

Go

JUN

OCT

NOV

19

2019

2020

2021



About this capture

[10 captures](#)

23 Aug 2019 - 17 Nov 2020

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U.S. Citizenship  
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# Chapter 10 - Legal Analysis and Use of Discretion

## Guidance

[Resources \(5\)](#)
[Appendices \(0\)](#)
[Updates \(5\)](#)

## A. Burden of Proof and Standard of Proof

In matters involving immigration benefits, the applicant always has the burden of proving that he or she is eligible to receive the immigration benefit sought.<sup>[1]</sup>

The standard of proof applied in adjustment proceedings should not be confused with the burden of proof.<sup>[2]</sup> The standard of proof relates to the persuasiveness of the evidence necessary to meet the eligibility requirements for a particular benefit.

In adjustment of status, the standard of proof is generally preponderance of the evidence, proving a claimed fact is more likely than not to be true.<sup>[3]</sup> If the applicant is unable to prove his or her eligibility for the immigration benefit by a preponderance of the evidence, the officer must request additional evidence or deny the application.<sup>[4]</sup>

## B. Discretion<sup>[5]</sup>

Most adjustment applicants may only be granted permanent resident status in the discretion of USCIS.<sup>[6]</sup>

The following table highlights the adjustment case types that involve discretion.

### Adjustment Applications Involving Discretion

[INA 245\(a\)](#). Adjustment (including family and employment based as well as the Diversity Visa Program)

<a href="https://www.uscis.gov/policy-manual/volume-7-part-a-chapter-10">https://www.uscis.gov/policy-manual/volume-7-part-a-chapter-10</a> <input type="button" value="Go"/>		JUN	OCT	NOV			
<a href="#">10 captures</a> 23 Aug 2019 - 17 Nov 2020		◀	19	▶			▼ About this capture
2019		2020		2021			
Human Trafficking Victim Adjustment							
Crime Victim Adjustment							
Asylum Adjustment							
Cuban Adjustment Act							
Former Soviet Union, Indochinese, or Iranian Parolees (Lautenberg Parolees)							
Diplomats or High Ranking Officials Unable to Return Home (Section 13 of the Act of September 11, 1957)							

The following table highlights the adjustment cases that do not involve discretion. Therefore, provided the applicant meets all eligibility requirements, USCIS must approve the application.

<b>Adjustment Applications Not Involving Discretion</b>
NACARA (Nicaraguan Adjustment and Central American Relief Act of 1997) <sup>[7]</sup>
Refugee Adjustment
HRIFA (Haitian Refugee Immigration Fairness Act of 1998) <sup>[8]</sup>
Persons Born Under Diplomatic Status
Presumption of Lawful Admission
American Indian Creation of Record

For adjustment case types that involve discretion, the exercise of favorable discretion and the approval of an adjustment application is a matter of administrative grace – meaning the application is worthy of favorable consideration.<sup>[9]</sup> For adjustment case types that involve discretion, discretion can only extend

<https://www.uscis.gov/policy-manual/volume-7-part-a-chapter-10>

Go

JUN OCT NOV

19

2019 2020 2021



10 captures

23 Aug 2019 - 17 Nov 2020

About this capture

## 1. Determining Whether Favorable Exercise of Discretion is Warranted

For adjustment case types that involve discretion, an applicant who meets the eligibility requirements contained in the law is eligible for adjustment of status but is not entitled to adjustment. The applicant has the burden of proving that discretion should be exercised in his or her favor.<sup>[10]</sup> An applicant must supply information within his or her knowledge that is relevant and material to a determination of whether adjustment is warranted.<sup>[11]</sup>

An officer must first determine whether the applicant otherwise meets the legal eligibility requirements. For example, in adjudicating an application for adjustment under [INA 245\(a\)](#), the officer first determines if the applicant is barred from applying for adjustment, is eligible to receive an immigrant visa, is admissible to the United States, and if a visa number is immediately available.

