DHS Adjustment of Status Policy: What Employers Need to Know About the New USCIS Guidance

The green card strategy that many employers rely on is facing new questions

Posted on 07-06-2026, **Read Time:** 6 Min


Dustin O'Quinn
Ballard Spahr


Christopher Motta-Wurst
Ballard Spahr


Juan Steevens
Ballard Spahr

Highlights:

- USCIS is reinforcing that adjustment of status is a discretionary benefit, increasing scrutiny of both pending and future green card applications filed inside the U.S.
- Employers sponsoring foreign talent may need to reassess immigration strategies, strengthen compliance efforts, and evaluate alternative pathways such as consular processing.
- Workers in single-intent visa categories could face greater uncertainty, while even H-1B and L-1 holders may encounter closer review if adverse factors are identified.

On May 21, U.S. Citizenship and Immigration Services (USCIS) issued Policy Memorandum PM-602-0199, formally reaffirming that adjustment of status (AOS) under Section 245 of the Immigration and Nationality Act is a matter of "discretion and administrative grace" — an extraordinary form of relief not designed to supersede the regular consular visa process. The memorandum is effective immediately and applies to all pending and future AOS applications.

After the policy memorandum was announced, the Department of Homeland Security (DHS) clarified that the policy memorandum is merely a reminder to officers of existing discretionary authority in granting adjustment of status, not a major policy shift. DHS stated that most individuals will still be able to complete the adjustment of status process in the U.S. The practical application of DHS' "reminder" to officers remains to be seen, but anyone filing an adjustment of status application in the U.S. subject to this policy memorandum should remain aware of potential heightened scrutiny.

Background: Statutory Design Versus Reality

Congress enacted AOS as a way for certain foreign nationals in the U.S. to obtain lawful permanent resident status without first leaving the country to process an "immigrant visa" at a U.S. consulate abroad. The AOS statute vests the DHS secretary with discretion to adjust status and establishes eligibility requirements that are more restrictive than those applicable to consular processing. Courts and the Board of Immigration Appeals have consistently characterized AOS as "extraordinary" relief, and the Supreme Court has repeatedly affirmed that adjustment is "a matter of grace, not right."

However, AOS has become the predominant mechanism by which employment-based immigrants in the U.S. obtain permanent residence. In practice, most employer-sponsored foreign nationals who are present in the U.S. in a temporary non-immigrant status file for AOS rather than departing for consular processing abroad. The AOS process has thus become the default process for employment-based green cards and is deeply embedded in employer-sponsored immigration strategies, particularly given multiyear visa backlogs in employment-based preference categories.

Summary of DHS Security Changes

The memorandum does not change the regulatory text governing AOS, but it substantively changes the manner in which USCIS officers are directed to exercise discretion. The key changes and directives include:

- **"Reaffirming" AOS as Extraordinary, Not Routine.** This framing signals that applications from individuals who could have pursued consular processing will face heightened scrutiny.

- **Expanded Adverse Factor Analysis.** Officers are directed to consider as adverse factors in their discretionary AOS analysis "any conduct of the alien after admission as a non-immigrant or parolee inconsistent with the purpose of that non-immigrant status or parole or with representations made to consular or DHS officers."

- **Dual Intent Acknowledgment — With Limits.** "Dual intent" allows certain individuals to be in temporary non-immigrant status (H-1B or L-1) while also pursuing permanent immigrant status (i.e., becoming a permanent resident). The memorandum acknowledges that "applying for adjustment of status is not inconsistent with simultaneously maintaining non-immigrant status in a category with dual intent." However, it immediately cautions that "maintaining lawful status in a dual intent non-immigrant category is **not** sufficient, on its own, to warrant a favorable exercise of discretion" (emphasis added).

Impact on Employers and Foreign Nationals

This memorandum may substantially complicate the green card process for employers and foreign nationals. Under the current system, most employer-sponsored immigrants apply for AOS and complete the green card process from within the U.S. The memorandum's instruction that AOS is extraordinary and that pursuing it is itself an adverse factor disrupts this established workflow. Thus, the memorandum introduces uncertainty regarding the approvability of routine AOS applications, even for applicants who satisfy all eligibility requirements.

