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Policy Paper: Discretion in Adjustment of Status

Synopsis

This piece analyzes the practical impact of the May 21 USCIS memo titled "Adjustment of Status is a Matter of Discretion and Administrative Grace, and an Extraordinary Relief that Permits Applicants to Dispense with the Ordinary Consular Visa Process" (herein "May 21 memo").[1] Predictions will be made regarding potential ways the Administration could enforce the memo's purported objectives. Contrary to most media reports, the May 21 memo would not henceforth eliminate the option to adjust status to permanent residency inside the U.S. for most non-immigrant visa holders. With that said, persons who lack lawful status but are otherwise eligible to adjust status under the INA will face heightened scrutiny. Given the memo's unconventional interpretation of "intent," it is yet unclear how persons on certain non-immigrant visas will be affected.

Rhetoric, policy, and legislative history

The USCIS press release states:

> *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. . . . Non-immigrants, like students, temporary workers, or people on tourist visas, come to the U.S. for a short time and for a specific purpose. Our system is designed for them to leave when their visit is over. Their visit should not function as the first step in the Green Card process.*[2]

The above statement is a simplification of the ruling in *Matter of Blas*, 15 I&N Dec. 626 (BIA 1974), which describes adjustment of status as an "extraordinary" departure from the default of consular processing and "a matter of discretion and administrative grace." To the extent that *Blas* is good law, it does not change the fact that Congress has created elaborate rules in the INA governing eligibility for adjustment of status.

The relevant statute, INA § 245, was first created in 1952. House Judiciary Committee stated in 1958 that it "has for a considerable period of time watched with apprehension the steadily mounting number of cases in which aliens . . . had to undergo a cumbersome procedure" involving "applying for an immigrant visa in . . . consular offices in Canada," a practice then known as pre-examination. The Committee recommended that non-citizens be able to "adjust [their] status through administrative procedure without resorting to the fallacious device of departing from the United States for the sole purpose of obtaining an

[1] U.S. Citizenship & Immigr. Servs., *Policy Memorandum PM-602-0199, Adjustment of Status and Discretion* (May 21, 2026).
[2] U.S. Citizenship & Immigr. Servs., *U.S. Citizenship and Immigration Services Will Grant Adjustment of Status Only in Extraordinary Circumstances*, (May 22, 2026).

immigrant visa abroad and immediately returning."[3] In subsequent years, Congress has expanded the types of nonimmigrants eligible to adjust status.

The May 21 memo fully acknowledges the intent of Congress, although it stresses that adjustment is ultimately within the discretion of executive branch officers. See INA § 245(a). The memo merely restates existing law. All immigration benefits are discretionary, after all.

In one significant area, the text of the May 21 memo appears to contradict the accompanying press release. The memo states:

> *Generally, when a nonimmigrant or parolee fails to depart as required and instead seeks adjustment of status, it contravenes these Congressional expectations, though USCIS acknowledges exceptions including nonimmigrant categories with dual intent . . . .*[4]

The press release claims that temporary workers seeking green cards—many of whom are on dual intent non-immigrant visas like the H-1B—will have to depart the U.S. for consular processing. The memo says no such thing. If anything, it "reminds [USCIS adjudicators] that applying for adjustment of status is not inconsistent with simultaneously maintaining nonimmigrant status in a category with dual intent." Therefore, the rhetoric used in the press release should be viewed as aspirational at best.

However, the memo's supposed leniency towards dual intent visa holders betrays what is arguably an incorrect interpretation of the meaning of intent. In the INA, all noncitizens seeking admission shall be presumed to be immigrants unless they affirmatively demonstrate non-immigrant intent. 8 U.S.C. § 1184(b). "Dual intent" refers to an exemption from the need to demonstrate non-immigrant intent "to the satisfaction of the consular officer, at the time of application for a visa, and the immigration officers, at the time of application for admission." Id. Non-immigrant intent is typically proven through evidence of one's unwillingness to abandon their foreign residence. To those applying for the H-1B and L-1, among other visas, being the beneficiary of an immigrant preference category does not constitute evidence of an intention to abandon foreign residence, see Id. § 1184(h), confirming that intent is a rule of evidence concerning one's desire to immigrate at the time of application or admission.