If the officer finds that the applicant meets the eligibility requirements, the officer then determines whether the application should be granted as a matter of discretion.

## 2. Issues and Factors to Consider

Absent compelling negative factors, an officer should exercise favorable discretion and approve the application.<sup>[12]</sup> If the officer finds negative factors, the officer must weigh all of the positive and negative factors in the totality of the circumstances.<sup>[13]</sup>

### *Effect of Unexecuted Removal Orders*

In cases where a removal order has been issued to an “arriving alien” but not executed, USCIS generally does not exercise favorable discretion. The USCIS officer may consult with the local Immigration and Customs Enforcement (ICE) Enforcement and Removal Operations (ERO) office concerning the merits and equities of the case and whether the removal order might be withdrawn.

If ICE withdraws or rescinds the removal order or obtains a withdrawal or rescission of the removal order from EOIR, then the local USCIS field office adjudicates the case as appropriate. If the removal order is not withdrawn or rescinded, then the removal order should be considered a significant adverse factor and any denial of adjustment may include the grounds cited in the removal order.

## 3. Proper Use of Discretion

The exercise of discretion does not mean the decision can be arbitrary, inconsistent, or dependent on intangible or imagined circumstances. At the same time, there is no calculation that lends itself to a certain conclusion.<sup>[14]</sup>

Discretionary decisions that involve complex or unusual facts, whether the outcome is favorable or unfavorable to the applicant, may require supervisory review. Further, officers may consult the Office of Chief Counsel through appropriate supervisory channels.

<https://www.uscis.gov/policy-manual/volume-7-part-a-chapter-10>

Go

JUN

OCT

NOV

19

2019

2020

2021



About this capture

[10 captures](#)

23 Aug 2019 - 17 Nov 2020

in the decision on an adjustment application.

### Summary of Adjudication Involving Discretion

Has Applicant Otherwise Met Eligibility Requirements?	Does Applicant Warrant a Favorable Exercise of Discretion?	Decision
Yes	Yes, the positive factors outweigh the negative factors	<b>Approve</b> the application. Eligibility requirements are met and a favorable exercise of discretion is warranted.
Yes	No, the negative factors outweigh the positive factors	<b>Deny</b> the application. Eligibility requirements are met but a favorable exercise of discretion is not warranted.  The officer should explain the reasons why USCIS is not exercising discretion in the applicant's favor. The officer should clearly set forth the positive and negative factors considered and why the negative factors outweigh the positive factors.
No	No, even if the positive factors outweigh the negative factors	<b>Deny</b> the application. Eligibility requirements are not met.  The officer should explain the reasons why the applicant has not met the eligibility requirements. Even if the positive factors outweigh the negative factors, discretion cannot be used to approve an application if the applicant does not meet the statutory requirements.

<https://www.uscis.gov/policy-manual/volume-7-part-a-chapter-10>

Go

JUN

OCT

NOV

19

2019

2020

2021



About this capture

10 captures

23 Aug 2019 - 17 Nov 2020

Applicant Otherwise Met Eligibility Requirements?	Warrant a Favorable Exercise of Discretion?	Decision
No	No, the negative factors outweigh the positive factors	<p><b>Deny</b> the application. Eligibility requirements are not met and a favorable exercise of discretion is not warranted.</p> <p>It is generally preferable to describe both the statutory and discretionary reasons for the denial, but an officer <u>is not required</u> to discuss the discretionary grounds where the statutory ones are clear.</p> <p>If the determination on eligibility requirements might be overturned (e.g., where there is an unsettled area of law), an officer should explain the discretionary basis for denying the case.</p> <p>The officer should explain the reasons why USCIS is not exercising discretion in favor of the applicant. The officer should clearly describe the positive and negative factors considered and why the negative factors outweigh the positive factors.</p>

## Footnotes

[^1] See [INA 291](#). See *Matter of Arthur*, 16 I&N Dec. 558 (BIA 1978). See *Matter of Rivero-Diaz*, 12 I&N Dec. 475 (BIA 1967).

