



U.S. Department of Homeland Security
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U.S. Citizenship
and Immigration
Services

Interoffice Memorandum

To: Office of Domestic Operations
Office of Refugee, Asylum, and International Operations
Office of National Security and Records Verification

From: Robert C. Divine /s/
Acting Deputy Director

Date: May 3, 2006

Re: Legal and Discretionary Analysis for Adjudication

U.S. Citizenship and Immigration Services (USCIS) adjudicators and supervisors are reminded of the importance of carefully analyzing the factual findings, legal requirements, and discretionary factors in adjudicating applications and petitions. The typical approach for Adjudication Officers should be as noted below (Asylum Officers should follow existing procedures and guidance in training materials):

1. **Law enforcement checks:** Follow USCIS procedures to confirm that the necessary background checks have been completed and resolved. Some types of results may delay the adjudication process until the information obtained is reviewed and resolved.
2. **Legal analysis:** Confirm what facts the customer must establish in order to prove eligibility under the law, and then assess whether those facts have been established. The customer bears the burden of proof to demonstrate, typically by the preponderance of the evidence but sometimes by a higher standard, that the required conditions are present and that disqualifying conditions are not present.
3. **Waivers:** If the applicant is legally ineligible for the benefit being sought, particularly because of an inadmissibility ground, the law may afford the applicant the opportunity to seek a waiver. Many waivers require establishment not only of essential facts, but also of extreme hardship or exceptional hardship to another person (i.e., 212(h), 212(i), 212(a)(9)(B), 212(e)) or to the applicant (i.e., battered spouse or child).¹ Again, the applicant bears the burden of proof.
4. **Discretionary analysis:** In many types of cases, legal analysis is not the end of the adjudication, regardless of whether the customer has shown legal eligibility or not, and

¹ Courts have found assessment of hardship to be itself discretionary, but even a finding of extreme hardship is only a threshold finding that an adjudicator must make before reaching the ultimate, and separate, determination as to whether to exercise discretion in favor of the applicant or beneficiary for purposes of a waiver and the ultimate benefit request. *See Bugayong v. INS* (2d Cir. Mar. 15, 2006).

even if the requisite hardship for a waiver has been shown. The additional step is a discretionary analysis concerning the applicant's or beneficiary's equities.²

In discretionary cases, the adjudicator must assess the positive and negative factors applicable to the alien, including the applicant's conduct, character, relationships, U.S. ties, and other humanitarian factors. Further discussion of discretionary analysis and related case law can be found at sections 10.15 and 23.2 of the Adjudicator's Field Manual (AFM), available on the USCIS intranet.

The analytical steps noted above are meant to amplify and not to replace the guidance concerning denial orders set forth at AFM Section 10.7, which sets forth other important aspects of a proper denial order.

When the analysis leads to an ultimate decision of approval, a detailed written decision may not be necessary. Rather, an approval notice can be issued. Close cases, particularly involving criminality issues, can be discussed with supervisors and USCIS counsel. The adjudicator should annotate the file to clearly reflect the favorable factors and consultations that supported the approval in close or complex cases.

Sometimes a case, especially when coupled with government errors or delay and compelling humanitarian factors, may justify an exercise of discretion resulting in an extraordinary favorable outcome for the applicant. Adjudicators considering such action should carefully confirm the availability of such action under the law,³ weigh the equities as in every discretionary decision, consult with supervisors or counsel, and record the analysis and consultation.

When the decision is denial, adjudicators should take care to articulate clearly the legal analysis and then, separately, any discretionary analysis. In cases in which the legal ineligibility is completely clear, an extensive write-up of any discretionary analysis may not be necessary, but the decision should still reflect that the adjudicator did make a discretionary assessment, where applicable. If there is a possibility that the legal analysis could be overturned (such as in an unsettled area of law), or if the legal analysis leads to a finding of eligibility, but the discretionary analysis is negative, then it is critical to articulate carefully the discretionary analysis by setting forth the positive and negative factors considered and the reasons the negative factors outweigh the positive. The rationale should be set forth so that the customer, any administrative reviewer (AAO, BIA, IJ), and the federal courts can

² A nonexclusive list of such case types is attached, and in such cases the analytical discipline of this memo is required. In other case types, adjudicators who encounter an applicant with a significant risk to national security or public safety should consult supervisors and counsel before approving the case believed not to allow discretion. Further legal analysis may be warranted in such cases.

³ *Munoz v. Ashcroft*, 339 F.3d 950 (9th Cir. 2003) (stating, "It is true that equitable tolling is available in INA cases, as there is a 'presumption, read into every federal statute of limitation, that filing deadlines are subject to equitable tolling [and that] the same rebuttable presumption of equitable tolling ... applies in suits against private defendants and ... in suits against the United States," but concluding that the April 1, 1990 (asylum application deadline to qualify under NACARA) is a statute of repose that cannot be subject to equitable tolling); *Mohawk Power Corp. v. Federal Power Commission*, 379 F.2d 153, 160 (D.C. Cir. 1967) ("Conceptions of equity are not a special province of the courts but may properly be invoked by administrative agencies seeking to achieve 'the necessities of control in an increasingly complex society without sacrifice of fundamental principles of fairness and justice.'")

understand it and appreciate its logic. Again, close cases, particularly involving criminality issues, can be discussed with supervisors and USCIS counsel.

This memorandum should not be interpreted as an instruction to presume denial of immigration benefits, even where unfavorable factors may be present. Rather, this memorandum is meant to describe a pattern for analysis and a discipline for recording that analysis that will withstand further scrutiny.

To the extent this memorandum justifies amendment to the Adjudicator's Field Manual, such changes should be made and announced in the near future.

Nonexclusive List of USCIS Case Types Authorizing Discretion

Adjustment of status under 245 and 209(b) (with limited exceptions such as NACARA section 202 and HRIFA) and creation of record under Section 249

Employment authorization (with limited exceptions such as for asylum applicants)

Waivers of various inadmissibility grounds, and advance permission to return to the U.S., INA 211, 212 and 213

Extension of nonimmigrant stay and change of nonimmigrant status

Advance parole and reentry permits

Temporary protected status

Waiver of labor certification requirement “in the national interest”

Revocation of visa petitions, INA 205

Waiver of joint filing requirement to remove conditions on permanent residence

Fiancé petitions, INA 214(d)

Special Rule Cancellation of Removal for Battered Spouses and Children, INA 240A(b)(2)(D)

Furnishing of information otherwise protected by the legalization confidentiality provisions, INA 245A(c)(5)(C)