



U.S. Citizenship and Immigration Services

RAIO DIRECTORATE – OFFICER TRAINING

RAIO Combined Training Course

DISCRETION

TRAINING MODULE

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RAIO Directorate – Officer Training / *RAIO Combined Training Course***DISCRETION**

Training Module

MODULE DESCRIPTION

This module provides guidelines for adjudicating immigration benefits or other immigration-related requests that are subject to the discretion of the Department of Homeland Security (DHS). The module addresses the basis for determining when discretion is warranted and for performing the legal analysis of claims that involve discretion.

TERMINAL PERFORMANCE OBJECTIVE(S)

Given a petition or application that requires a discretionary determination, you will be able to weigh discretionary factors properly and articulate your exercise of discretion in a written decision when appropriate.

ENABLING PERFORMANCE OBJECTIVES

1. Explain what adjudicative discretion is.
2. Identify the different circumstances that will require an officer to exercise discretion in an adjudication.
3. Apply the positive and negative factors properly in making a decision on a given case.
4. Explain the reasoning for an exercise of discretion.

INSTRUCTIONAL METHODS

- Interactive presentation
- Discussion
- Practical exercises

METHOD(S) OF EVALUATION

Written exam

Practical exercise exam

REQUIRED READING

1. Divine, Robert C., Acting Director, USCIS. [Legal and Discretionary Analysis for Adjudication](#), Memorandum to Office of Domestic Operations, Office of Refugee, Asylum, and International Operations, and Office of National Security and Records Verification (Washington, DC: 03 May 2006)
2. [Matter of Pula](#), 19 I&N Dec. 467 (BIA 1987)
3. [Matter of Marin](#), 16 I&N Dec. 581 (BIA 1978)

ADDITIONAL RESOURCES

Kanstroom, Daniel, [Surrounding the Hole in the Doughnut: Discretion and Deference in U.S. Immigration Law](#), *Tulane Law Review*, Volume 7, Number 3, p. 703 (February 1997).

Critical Tasks

Task/ Skill #	Task Description
DM5	Skill in analyzing complex issues to identify appropriate responses or decisions (5)
DM7	Skill in making legally sufficient decisions (5)
DM10	Skill in developing a logical argument to support a determination or conclusion (5)

SCHEDULE OF REVISIONS

Date	Section (Number and Name)	Brief Description of Changes	Made By
12/12/2012	Entire Lesson Plan	Lesson Plan published	RAIO Training
11/23/2015	Throughout document	Corrected links and minor typos	RAIO Training
3/2/2018	RAD Supplement	Expanded and updated RAD Supplement	RAD Policy

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Throughout this training module you will come across references to division-specific supplemental information located at the end of the module, as well as links to documents that contain division-specific, detailed information. You are responsible for knowing the information in the referenced material that pertains to your division. Officers in the International Operations Division who will be conducting refugee interviews are also responsible for knowing the information in the referenced material that pertains to the Refugee Affairs Division.

For easy reference, each division's supplements are color-coded: Refugee Affairs Division (RAD) in pink; Asylum Division (ASM) in yellow; and International Operations Division (IO) in purple.

1 INTRODUCTION

Some decisions made by USCIS are mandatory once facts meeting the applicable standard have been established. Other decisions are made in the exercise of discretion after the officer finds facts that establish eligibility.

1.1 Decisions That Are Mandatory

Mandatory decisions involve no discretion, only an inquiry into whether the facts of the case meet the relevant standard. The adjudicator is concerned only with the evidence that establishes eligibility; once the applicant has met his or her burden of proof, the analysis ends. An example of a benefit that is conferred once the applicant establishes eligibility is the approval of Form I-130, Petition for Alien Relative.¹

1.2 Decisions that are made in the Exercise of Discretion

Although the applicant may have met the burden of proof by showing that he or she is statutorily eligible, statutory eligibility depends on the exercise of discretion. Eligible applicants may be denied a benefit through an officer's exercise of discretion.

1.2.1 Nonexclusive List of USCIS Case Types in which Discretion is Exercised

- Adjustment of status under Immigration and Nationality Act (INA) §§ 245 and 209(b) (with limited exceptions such as NACARA § 202 and Haitian Refugee

¹ USCIS officers must approve the I-130 Petition for Alien Relative when the qualifying relationship between the petitioner and the alien beneficiary and the individuals' identities have been established. The approved I-130 permits the beneficiary to apply for an immigrant visa from the Department of State. The consular officer then exercises discretion in determining whether to issue the visa. If the I-130 is being adjudicated under INA §245, in the U.S. concurrently with an I-485 application to adjust status, the grant of the I-485 by the USCIS officer would be discretionary.