By distinguishing between non-immigrant visas based on dual intent (or lack thereof) for the purpose of adjustment of status, the memo appears to construe intent to mean one's intent at the time of adjustment. Misalignment with one's stated intent at the time of admission is purportedly illegitimate and subject to scrutiny. However, barring a few exceptions like the J-1 visa, which necessitates consular processing by requiring the beneficiary to depart the U.S. for two years prior to obtaining an immigration benefit, the type of non-immigrant visa one currently holds does not affect eligibility for adjustment of status. The May 21 memo implicitly invents a new eligibility category.

With that said, the legislative history of INA § 245 does lend some support to the idea that a nonimmigrant's purported intent at the time of admission is not irrelevant to his eligibility to adjust status. Subsection 245(a) as enacted in 1952 originally read:

> *The status of an alien who was lawfully admitted to the United States as a bona fide nonimmigrant and who is continuing to maintain that status may be adjusted by the Attorney General in his discretion (under such regulations as he may prescribe to ensure the application of*

[3] 104 Cong. Rec. (1958), pt. 12.
[4] USCIS, *supra* note 1.

this paragraph solely to the cases of aliens who entered the United States in good faith as nonimmigrants).[5]

In other words, a nonimmigrant could not adjust status to permanent residency if they intentionally misrepresented nonimmigrant intent. Granted, Congress removed from the statutory text "aliens who entered the United States in good faith as nonimmigrants" in 1958 and the term "bona fide nonimmigrant" in 1960. However, decisions by the BIA and federal courts have continued to treat post-admission behavior indicating misrepresentation of nonimmigrant status as an adverse factor for adjustment. See *Chen v. Foley*, 385 F.2d 929 (6th Cir. 1967). In *Chen*, the Sixth Circuit wrote:

> *[T]he record of the respondent's employment and his persistent efforts to adjust his immigration status raises a doubt as to the bona fides of respondent's entry as a nonimmigrant visitor for pleasure. We have consistently held that a preconceived intent to establish permanent residence via the nonimmigrant route . . . is a factor to be considered in denying relief under Section 245.*

In *Patel v. INS*, 738 F.2d 239 (7th Cir. 1984), the Seventh Circuit concluded that "Absence of good faith entry is considered a critical adverse factor in an application for adjustment of status." The May 21 memo itself quoted the Fourth Circuit's holding in *Lee v. USCIS*, 592 F.3d 612 (4th Cir. 2010):

> *Congress has limited the use of the adjustment-of-status mechanism to lawfully present aliens in order "to discourage intending immigrants from moving to the United States before becoming fully eligible for permanent residence . . . ."*

Common adjustment of status scenarios

The following is a list of the common scenarios non-citizens find themselves in when they seek to adjust status to permanent residency. In this analysis, it is assumed that scenarios 1 and 2 do not involve any unlawful presence or status violations.

1. Dual intent – People who are on dual intent non-immigrant visas like the H-1B, E-2, O-1, or L-1 at the time of adjustment.
2. Non-dual intent – People who are on non-dual intent non-immigrant visas like the F-1 or B-2 at the time of adjustment.
3. Status violations – People on non-immigrant visas, which may or may not permit dual intent, who have violated the terms of their stay at the time of adjustment. For example, an F-1 student or B-2 tourist who has engaged in unauthorized employment would be in violation of status. This also refers to people who have overstayed their non-immigrant visas.
4. Consular processing – People who have either 1) entered without inspection and have since become eligible for permanent residency through a U.S. Citizen or LPR relative petitioner or 2) obtained a non-humanitarian benefit from USCIS, such as an I-140, after entering through a non-immigrant visa and violating its status.
5. Other – Cancellation of removal, Cuban Adjustment Act, asylees, refugees, certain Special Immigrants etc.

In scenario 1, adjustment typically occurs through employment sponsorship and upon the approval of an I-140, Immigrant Petition for Alien Worker. Note that someone who has a dual intent non-immigrant

[5] 66 Stat. 217 (1952).

visa like the H-1B may nonetheless adjust status through U.S. Citizen or LPR relative petitioners. Such persons may or may not have a green card sponsorship from their employer.

In scenario 2, adjustment typically occurs through marriage to U.S. Citizens and upon the approval of an I-130, Petition for Alien Relative. The authorized period of stay for most non-dual intent temporary non-immigrant visas are rather short such that it is impossible for most people in scenario 2 to remain in lawful status on U.S. soil by the time their visas become current, at least without filing Form I-539 to extend or change their status. After all, the number of visas that could be issued annually pursuant to employment and family-based preferences are capped, causing long wait times, not to mention all the lengthy procedures preceding the assignment of a priority date, such as PERMs.

