



November 14, 2013

PM-602-0093

Policy Memorandum

SUBJECT: Adjudication of Adjustment of Status Applications for Individuals Admitted to the United States Under the Visa Waiver Program

Purpose

This policy memorandum (PM) provides guidance on the adjudication of Form I-485, Application to Register or Adjust Status, filed by immediate relatives of U.S. citizens who were last admitted under the Visa Waiver Program (VWP). This PM updates the Adjudicator's Field Manual (AFM) by adding a new section (j) to Chapter 10.3 and 23.5 (AFM Update AD11-30).

Scope

This PM applies to, and is binding on, all U.S. Citizenship and Immigration Services (USCIS) employees, unless specifically exempt.

Authority

- Immigration and Nationality Act (INA) sections 217, 245 and 245(c)(4)
- 8 CFR 245.1(b)

Background

The VWP allows qualifying foreign nationals of designated countries to enter the United States for up to 90 days to conduct business or for pleasure without first obtaining a visa.¹ Before a foreign national is admitted under the VWP, in addition to meeting certain requirements, he or she must waive the right to contest any action for removal, other than on the basis of an application for

¹ INA section 217(a)(1). Pursuant to INA section 217(a)(1), an individual seeking admission under the VWP applies for admission as a nonimmigrant, as that term is defined in INA section 101(a)(15)(B), and is provided with a waiver of the visa requirement. See INA section 212(a)(7)(B)(i)(II).

asylum.² Removal of such an individual “shall be effected without referral of the alien to an immigration judge for a determination of deportability.”³

Unlike those who enter the United States in B-1 Temporary Visitor for Business status or as a B-2 Temporary Visitor for Pleasure, individuals admitted under the VWP cannot extend the duration of their stays. Under limited circumstances, the local USCIS Director may grant a 30-day period of “Satisfactory Departure”; otherwise, the individual must depart from the United States prior to the expiration of the VWP admission period.⁴

INA section 245(c)(4) renders aliens admitted under the VWP ineligible to adjust status to that of a person admitted for permanent residence. This provision, however, includes an exception for immediate relatives of U.S. citizens.⁵ Thus, an individual admitted under the VWP who is also an immediate relative is not precluded from seeking adjustment of status, even after the VWP period has expired.

U.S. Immigration and Customs Enforcement (ICE) has authority to order the removal of a VWP overstay, including an immediate relative, under INA section 217(b) and 8 CFR 217.4(b). Numerous courts of appeals agree that, generally, a VWP overstay may not contest a removal action on the basis that he or she has filed Form I-485.⁶ However, these cases concern only the individual’s inability to contest removal. They do not address whether the Department of Homeland Security (DHS) can, as a matter of discretion, decline to seek the individual’s removal and grant adjustment if the individual is eligible. Nor do these decisions preclude a VWP overstay who is not subject to a removal order from filing a Form I-485 with USCIS.

Whether to grant adjustment to an eligible applicant is a matter entrusted to DHS discretion. USCIS exercises this discretion on behalf of DHS.

Policy

USCIS field offices shall adjudicate adjustment of status cases filed by immediate relatives of U.S. citizens who were last admitted to the United States under the VWP, in accordance with section 245 of the INA. This includes cases where Form I-485 was filed after the 90-day period of admission. Adjudication shall occur prior to referral to ICE unless:

- ICE has issued a removal order;

² INA section 217(b)(2). An application for asylum is also deemed to be an application for withholding of removal under INA section 241(b)(3). See 8 CFR 1208.3(b).

³ 8 CFR 217.4(b).

⁴ In the event of an emergency that prevents the individual from departing the United States by the 90th day, USCIS may provide a period of Satisfactory Departure not to exceed 30 days. See 8 CFR 217.3(a).

⁵ INA section 201(b)(2)(A)(i) defines “immediate relatives” of U.S. citizens and provides that they are not subject to numerical limitations.

⁶ See *Bradley v. Att’y Gen.*, 603 F.3d 235 (3rd Cir. 2010); *Lang v. Napolitano*, 596 F.3d 426 (8th Cir. 2010); *Bayo v. Napolitano*, 593 F.3d 495 (7th Cir. 2010); *McCarthy v. Mukasey*, 555 F.3d 459 (5th Cir. 2009); *Momeni v. Chertoff*, 521 F.3d 1094 (9th Cir. 2008); *Zine v. Mukasey*, 517 F.3d 535 (8th Cir. 2008); *Lacey v. Gonzales*, 499 F.3d 514 (6th Cir. 2007); *Ferry v. Gonzales*, 457 F.3d 1117 (10th Cir. 2006); *Schmitt v. Maurer*, 451 F.3d 1092 (10th Cir. 2006); *Freeman v. Gonzales*, 444 F.3d 1031 (9th Cir. 2006); see also *Nose v. Att’y Gen.*, 993 F.2d 75 (5th Cir. 1993).