- Immigration Fairness Act (HRIFA)) and creation of record under section 249 (registry)
- 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, INA § 248
 - Advance parole and reentry permits, INA §§ 212(d)(5)(A) and 223
 - Waiver of labor certification requirement “in the national interest”, INA § 203(b)(2)(B)
 - Revocation of visa petitions, INA § 205
 - Waiver of joint filing requirement to remove conditions on permanent residence, INA § 216(b)(4)
 - Fiancé(e) 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)²
 - Refugee status, INA § 207
 - Asylum, INA § 208

This lesson covers what discretion is, and how it is exercised. As an adjudicator you may have the authority to deny a benefit in the exercise of discretion, but that is not license to deny a benefit for just any reason. As this lesson will explain, there are serious limits on exercising your discretion in making a decision on an application.

2 OVERVIEW OF DISCRETION

2.1 Definition

As a practical matter, in the immigration context, the Board of Immigration Appeals (BIA) has described discretion as a balancing of “the adverse factors evidencing an alien’s undesirability as a permanent resident with the social and humane considerations presented in his behalf to determine whether ... relief appears in the best interests of this country.”³

² See Devine, Robert C., Acting Director, USCIS. [Legal and Discretionary Analysis for Adjudication](#), Memorandum to Office of Domestic Operations, Office of Refugee, Asylum, and International Operations, and Office of National Security and Records Verification (Washington, DC: 03 May 2006).

³ [Matter of Marin](#), 16 I&N Dec. 581 (BIA 1978).

Discussion

For our purposes, a simple definition of discretion is the “[a]bility or power to decide responsibly.”⁴ Alternatively, discretion can be defined as, “freedom or authority to make judgments and to act as one sees fit.”⁵ Of the two, the second definition is probably what “discretion” is more commonly understood to mean; however, the law imposes restrictions on the exercise of discretion by an adjudicator, which makes the first definition more accurate for our purposes. While discretion gives the adjudicator some freedom in the way in which he or she decides a particular case after eligibility has been established, that freedom is always constrained by legal restrictions. It is the restrictions that define scope of the adjudicator’s power of discretion.

The concept of discretion is not simple, as it implies certain limitations, without explaining just what those limitations are. One commentator has described discretion thus: “like the hole in a doughnut, [it] does not exist except as an area left open by a surrounding belt of restriction.”⁶ The rules as to how to exercise discretion are scarce, but there are many restrictions that have been imposed by the courts in order to ensure that the official exercising discretion does not abuse that power. Discretion is defined in a negative manner, by what is impermissible rather than by what is permissible. In addition, in some instances, regulations or policy guidance may elucidate what factors should be considered in discretion.

2.2 Two Types of Discretion

There are two broad types of discretion that may be exercised in the context of immigration law: prosecutorial (or enforcement) discretion and adjudicative discretion. The scope of discretion is defined by what type of discretionary decision is being made. For the purposes of your work with RAIO, you will be involved in exercising adjudicative discretion, but it is important to know about prosecutorial discretion to help you understand the limitations that are placed on you in your exercise of adjudicative discretion.

2.2.1 Adjudicative Discretion

Adjudicative discretion involves the affirmative decision of whether to exercise discretion favorably or not under the standards and procedures provided by statute, regulation, or policy that establish an applicant’s eligibility for the benefit and guide the exercise of discretion. Adjudicative discretion has been referred to as “merit-deciding

⁴ *The American Heritage Dictionary of the English Language*, Fourth Edition Houghton Mifflin Company (2000), available at: <http://www.thefreedictionary.com/discretion> (last visited November 23, 2015).

⁵ *Collins English Dictionary – Complete and Unabridged*, HarperCollins Publishers 2003, available at <http://www.thefreedictionary.com/discretion> (last visited November 23, 2015).

⁶ Ronald M. Dworkin, *Is Law a System of Rules?*, in *The Philosophy of Law* 52 (R.M. Dworkin ed., 1977).

discretion.”⁷ The exercise of discretion is specifically provided in statute for certain benefits. Some mandatory benefits may have a discretionary component, while other types of adjudicative actions may have no discretionary component. In the case of a waiver-of-inadmissibility application, a favorable exercise of discretion on that application, absent any other negative factors, may lead to a mandatory positive decision on the underlying application.

Example

The beneficiary of an I-730 Refugee/Asylee Relative Petition is seeking to join his spouse, who has been resettled in the United States as a refugee. He has an approved I-730, but you find that he had been living in the United States without documentation prior to their marriage and his wife’s resettlement as a refugee and is therefore inadmissible and not eligible for derivative status. He may submit an I-602 Application by Refugee for Waiver of Grounds of Excludability in order to cure that defect in eligibility. Your decision to grant the waiver is discretionary, but once you grant the waiver, the I-730 benefit must be granted.

In general, absent any negative factors, discretionary decisions should be to grant once the applicant has met the requirements of the application or petition.⁸ A formal exercise of discretion to deny, rather than to grant, may be appropriate when the applicant has met the requirements of the application or petition, but negative factors have been found in the course of the adjudication and outweigh the positive factors.

