

Submitted via email to: [USCISPolicyManual@uscis.dhs.gov](mailto:USCISPolicyManual@uscis.dhs.gov)

August 13, 2020

U.S. Department of Homeland Security  
U.S. Citizenship and Immigration Services  
Office of the Director  
20 Massachusetts Avenue, N.W.  
Washington, D.C. 20529

**Re: Opposition to Changes to USCIS Policy Manual, Applying Discretion in USCIS Adjudications, 1 USCIS-PM 8 and 10 USCIS-PM 5**

To Whom It May Concern:

As over 100 organizations committed to advancing the rights of immigrant communities, we write in strong opposition to recent changes made to USCIS Policy Manual Volume 1, Chapter 8 and Volume 10, Chapter 5, announced by USCIS on July 15, 2020<sup>1</sup> regarding the use of discretion in the adjudication process for various applications. We urge you to eliminate these policy changes in light of the devastating impact they will have on the lives of immigrant applicants, the onerous burdens they will place on those seeking protections and benefits, and the significant delays they will cause in processing and adjudication of applications.

We are deeply troubled by and skeptical of the agency's decision to introduce policy changes that will lead to significant administrative inefficiencies and delays at the very time when the agency is threatening furloughs and making desperate asks to Congress for more money.<sup>2</sup> The following encompasses our core objections to the changes.

**A. The Policy Changes Place Onerous Requirements on Applications for Life-Sustaining Benefits**

In practice, the agency's policy changes will require immigrants submitting any application listed in Volume 1, Chapter 8<sup>3</sup> of the policy manual to amass a significantly increased amount of evidence to support their application—a time and resource-intensive task that most immigrants will not have capacity to fulfill. This added burden will prohibit hundreds of thousands of immigrants—including domestic violence and trafficking survivors, asylum seekers, refugees, beneficiaries of Deferred Action for Childhood Arrivals, and children—from gaining critical and urgently-needed benefits and relief. In many instances, these benefits are all that stands between a person being permanently separated from their loved ones, unable to financially support their families, or returned to life-threatening harm.

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<sup>1</sup> USCIS, *Applying Discretion in USCIS Adjudications* (July 15, 2020)

<https://www.uscis.gov/sites/default/files/document/policy-manual-updates/20200715-Discretion.pdf>

<sup>2</sup> Hamed Aleaziz, BuzzFeed, "The Immigration System Is Set To Come To A Near Halt And No One Is Paying Attention," June 30, 2020, <https://www.buzzfeednews.com/article/hamedaleaziz/immigration-system-budget-cuts>.

<sup>3</sup> A non-exhaustive list of applications involving discretion now subject to the new discretionary analysis can be found here: <https://www.uscis.gov/policy-manual/volume-1-part-e-chapter-8>.

Until now, if an immigrant met the eligibility requirements for many of the USCIS applications encompassed in the policy, they would usually receive the benefit for which they applied, barring a negative factor. Under the new policies, officers are required to engage in a detailed discretionary analysis and provide written documentation of their discretionary decision for every adjudicated application for which there is any even slight negative factor—whether a positive or negative outcome results. The officers will no longer presuppose an exercise of discretion in favor of an immigrant who is relief-eligible in the absence of significant negative factors. In other words, the new discretionary process intentionally shifts a long-applied analysis in favor of the immigrant and instead favors the denial of benefits. This shifting burden will transform the United States benefits adjudication process into one that favors exclusion over inclusion.

The policy changes also place immigrants in a defensive posture from the initiation of applications and therefore convert the traditional affirmative, non-adversarial nature of USCIS adjudications into a process more akin to an immigration court hearing. In practice, even when an immigrant has no serious negative equities and meets the eligibility requirements for an application, they will bear a burden of producing evidence of family ties, community involvement, employment, and education to demonstrate positive equities. This evidence is the same as what immigrants usually gather over the course of many months for full hearings in immigration court; but, in this context, immigrant applicants will have a condensed timeline to amass that evidence, which will be presented to an anonymous adjudicator with no clear timeline for a response and no opportunity for the individual immigrant to make a case in-person. USCIS is tasked with adjudicating benefits, not functioning as a pseudo-enforcement agency as the new changes envision.

For low-income immigrants who cannot afford representation and are submitting applications *pro se*, amassing substantial evidence of positive equities will be a near-impossible task. This is particularly the case given the realities of living in this country as a low-income immigrant, which often include working multiple jobs with insufficient time for evidence gathering. These same immigrants desperately need and rely upon applied-for benefits for daily survival.<sup>4</sup> Furthermore, language barriers will prevent many immigrants from effectively collecting evidence of positive equities or understanding the importance of such evidence to the strength of an application. Even for individuals with legal counsel, the new analysis places significant time and resource constraints on already overwhelmed immigration attorneys.