- The adjustment applicant is under investigation for, has been arrested for (without disposition), or has been convicted of an egregious public safety offense as described in Part IV of USCIS Policy Memo 602-0050, “Revised Guidance for the Referral of Cases and Issuance of Notices to Appear (NTAs) in Cases Involving Inadmissible and Removable Aliens” (November 7, 2011); or
- There are fraud and/or national security issues that require resolution.⁷

Removal Order

INA section 245 provides that applicants who were inspected and admitted or paroled into the United States may be adjusted by the Secretary of Homeland Security,⁸ in his or her discretion.⁹ If ICE has issued a removal order for violation of INA section 217, USCIS should interpret the entry of that order as the Secretary exercising his or her discretion not to adjust the status of that individual. Therefore, as long as the individual remains subject to a section 217 removal order, USCIS should deny the Form I-485 *as a matter of discretion*. If ICE withdraws or rescinds the removal order, USCIS can then approve the application as appropriate.

Refusal of Admission

A VWP applicant who is refused admission may also be removed from the United States. Refusal of admission under the VWP is not a “removal” for purposes of future inadmissibility under INA section 212(a)(9)(A) or (C). 8 C.F.R. § 217.4(a)(3). But like someone actually admitted under the VWP, a refused applicant is not entitled to appeal or review of the refusal of admission. INA section 217(b)(1).

The individual’s actual removal, however, may be deferred pending an asylum-only proceeding before an immigration judge. Whether the refused applicant can seek adjustment at all would depend on his or her custody status. Adjustment of status would not be available if the individual were detained or released on a basis other than parole under INA section 212(d)(5)(A). But if, in a given case, the individual were paroled under INA section 212(d)(5)(A), that would be “parole” for purposes of adjustment of status under INA section 245(a).

⁷ Before denying an application, ISO’s must follow the guidance contained in the USCIS National Background Identity and Security Checks Operating Procedures (NaBISCOP) Handbook (FOUO) and the Fraud Detection and National Security Standard Operating Procedures (FOUO). These documents are continuously updated and contain links to all relevant PMs.

⁸ INA section 245 specifically reads, “The status of an alien who was inspected and admitted or paroled into the United States . . . may be adjusted by the Attorney General, in his discretion . . .” Pursuant to the Homeland Security Act of 2002, tit. XV, [Pub. L. No. 107-296, § 1517, 116 Stat. 2135](#), 2311 (codified at [6 U.S.C. § 557](#) (Supp. IV 2004)), the reference to the Attorney General in section 245(a) of the Act is now deemed to refer to the Secretary of Homeland Security as well.

⁹ An alien who was released from custody on conditional parole pursuant to section 236(a)(2)(B) of the Act has not been ‘paroled into the United States’ for purposes of establishing eligibility for adjustment of status under section 245(a) of the Act, 8 U.S.C. § 1255(a) (2006).” See *Matter of Castillo-Padilla*, 25 I&N Dec. 257 (BIA 2010). Aliens who were refused admission under the VWP are only eligible for adjustment of status under INA section 245(a) if they were paroled into the United States under INA section 212(d)(5)(A).

Nevertheless, the refusal of admission under the VWP is a factor that weighs against a finding that the applicant merits a favorable exercise of discretion. It could be a basis for denying adjustment of status, *as a matter of discretion*, especially if other negative factors are present.

Denied Applications

A VWP overstay whose case is denied by USCIS has no appeal rights and may not be placed in removal proceedings before an immigration judge. There is, however, an exception for cases filed within the jurisdiction of the Ninth Circuit.¹⁰ A VWP overstay who is an immediate relative and whose Form I-485 was filed within the 90-day period of admission within the jurisdiction of the Ninth Circuit is entitled to be placed in removal proceedings under INA section 240 should the adjustment application be denied by USCIS. In such cases, USCIS will refer the case to ICE for its consideration. USCIS may also issue an NTA before referring a Ninth Circuit case to ICE, if doing so is consistent with USCIS guidance on NTA issuance.

Jurisdiction

Since ICE makes the determination to issue an order of removal for a VWP overstay under INA section 217, and the removal of that individual is, “effected without referral of the alien to an immigration judge for a determination of deportability,”¹¹ jurisdiction over the adjustment of status application remains with USCIS at all times. There is no appeal from a denial of the adjustment of status application,¹² and the VWP overstay may not renew the application in removal proceedings before an immigration judge. The only exception, as noted, applies to a case in the Ninth Circuit in which the individual applied for adjustment before the VWP admission expired.¹³

Implementation

The AFM is updated by:

- ☞ 1. Adding new section 10.3(j);
- 2. Redesignating current section 23.5(p) as section 23.5(q); and
- 3. Adding a new section 23.5(p).

The revisions read as follows.

¹⁰ See *Freeman v. Gonzales*, 444 F.3d 1031 (9th Cir. 2006); *Momeni v. Chertoff*, 521 F.3d 1094 (9th Cir. 2008).

¹¹ 8 CFR 217.4(b).

¹² 8 CFR 245.2(a)(5)(ii).

¹³ In the Ninth Circuit, a VWP overstay whose adjustment of status application is filed within the 90-day period of admission and denied by USCIS has the right to renew that application in removal proceedings. See *Freeman v. Gonzales*, 444 F.3d 1031 (9th Cir. 2006); see also *Momeni v. Chertoff*, 521 F.3d 1094 (9th Cir. 2008).