In scenario 3, adjustment occurs mostly through marriage to U.S. Citizen petitioners or through petitions by adult U.S. Citizen children. Immediate relatives of U.S. Citizens (spouses, parents, and unmarried children under 21) who came here legally through either a visa or parole do not need to leave the country for consular processing even if they overstayed their visas. Their unlawful status and/or unauthorized employment do not bar adjustment. 8 U.S.C. § 1255(c)(2). Scenario 3 also includes those who have submitted an immigrant petition or a labor certification on or before April 30, 2001. INA § 245(i). However, grounds of inadmissibility (unlawful presence, fraud, etc.) may still apply. They will have to be waived provisionally with USCIS.

The people in scenario 4, unless they are grandfathered under INA § 245(i), generally cannot adjust status. They must depart for consular processing after obtaining their I-130/I-140 and waiving any grounds of inadmissibility. However, many individuals protected by Temporary Protected Status (TPS) or Deferred Action for Childhood Arrivals (DACA) satisfy the "inspection or parole" requirement for adjustment of status by departing the U.S. and being readmitted pursuant to Advance Parole. Those in scenario 4 with an outstanding final order of removal may attain permanent residency through, among other procedures, Cancellation of Removal before an EOIR immigration court after their Motion to Reopen is granted.

The people in scenario 5 obtain their green cards only through adjustment of status.

Who is affected?

The May 21 memo appears to primarily affect people in scenarios 3 and 4. The memo writes:

> *With limited exceptions, the statutory scheme suggests that Congress expects aliens paroled into the United States or admitted into the United States as nonimmigrants to depart rather than pursue adjustment of status. . . . While such aliens may be otherwise eligible for adjustment of status, their contravention of this expectation and attempt to avoid the ordinary consular immigrant visa process, usually accompanied by their violation of our immigration laws, are adverse factors that the aliens may need "to offset . . . by a showing of unusual or even outstanding equities." . . . The absence of adverse factors, by itself, does not demonstrate such unusual or outstanding equities. . . . Where adjustment of status is in the discretion of USCIS, officers are reminded that they are to consider all relevant factors and information in the totality of the circumstances in exercising that discretion. For example, existing guidance directs officers to consider violations of our immigration laws or the conditions of any immigration status held, current or previous instances of fraud or false testimony in dealings with USCIS or any government agency, whether an alien's application for admission or parole violated the laws, regulations, and policies in place at the time, and any conduct of the alien after admission as a nonimmigrant or parolee inconsistent with the*

purpose of that nonimmigrant status or parole or with representations made to consular or DHS officers when applying for a visa, admission, or parole.[6]

The repeated reference to status violations shows that the memo is primarily intended to heighten scrutiny of those who are eligible for adjustment under 8 U.S.C. § 1255(c)(2) and INA § 245(i) but whose very presence in the U.S. is technically unlawful. The fact that they engage in unauthorized employment and apply for humanitarian and family-based pathways to permanent residency may be seen as evidence of having misrepresented nonimmigrant intent prior to admission. A person who entered on a B-2 visa, endured several unsuccessful marriages with U.S. Citizens resulting in multiple I-130s, and finally applied for Asylum 10 years after entry will not be deemed a "bona fide" nonimmigrant.

It is unclear how people in scenario 1 are affected. As previously mentioned, the memo acknowledges the legitimacy of the immigrant intent of those with a dual intent visa. Provided that they do not violate their status, such people might not face any scrutiny. With that said, a footnote in the memo suggests otherwise: "[M]aintaining lawful status in a dual intent nonimmigrant category is not sufficient, on its own, to warrant a favorable exercise of discretion." Hopefully, there will be more guidance forthcoming.

As for scenario 2, one might say that, despite the absence of any actual status violations, their adjustment may sometimes violate the spirit of the law. According to *The Washington Post*, there is some anecdotal evidence that

USCIS has already started asking some applicants why they did not leave the United States and return home to apply for a green card, according to two lawyers with direct knowledge of the communications. Some are also being asked why they didn't return home when their visas expired, or if there is anything preventing them from applying through a consulate.[7]

These questions were posed during green card interviews. Misalignment between one's purported non-immigrant intent at the time of admission and one's post-admission intent to immigrate, as shown by the application for adjustment, is suspect. This explains why the May 21 memo seems lenient towards dual intent visas: being exempt from attestations of non-immigrant intent means that there will be no misalignment between one's intent pre-admission and post-admission.

