

How discretionary analysis can impact the granting of immigration benefits



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Most foreign nationals who make applications to the U.S. government for immigration status expect that their applications will be approved. But many of those same foreign nationals do not know that even if they provide every page of required documents and answer every question on the forms to perfection, they may still be denied the benefit sought. That is because of the discretion afforded to officers who work for the U.S. government's immigration-related agencies, including the U.S. Department of Homeland Security (USDHS) and U.S. Department of State (USDOS).

Which U.S. agencies are authorized to use discretion in approving applications?

U.S. Citizenship and Immigration Services (USCIS) is the immigration benefit arm of USDHS and is responsible for granting most types of immigration-related benefits.

The other agency that adjudicates immigration applications is the USDOS, which grants visas to would-be visitors to

the U.S. and, in certain circumstances, work-authorized visas as well. This agency does not necessarily follow USCIS guidance and recommendations for how and when to apply its discretion to deny immigration-related visa applications; however, many of the standards overlap based on shared government priorities and principles.

When and how is discretion applied to applications?

USCIS has recently provided guidance to its officers in the field and to the public about the factors that are likely to influence the exercise of discretion. These factors are considered after the officer has come to a conclusion based on the merits of any filed petition and include the conduct of the applicant, character, family ties, immigration history and humanitarian concerns. The USCIS officer engages in a balancing act between favourable factors and unfavourable factors, including how he or she can justify the denial of an application in writing if the officer uses negative discretion.

If an applicant has engaged in an activity that the U.S. government discourages, but that does not make the applicant inadmissible, that could result in negative discretion being applied to a pending application. For example, if an applicant has multiple charges for crimes that fall short of making him or her inadmissible, or multiple convictions for crimes but no criminal inadmissibility, the USCIS or USDOS officer may utilize negative discretion. If the applicant is tied by family to individuals that the U.S. has decided cannot come to the U.S. based on criminal, terrorist or other inadmissible actions, USCIS may deny an application at its discretion. Some applicants may not be inadmissible based on their long, storied, checkered immigration history, but a USCIS or USDOS officer may determine that those applicants are too much of a risk to approve their application anyway.

Current concerns impacting visa approvals or admission to the U.S.

There has recently been a focus placed on foreign nationals who are involved in promoting the views of organizations that are perceived by USCIS as anti-American or antisemitic or have been designated as terrorist organizations. This focus appears largely to be in response to U.S. university or college campus occupations by such groups and their supporters, including students, as well as other public and publicized demonstrations of anti-American sentiment and/or support for terrorist-linked organizations.

USCIS has made clear that foreign nationals who have engaged in such activity can expect USCIS to enforce all relevant laws and to take the opportunity to use its discretion to deny applications where such discretion is permitted in the statutes and regulations. Most employment-based petitions filed by potential employers do not afford such discretion to USCIS, but applications that permit it include extension or change of status, student reinstatement and applications for certain employment authorization filed by applicants.

Likewise, while USDOS does not appear to have the same laser focus on applicants' politically related activities when granting visa applications, it — along with other government agencies — is increasingly utilizing social media to screen applicants and their activities, to determine intent related to visits or immigration, and the risk the visa applicant may pose to U.S. persons if admitted to the country. Just because someone had been approved for a visa before does not guarantee that he or she will continue to be eligible, if factors arise or new information comes to light that the agency takes into account as a negative factor, creating risk to the U.S. if the applicant is granted a visa. If a visa is denied, it is also difficult, if not impossible, to find out what factors or specific information led to the officer utilizing their discretion to deny the application, and an appeal is often not an option.

While applicants can reapply for the visa without knowing what circumstances led to the initial denial, it will likely be difficult to obtain the visa once denied. However, it is possible to still obtain a visa for a different status than the one for which one applied and was initially denied. For example, if someone were denied a visitor visa and suspects it could be because of spending significant time in the U.S. — such that the officer may have thought the applicant was trying to live in the U.S. rather than just visit — applying for a visa in a non-visitor category (such as one that permits work authorization) could result in an ability to travel once again to the U.S.

Applicants for immigration benefits should conduct their affairs as model citizens, including minimizing relationships with those who may be at odds with the law, in order to maximize their opportunities within the framework of benefits available to foreign nationals. Doing otherwise may result in disappointment and missed opportunities in the U.S.

If someone is unsure why a visa or status was denied, the best option is to contact a qualified immigration professional to assess relevant factors and determine what, if any, options exist to overcome the inability to obtain status to enter the U.S. In some cases, where an applicant has been deemed to be inadmissible based on the discretion of the adjudicating officer, it may be possible to obtain a waiver of inadmissibility to once again travel to the U.S.

If you have questions about the role of discretionary analysis in USCIS proceedings, please contact Lippes Mathias immigration team members Eileen M. Martin (emartin@lippes.com) or Elizabeth M. Klarin (eklarin@lippes.com), who would be happy to offer assistance.

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