## **B. The Policy Changes Go Beyond the Scope of the Agency’s Authority and Undermine Immigrants’ Ability to Work**

The discretionary analysis added under 10 USCIS-PM 5 for adjudication of employment authorization for qualified applicants under 8 C.F.R. § 274a.12 (c) will severely impact applicants’ ability to self-support while awaiting USCIS action in their pending cases. Among the persons impacted in this group are: individuals applying for family-based adjustment of status, cancellation of removal, and those who have been ordered removed, but remain in the

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<sup>4</sup> See *D.H.S. v. Regents of the Uni. Of C.A.*, 591 U.S. \_\_\_\_ (slip op., at 23) (2020) (quoting *Encino Motorcars, LLC v. Navarro*, 579 U.S. \_\_\_\_, \_\_\_\_ (slip op., at 9) (2016)) (“When an agency changes course ... it must ‘be cognizant that longstanding policies may have engendered serious reliance interests that must be taken into account.’”).

U.S.<sup>5</sup> Due to the extraordinarily long wait periods on agency or immigration court adjudication of such applications, immigrant applicants depend on a quick work authorization process for basic economic survival. For example, current processing times for adjustment applications can run as long as three years.<sup>6</sup> The adjudication period for cancellation applications is similarly delayed with an estimated one million such applications currently pending before immigration courts.<sup>7</sup>

The policy changes will deprive these immigrants of the long-held assurance of employment authorization while they await lengthy adjudication times on outstanding applications for more permanent relief.<sup>8</sup> Individuals could wait years simply to obtain approval to work, placing enormous economic strains on immigrants, their families, and any U.S. citizen and lawfully present relatives who will be forced to support family members with pending applications for extended periods of time.

Furthermore, the extension of a detailed discretionary analysis to otherwise routine adjudications of work authorization for those with pending applications oversteps the agency's power as promulgated in the authorizing regulations. Specifically, the two regulations that reference discretion in the adjudication of these applications limit the agency's discretion to the determination of duration of the work authorization and to issues of "economic necessity."<sup>9</sup> In other words, expanding discretion to include a wide range of factors—more than 22 are outlined in the policy manual changes—is outside these two areas and goes beyond the discretion envisioned under the regulations. If the agency wants to apply unfettered discretion in this context, it is required to engage in the formal rulemaking process to promulgate a new rule that supports such changes.

### **C. The Policy Changes Intentionally Narrow an Immigrant's Recourse for Appeal**

By requiring a detailed discretionary analysis on a wide range of applications, the agency also decreases the ability of applicants to find recourse on a negative decision via appeal. When a USCIS officer adjudicates any application, certain final decisions can be appealed to the Administrative Appeals Office (AAO) or the Board of Immigration Appeals (BIA). If the decision on the application is based on an officer's discretion rather than merely whether the person applying met specific eligibility requirements, in practice, the AAO and BIA often give strong deference to the USCIS officer's decision. Furthermore, under the policy changes, even when an issue on appeal relates to an applicant's eligibility, the added discretionary analysis makes administrative appellate review more complex. In other words, the policy changes add unnecessary complexity to the review process and make it less likely for the person who applied to win an appeal overturning that officer's decision.

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<sup>5</sup> A full list of the applications included under this regulation can be found here: [https://www.ecfr.gov/cgi-bin/text-idx?SID=21dafbc62141be9d8ca4921525bd3441&mc=true&node=se8.1.274a\\_112&rgn=div8](https://www.ecfr.gov/cgi-bin/text-idx?SID=21dafbc62141be9d8ca4921525bd3441&mc=true&node=se8.1.274a_112&rgn=div8).

<sup>6</sup> "Check Case Processing Times," United States Citizenship and Immigration Services (USCIS), <https://egov.uscis.gov/processing-times/>.

<sup>7</sup> "Immigration Court Backlog Tool," TRAC Immigration, [https://trac.syr.edu/phptools/immigration/court\\_backlog/](https://trac.syr.edu/phptools/immigration/court_backlog/).

<sup>8</sup> For more than thirty years—since the passage of 8 C.F.R. § 274a.12(c) in 1987—immigrant applicants have relied upon relatively rapid work authorization during the pendency of these larger applications.

<sup>9</sup> 8 C.F.R. § 274a.12(c); 8 C.F.R. § 274a.13.