Additionally, the instruction that officers weigh conduct "inconsistent with the purpose" of the non-immigrant status raises the question of whether USCIS will view the intent to immigrate permanently as inconsistent with single-intent non-immigrant categories (e.g., F-1, TN, E-3) or those with "quasi-dual intent" (e.g., O-1).

Implications by non-Immigrant Category

H-1B and L-1 Workers. H-1B and L-1 statuses are the only two non-immigrant categories that explicitly allow for dual intent. The memorandum acknowledges that AOS is "not inconsistent with simultaneously maintaining non-immigrant status in a category with dual intent." However, the caveat that a dual intent status is "not sufficient, on its own, to warrant a favorable exercise of discretion" introduces new risk even for this traditionally protected population. H-1B holders with any adverse factors — including minor status violations, employment gaps, or discrepancies in prior filings — may face denials on discretionary grounds.

F-1 Students. F-1 students are in a single-intent non-immigrant category. The memorandum's emphasis that pursuing AOS contravenes Congress' expectations creates substantial risk for F-1 holders who pursue AOS.

Other Single-Intent NIV Holders (O-1, TN, E-3, etc.). The risk profile varies by category. O-1 status is not officially dual-intent, although it is treated as permitting "quasi" dual-intent. TNs and E-3s or others in single-intent classification face higher risk profiles similar to F-1 students, although individual equities will vary.

Practical Considerations for Employers

This memorandum will likely face legal challenges, but prospects for success are uncertain. Given the rapidly evolving landscape, employers should work closely with immigration counsel to develop individualized strategies for sponsored employees, including contingency plans in the event of AOS denial.

Employers may consider the following steps in response to this memorandum:

- **Audit pending and planned AOS applications.** Review all pending I-485 applications and planned filings to assess vulnerability under the heightened discretionary standard. Identify employees with any adverse factors — status violations, gaps, unauthorized employment, prior misrepresentations — and develop mitigation strategies.

- **Reassess consular processing as the default.** For future green card cases, particularly for individuals who are abroad or who can travel, employers should evaluate whether consular processing is now the safer pathway. While consular processing has its own risks and delays, it avoids the discretionary landmine that this memorandum creates.

- **Prioritize dual-intent status.** For employees currently in single-intent categories (F-1 OPT, TN, E-3, etc.), employers should evaluate pathways to H-1B or L-1 status as a predicate to future AOS filing. The H-1B cap lottery should be viewed as an essential part of a long-term green card strategy for employees in vulnerable categories.

- **Ensure strict status compliance.** The memorandum's focus on violations of immigration law and conditions of status means that even minor violations — late filings, brief gaps in status, unauthorized employment — may be used in the discretionary analysis. Employers should work with immigration counsel to develop compliance protocols that ensure sponsored employees always maintain status.

Implications Beyond Employment-based Immigration

Although this alert focuses on the employer context, the memorandum's reach extends well beyond employment-based AOS. Family-based applicants — including beneficiaries of immediate relative and family preference petitions — who are present in the U.S. and seeking to adjust rather than pursue the consular process will face the same heightened discretionary scrutiny. The memorandum's adverse factor framework, including its emphasis on status violations, unauthorized employment, and failure to depart, will disproportionately affect family-based applicants who may have accrued periods of unlawful presence or engaged in

unauthorized work while awaiting visa availability.

Ultimately, the memorandum's signal is clear: USCIS intends to treat every discretionary AOS grant as extraordinary, regardless of the underlying immigrant classification, and applicants who could have pursued consular processing should expect to justify why they did not.