Suppose an F-1 student marries a U.S. Citizen a year after entering the U.S. and files the I-130 right away. Unlike in scenario 3, she is in lawful status at the time of adjustment. However, the F-1 visa is perhaps a pretext for entering the U.S. to marry and adjust status to permanent residency. Should such persons be denied adjustment? What about an F-1 student who marries a U.S. Citizen three years into her four-year academic program? The memo never draws a clear line.

Further complicating things is the fact that the F-1, unlike most non-immigrant visas, permits "duration of status" (D/S). Even after the expiration of the F-1 visa, a student can remain in lawful status as long as they are pursuing a "full course of study" and "making normal progress toward completion of their educational objective." See 8 C.F.R. §§ 214.2(f)(5)-(7). There is no need to file Form I-539 as long as the student has a valid I-20. On August 20, 2025, DHS published a Notice of Proposed Rulemaking (NPRM) to end D/S for the F-1 visa and replace it with a fixed 4-year period of admission that can be renewed at the discretion of USCIS. The proposal was justified as a way to crack down on "forever students" who enroll

[6] USCIS, *supra* note 1.
[7] Lauren Kaori Gurley & David Nakamura, *Trump Administration Begins Making New Requests of Green-Card Applicants*, Wash. Post (May 27, 2026).

in school simply to maintain non-immigrant status in perpetuity, which speaks to immigrant intent.[8] The rationale shows that the Administration is suspicious of changes in one's intent post-admission even if there are no status violations on paper. USCIS may henceforth treat repeated extensions of non-immigrant status as an adverse factor. In any case, it is too early to tell how adjustment will play out for scenario 2.

As for scenario 5, namely those cases in which adjustment is the only pathway to permanent residency, the memo merely says that adjustment does not contravene alleged default Congressional intent to have nonimmigrants depart the U.S. for consular processing. However, heightened scrutiny of adjustment applications may result in more denials. In a February 18 memo, DHS asserts the authority to detain refugees if they fail to adjust a year after admission. The policy is currently stayed by the U.S. District Court for the District of Massachusetts.[9]

Recommendations

To quote the May 21 memo:

> *Given the significant privileges granted to lawful permanent residents, USCIS reminds its officers that they must consider and weigh all the relevant evidence in the record, taking into account the totality of the circumstances to determine whether the alien is suitable for permanent residence and if approval of the alien's adjustment of status application is in the best interest of the United States. Adjudicators must weigh all positive and negative factors, including family ties, immigration status and history, the applicant's moral character, and any other relevant factor that bears on determining whether the alien warrants a favorable exercise of discretion. USCIS reminds officers that when they deny a benefit request, they must issue a denial notice explaining in writing the specific reasons for denial. When the denial is based on an unfavorable exercise of discretion, the denial notice must include an analysis containing the positive and negative factors considered, along with an explanation of why the negative factors outweigh the positive factors in the decision.*[10]

From now on, an adjustment of status applicant is encouraged to attach evidence of positive equities. The burden is on the applicant to prove eligibility for adjustment. In scenario 2, repeated extensions of non-immigrant status, even if facially legal, are adverse factors when adjusting status. The applicant must muster a good reason for doing so, including but not limited to legitimate business or academic activities. Moreover,

> *USCIS will carefully review the various pathways to discretionary adjustment of status as well as discrete populations of aliens applying for adjustment of status in the context of the consistent and longstanding finding that adjustment of status is an extraordinary matter of discretion and administrative grace not designed to supersede the regular consular processing of immigrant visas.*

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[8] *Establishing a Fixed Time Period of Admission and an Extension of Stay Procedure for Nonimmigrant Academic Students, Exchange Visitors, and Representatives of Foreign Information Media*, 90 Fed. Reg. 42,070 (Aug. 28, 2025) (to be codified at 8 C.F.R. pts. 214, 248, 274a).

[9] Complaint for Vacatur, Preliminary and Permanent Injunctive Relief, and Declaratory Relief Under the Administrative Procedure Act and the Constitution at 1, *Jean A. v. Noem*, No. 3:26-cv-30031 (D. Mass. Feb. 27, 2026).

[10] USCIS, *supra* note 1.

USCIS may provide policy guidance specific to certain adjustment of status categories or discrete populations of aliens . . . .[11]

Hopefully, subsequent memos will clarify what shall be done.

[11] USCIS, *supra* note 1.