#### **D. The Policy Changes' Overemphasis on Criminal Record Will Harm Black and Brown Immigrants**

The added layers of discretionary analysis proposed in the new rules will also disproportionately impact immigrants with any involvement in the criminal legal system, therefore harming primarily Black and Brown immigrants who are overrepresented in the system. Specifically, the policy changes list explicit discretionary factors that officers should consider in their analysis including: “evidence regarding respect of law and order,” “criminal history” and, “criminal tendencies reflected by a single serious crime.”<sup>10</sup> Under these over-inclusive and vague categories, even individuals with minimal involvement in the criminal legal system—such as arrest with no subsequent charges or convictions—will be at a disadvantage without overwhelming positive equities, proof of those equities, and help in amassing evidence of such. In practice, any existence of any hint of a criminal history coupled with the required discretionary analysis and written decision will likely result in a denial.

In light of the disproportionate representation of Black and Brown people in the criminal legal system—which results from the over-policing of Black and Brown communities and systemic racial biases and injustices—Black and Brown immigrants applying for benefits will be more likely to be denied.<sup>11</sup> Decades of racist policing and discriminatory administration of the criminal legal system means that Black and Brown immigrants are far more likely to face arrest, suffer convictions, and be involved in the criminal legal system as compared to white immigrants.<sup>12</sup> The agency’s policy changes subject these immigrants to additional harm by triggering more negative consequences flowing from this unjust and racist system. Furthermore, by taking an overly punitive approach that places heavy emphasis on the existence of a criminal record as a weighty negative equity, the new policies impose a double-punishment on largely Black and Brown immigrants who have already served their full sentences and complied with the requirements and consequences of the criminal legal system.

#### **E. The Policy Changes Will Lead to Severe Administrative Inefficiencies, Significant Delays, and Devastating Consequences for Immigrants**

The new discretionary adjudication policies also impose significant administrative inefficiencies and will result in significant delays of adjudication of applications. These delays will have real-life consequences for immigrant applicants, particularly those who want and need to work lawfully to survive.

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<sup>10</sup> See 1 USCIS-PM 8, <https://www.uscis.gov/policy-manual/volume-1-part-e-chapter-8>.

<sup>11</sup> See, e.g., Emma Pierson *et al.*, Nature Human Behavior, “A large-scale analysis of racial disparities in police stops across the United States,” Mar. 2020, <https://5harad.com/papers/100M-stops.pdf>; “A Tale of Two Countries: Racially Targeted Arrests in the Era of Marijuana Reform,” American Civil Liberties Union, April 20, 2020, <https://www.aclu.org/report/tale-two-countries-racially-targeted-arrests-era-marijuana-reform>

<sup>12</sup> See, e.g., “Report to the United Nations on Racial Disparities in the U.S. Criminal Justice System,” The Sentencing Project, April 19, 2018; <https://www.sentencingproject.org/publications/un-report-on-racial-disparities/>; “Black Lives Matter: Elimination Racial Inequity in the Criminal Justice System,” The Sentencing Project, February 2, 2015, <https://www.sentencingproject.org/publications/black-lives-matter-eliminating-racial-inequity-in-the-criminal-justice-system/>; “Visualizing the racial disparities in mass incarceration,” Prison Policy Institute, July 27, 2020, <https://www.prisonpolicy.org/blog/2020/07/27/disparities/>.

Under the policy changes, officers could spend months or years adjudicating even the most basic applications. The policy changes will lead to longer adjudication times not only for employment authorization, but also for applicants seeking Temporary Protected Status (TPS), employment visas, and benefits of all kinds.<sup>13</sup> Requiring officers to offer a full written analysis of extensive evidence for applications as routine as employment authorization during the pendency of another application will slow down officers' ability to move onto new applications quickly, adding to the already severe agency backlog. Immigrants *already* wait months and months to receive a response regarding an application or renewal for work authorization. Under the new system, this timeline could be doubled or tripled—and since the analysis will be different between each application, predictability of timing for a response will decrease too.

The added time, work, and analysis imposed by these policy change belie the current financial reality USCIS itself claims in hearings before Congress. The agency has threatened to implement massive furloughs in light of an alleged budget shortfall and has made pleas to members of Congress for funding to support the agency. Asking Congress for money to support its activities, while simultaneously adding extensive, unnecessary work to the adjudication of basic, routine applications suggests either a complete mismanagement of the agency or intentional efforts to discourage immigrants from receiving critical benefits and relief.

## **CONCLUSION**

Immigrants already face enormous wait-times and backlogs in seeking the status and benefits they need to flourish in this country. The policy manual updates referenced here make sweeping changes to the discretionary adjudication process itself and improperly expand that discretion to a wider range of applications to the detriment of immigrant families. These changes will result in administrative inefficiencies, significant backlogs, and delays that will make it nearly impossible for hundreds of thousands of immigrants to obtain the benefits and authorizations they need to succeed. They also layer particular harm and punishment on Black and Brown immigrant communities by adding more punitive consequences to any prior involvement in the criminal legal system. On behalf of the communities we represent, we strongly urge you to rescind these policy manual changes.

