file an I-824 and delaying the case to initiate consular processing. Current policy is for USCIS to automatically transfer an I-130 or I-140 from the NVC to USCIS when an I-485 application is filed. However, if "adjustment of status" is indicated on the I-130 or I-140 petition and the beneficiaries then apply for consular processing, an I-824 must be filed to transfer the petition from USCIS to the NVC for immigrant visa processing.

• Unlawful Presence 3/10-year bars will apply if one departs the U.S. to consular process. If an individual who has accrued over 180 days of unlawful presence leaves to consular process, it constitutes a "departure" for purposes of triggering the 3 yr or 10 yr ULP presence bars.

• Child Status Protection Act (CSPA) considerations: USCIS policy guidance says that if a child's CSPA age is frozen under 21 years of age that the CSPA age is frozen until final adjudication of the I-485 application. If the I-485 application is denied (and not renewed in removal proceedings), then the child will likely lose CSPA protection and may age out.

Source: USCIS, AILA