10.3 General Adjudication Procedures

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(j) Adjudicating Form I-485 for Immediate Relatives Last Admitted Under the Visa Waiver Program (VWP) outlined in Immigration and Nationality Act (INA) section 217.

(1) VWP overstays

- Unless ICE has issued a removal order under 8 CFR 217.4(b), USCIS field offices may, as a matter of discretion, grant adjustment of status applications filed by immediate relatives of U.S. citizens, or by section 245(i) applicants, who are present in the United States pursuant to admission under the VWP if they meet the requirements of INA section 245 and the USCIS Field Operations Standard Operating Procedures (the “SOP”) for Form I-485, Application to Register Permanent Residence or Adjust Status. This includes Form I-485 cases filed after the 90-day period of admission.
- USCIS should deny the Form I-485, as a matter of discretion, in any case in which ICE has issued a removal order under 8 CFR 217.4(b). Approval may be a proper exercise of discretion only if ICE rescinds or withdraws the removal order.
- If, in the course of adjudication, information indicates the individual is under investigation, or has been arrested (without disposition), or has been convicted of an egregious public safety offense as described in USCIS Policy Memo 602-0050 titled “Revised Guidance for the Referral of Cases and Issuance of Notices to Appear (NTAs) in Cases Involving Inadmissible and Removable Aliens” (November 7, 2011); or, there are fraud and/or national security issues that require resolution, do not adjudicate the case. Instead, follow the guidance contained in USCIS’s National Background Identity and Security Checks Operating Procedures (NaBISCOP) Handbook (FOUO) and the Fraud Detection and National Security Standard Operating Procedures (FOUO).
- USCIS will refer all denied Form I-485 cases filed by VWP overstays to the local ICE office for consideration of a § 217 removal order. There is an exception for certain cases filed within the Ninth Circuit.
 - ***Ninth Circuit Jurisdiction*** – A VWP overstay who is an immediate relative and who files a Form I-485 during the 90-day period of admission within the jurisdiction of the Ninth Circuit is entitled to be placed in section 240 removal proceedings if the case is denied. This includes cases where the beneficiary originally files the Form I-485 while living within the jurisdiction of the Ninth Circuit, but moves out of the Ninth Circuit jurisdiction before the Form I-485 is adjudicated. If USCIS denies an I-485 filed within the jurisdiction of the Ninth Circuit during the applicant’s VWP admission, USCIS will refer the case to the

local ICE office. USCIS may issue an NTA before referring the case to ICE, if doing so is consistent with USCIS guidance on NTA issuance. If, however, the I-485 is filed after the 90-day period of admission, the VWP overstay is not entitled to be placed in removal proceedings if the I-485 is denied, and will be referred to ICE for consideration of a section 217 removal order.

(2) Refused VWP applicants

- If an adjustment applicant was refused admission under the VWP, the refused individual's eligibility for adjustment of status depends on his or her custody status. Adjustment is not available if the individual is detained or has been released on a basis other than parole under INA section 212(d)(5)(A). In particular, release under INA section 236 is not parole. See *Matter of Castillo-Padilla*, 25 I&N Dec. 257 (BIA 2010). If the individual was paroled under INA section 212(d)(5)(A), that is "parole" for purposes of adjustment under INA section 245(a).
- Before reaching the exercise of discretion, the USCIS officer should examine the basis for the VWP refusal, to determine whether the basis for the refusal supports a finding of inadmissibility. This inadmissibility, if not waived, would warrant denial of the Form I-485 as a matter of statutory ineligibility.
- Refusal of admission does not, in the legal sense, result in a "removal" order. Still, the refused applicant cannot challenge the refusal of admission. For this reason, the fact that the applicant was refused VWP admission is a negative factor that, in conjunction with any other negative factors and in the absence of favorable equities, could warrant denial of the Form I-485, as a matter of discretion, even if CBP paroled the applicant for asylum-only proceedings.

23.5 Adjustment of Status under Section 245 of the Act

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(p) Exercise of discretion in Visa Waiver Program cases.

See chapter 10.3(j) for guidance concerning exercise of discretion in VWP cases.

(q) Precedent Decisions Pertaining to Adjustment of Status.

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- ☞ 4. The AFM Transmittal Memoranda button is revised by adding, in numerical order, a new entry to read:

AD11-30 11/14/2013	Chapter 10.3(j)	Adds guidance regarding the adjudication of adjustment of status applications for immediate relatives who were last admitted under the Visa Waiver Program (VWP).
	Chapter 23.5	Adds cross reference to chapter 10.3(j).

Use

This PM is intended solely for the guidance of USCIS personnel in the performance of their official duties. It is not intended to, does not, and may not be relied upon to create any right or benefit, substantive or procedural, enforceable at law or by any individual or other party in removal proceedings, in litigation with the United States, or in any other form or manner.

Contact Information

Questions regarding the guidance contained in this PM should be forwarded to the Field Operations Directorate, through appropriate channels.