Sincerely,

National Immigrant Justice Center  
American Immigration Council  
American Immigration Lawyers Association  
National Immigration Law Center  
Kids in Need of Defense  
Immigrant Legal Resource Center  
Black Alliance for Just Immigration (BAJI)  
Asian Americans Advancing Justice (AAJC)  
Coalition for Humane Immigrant Rights (CHIRLA)

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<sup>13</sup> In a recent House Judiciary Committee USCIS Oversight Hearing, held on July 20, 2020, USCIS Deputy Director for Policy, Joseph Edlow, testified that at this time USCIS has a backlog of 2.5 million applications that have not been processed and another 2.5 awaiting processing times. These recent policy manual changes will severely burden an already-burdened and backlogged system.

National Center for Lesbian Rights  
National Partnership for New Americans  
Center for Gender & Refugee Studies  
Women's Refugee Commission  
Center for Victims of Torture  
Immigrant Legal Defense  
Lutheran Immigration and Refugee Service  
Immigrant Defense Project  
Legal Aid Justice Center  
International Refugee Assistance Project  
OneAmerica  
Alianza Nacional de Campesinas  
National Network for Immigrant & Refugee Rights  
Transgender Law Center  
Asian American Legal Defense and Education Fund (AALDEF)  
Human Rights First  
Southeast Asian Resource Action Center  
Refugee Women's Alliance  
International Rescue Committee  
American Friends Service Committee  
SPLC Action Fund  
Americans for Immigrant Justice  
Immigrant Legal Advocacy Project  
Tahirih Justice Center  
National Asian Pacific American Women's Forum (NAPAWF)  
Hispanic Federation  
South Asian Americans Leading Together (SAALT)  
AsylumWorks  
Immigrant Defenders Law Center  
Alianza Americas  
Families Belong Together  
Al Otro Lado  
Immigrant Justice Corps  
Young Center for Immigrant Children's Rights  
Asian Pacific Islander Legal Outreach  
Coalition to Abolish Slavery & Trafficking (CAST)  
National Council of Jewish Women  
Capital Area Immigrants' Rights (CAIR) Coalition  
Aldea - The People's Justice Center  
UDC Law Immigration and Human Rights Clinic  
NWI Resist  
Immigrant and Non-Citizen Rights Clinic, CUNY School of Law  
Bonding Against Adversity  
Khmer Anti-deportation Advocacy Group (KhAAG)  
Southeast Asia Resource Action Center  
Columbia Law School Immigrants' Rights Clinic

Massachusetts Immigrant and Refugee Advocacy Coalition  
New York Immigration Coalition  
HIAS  
HIAS Pennsylvania  
Mi Familia Vota Education Fund, Nevada  
Unitarian Universalist Service Committee  
Friends of Miami-Dade Detainees  
Boulder Valley Unitarian Universalist Fellowship Immigration Justice Task Force  
Immigrant & Refugee Services, Catholic Charities, Archdiocese of New York  
Still Waters Anti-trafficking Program  
Witness at the Border  
Illinois Coalition for Immigrant and Refugee Rights  
Massachusetts Law Reform Institute  
Acadiana Advocates for Immigrants in Detention  
National Korean American Service & Education Consortium  
Washington Defender Association  
Jefferson County Immigrant Rights Advocates  
Jobs With Justice  
Snohomish Immigration Advocacy  
Louisiana Advocates for Immigrants in Detention  
Michigan Immigrant Rights Center  
United Food and Commercial Workers Local 1445  
Human Rights Initiative of North Texas  
Union for Reform Judaism  
Central American Resource Center of California (CARECEN L.A.)  
Central American Resource Center of Northern California (CARACEN S.F.)  
Asian Americans Advancing Justice - Los Angeles  
Wind of the Spirit Immigrant Resource Center  
Rocky Mountain Immigrant Advocacy Network  
Mariposa Legal, program of COMMON Foundation  
Rian Immigrant Center  
Harvard Immigration and Refugee Clinical Program  
UnidosUS  
Political Asylum Immigration Representation (PAIR) Project  
Catholic Legal Immigration Network, Inc.  
Desert Support for Asylum Seekers  
Freedom Network USA  
Casa de Esperanza: National Latin Network for Healthy Families and Communities  
Make the Road New York  
Promise Arizona  
Ayuda  
Immigration Justice Clinic, John Jay Legal Services, Inc.  
Pangea Legal Services