[^2] The person who bears the burden of proof must submit evidence to satisfy the applicable standard of proof.

[^3] See [Matter of Chawathe \(PDF\)](#), 25 I&N Dec. 369, 375 (AAO 2010).

[^4] The law occasionally requires a higher standard of proof. For example, the higher standard of “clear and convincing evidence” is required to rebut the presumption of a prior fraudulent marriage. See [INA 245\(e\)\(3\)](#).

<https://www.uscis.gov/policy-manual/volume-7-part-a-chapter-10>

Go

JUN

OCT

NOV

◀ 19 ▶

2019

2020

2021



▼ About this capture

[10 captures](#)

23 Aug 2019 - 17 Nov 2020

[\[ ^ 6 \]](#) See [INA 243\(a\)](#).[\[ ^ 7 \]](#) See Title II of [Pub. L. 105-100 \(PDF\)](#), 111 Stat. 2160, 2193 (November 19, 1997).[\[ ^ 8 \]](#) See Division A, Section 902 of [Pub. L. 105-277 \(PDF\)](#), 112 Stat. 2681, 2681-538 (October 21, 1998).[\[ ^ 9 \]](#) See *Von Pervieux v. INS*, 572 F.2d 114, 118 (3rd Cir. 1978). See *Ameeriar v. INS*, 438 F.2d 1028, 1030 (3rd Cir. 1971). See [Matter of Marques \(PDF\)](#), 16 I&N Dec. 314 (BIA 1977).[\[ ^ 10 \]](#) See [Matter of Arai \(PDF\)](#), 13 I&N Dec. 494 (BIA 1970). See [Matter of Ortiz-Prieto \(PDF\)](#), 11 I&N Dec. 317 (BIA 1965).[\[ ^ 11 \]](#) See [Matter of Marques \(PDF\)](#), 16 I&N Dec. 314 (BIA 1977). See [Matter of Mariani \(PDF\)](#), 11 I&N Dec. 210 (BIA 1965). See [Matter of De Lucia \(PDF\)](#), 11 I&N Dec. 565 (BIA 1966). See [Matter of Francois \(PDF\)](#), 10 I&N Dec. 168 (BIA 1963). See [Matter of Pires Da Silva \(PDF\)](#), 10 I&N Dec. 191 (BIA 1963).[\[ ^ 12 \]](#) See [Matter of Arai \(PDF\)](#), 13 I&N Dec. 494 (BIA 1970). See [Matter of Lam \(PDF\)](#), 16 I&N Dec. 432 (BIA 1978).[\[ ^ 13 \]](#) For more information on discretionary factors, see Volume 1, General Policies and Procedures, Part E, Adjudication, Chapter 8, Discretionary Analysis [[1 USCIS-PM E.8](#)]. Adjustment applicants who have committed violent or dangerous crimes need to show extraordinary circumstances, not just that positive factors outweigh negative factors, for USCIS to favorably exercise discretion. See [Matter of Jean \(PDF\)](#), 23 I&N Dec. 373 (A.G. 2002). See [67 FR 78675 \(PDF\)](#), 78676-677 (Dec. 26, 2002) (codified at [8 CFR 212.7\(d\)](#)), incorporating the *Matter of Jean* standard in the broader context of [INA 212\(h\)](#) waivers of inadmissibility.[\[ ^ 14 \]](#) For more information on how to properly apply discretion, see Volume 1, General Policies and Procedures, Part E, Adjudication, Chapter 8, Discretionary Analysis [[1 USCIS-PM E.8](#)].

Current as of October 15, 2020

[Back](#)[Next](#)

U.S. Citizenship and  
Immigration Services



<https://www.uscis.gov/policy-manual/volume-7-part-a-chapter-10>

Go

JUN OCT NOV

◀ 19 ▶

2019 2020 2021



[10 captures](#)

23 Aug 2019 - 17 Nov 2020

▼ About this capture