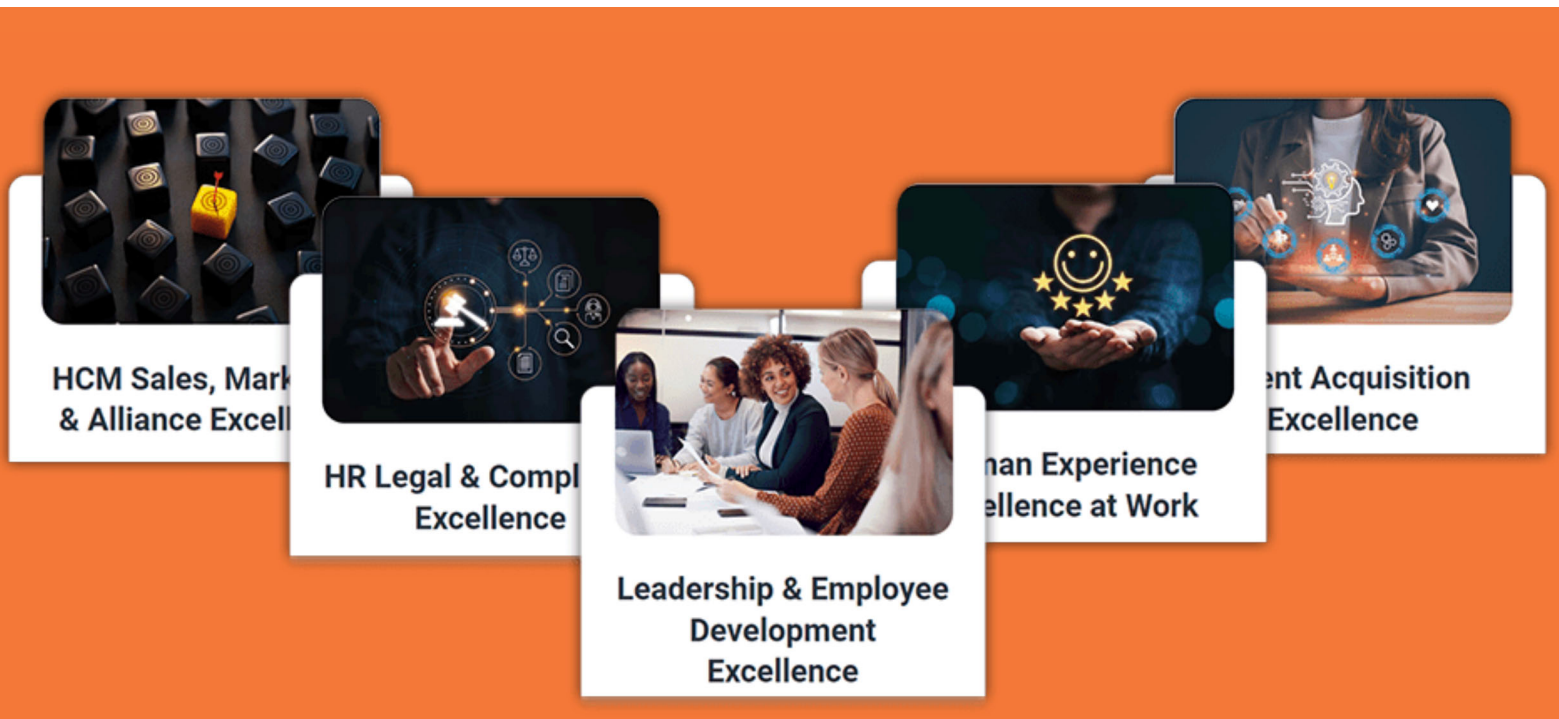
Author Bio

Dustin O'Quinn, a Partner at Ballard Spahr and leader of the firm's Immigration practice, counsels employers of all sizes in all areas of immigration law.

Christopher Motta-Wurst is Counsel at Ballard Spahr, where he advises businesses and their employees throughout the employment-based immigration life cycle.

Juan Steevens, an Associate at Ballard Spahr, delivers strategic, solutions-driven counsel to global corporations, startups, and high-impact talent navigating the complexities of U.S. immigration and nationality law.

Categories :



This article was published in the following issue:
July 2026 HR Legal & Compliance Excellence

View HR Magazine Issue