However, adjudicative discretion does not allow an adjudicator to grant an immigration benefit in cases where the individual is not otherwise eligible for that benefit. [IO Supplement – Common Forms Requiring Adjudicative Discretion](#)

2.2.2 Prosecutorial Discretion

Prosecutorial discretion is a decision to enforce—or not enforce—the law against someone made by an agency charged with enforcing the law. The term “prosecutorial” can be deceptive, because the scope of decisions covered by this doctrine includes the decision of whether to arrest a suspected violator and the decision of whether to file a charging document against someone. Prosecutorial discretion is not an invitation to violate or ignore the law. Rather, it is a means to use the agency resources in a way that best accomplishes our mission of administering and enforcing the immigration laws of the United States.

Most prosecutorial discretion is exercised by enforcement agencies such as ICE and CBP in the context of their enforcement function (*i.e.*, removal proceedings). Prosecutorial

⁷ [INS v. Doherty](#), 502 U.S. 314 (1992).

⁸ [Matter of Pula](#), 19 I&N Dec. 467, 474 (BIA 1987).

discretion may be exercised at different points in the removal process, from the decision of who to detain or release on bond; to issue, or rescind a detainer, or a Notice to Appear (NTA); a decision to join in a motion for relief or benefit; or even to enforce an order of removal.⁹

One example of prosecutorial discretion exercised by some USCIS officers involves the issuance of an NTA, the document that puts an individual into removal proceedings after the denial of a petition or application. In certain situations officers have the authority to exercise their discretion and not issue an NTA, despite the applicant's lack of immigration status. In RAIO, only Asylum Officers issue NTAs. This, however, is not a discretionary action by the Asylum Division. Under current regulations,¹⁰ if an applicant is out of status and asylum is not granted, Asylum Officers do not issue denials, but must refer the case to the immigration court.

2.2.3 The Difference between Prosecutorial Discretion and Adjudicative Discretion

As noted earlier, officers have no adjudicative discretion to grant a claim that does not meet eligibility requirements. By contrast, prosecutorial discretion may be exercised before any legal finding and therefore may be exercised in cases of individuals who would be ineligible for any other form of relief.

2.3 Who Exercises Discretion?

Each time you render a decision on an application in a situation where the benefit is discretionary, you are doing so in the exercise of discretion. This is not an exercise of your own personal discretion; rather, you are exercising discretion as an official of the U.S. Government.

In the Immigration and Nationality Act (INA), Congress has expressly granted discretion to the Secretary of the Department of Homeland Security in deciding when to grant some benefits. For example, the INA contains provisions such as: "Subject to the numerical limitations established pursuant to subsections (a) and (b), the Attorney General may, in the Attorney General's discretion and pursuant to such regulations as the Attorney General may prescribe, admit any refugee..."¹¹ Most of the time the grant of discretion is explicit in the statute;¹² in other instances it is implied, based on the language of the statute.

⁹ See, e.g., Jeh Johnson, Secretary of Homeland Security, Memo, "[Policies for the Apprehension, Detention, and Removal of Undocumented Immigrants](#)," (November 20, 2014).

¹⁰ [8 C.F.R. § 208.14\(c\)](#).

¹¹ [INA § 207\(c\)\(1\)](#).

¹² See, e.g., [INA § 209\(b\)](#) (The Secretary of Homeland Security or the Attorney General, **in the Secretary's or the Attorney General's discretion** and under such regulations as the Secretary or the Attorney General may prescribe, may adjust to the status of an alien lawfully admitted for permanent residence the status of any alien granted asylum who—...).

When Congress enacts a law and allows discretion in the enforcement of that law, it usually grants discretion to the head of the agency tasked with enforcing that law. When you exercise discretion in adjudicating an application for a benefit, you are exercising discretion on behalf of the Secretary of Homeland Security. The Secretary's discretionary power is delegated to you, the adjudicator, through DHS and USCIS.

In many cases, such as the waiver provisions in INA § 212, the statute still reads that is the Attorney General's discretion. In most instances, the statute has not been changed since the creation of the DHS and the transfer of many functions from the Department of Justice to DHS. If USCIS has adjudicative authority over the benefit, the statute should be read as conferring the power to exercise discretion on the Secretary of Homeland Security.¹³

The Secretary or the Director may, by regulation, or directive, set how you exercise your discretion in specific instances. For example, in the particular instance of asylum adjudications, regulations provide that when the applicant has met the refugee definition through a showing of past persecution, you must consider whether there is still a well-founded fear of persecution in the future. If you can show, by a preponderance of the evidence, that there is no well-founded fear, the regulations require you to exercise discretion to deny or refer the claim, unless the applicant shows compelling reasons arising from severe past persecution for being unwilling to return or shows that he or she would face other serious harm upon return.¹⁴

2.4 Limits on Discretion

Some clear limitations on the exercise of discretion must be kept in mind at all times, and are described in the following subsections.

2.4.1 Eligibility Threshold

There is never discretion to grant a benefit or relief in a case where the applicant has not met the eligibility requirements for the benefit or relief sought. As a legal matter, it is permissible to deny an application as a matter of discretion, without determining whether the person is actually eligible for the benefit.¹⁵ As a matter of policy, however, you should generally make a specific determination of statutory eligibility before addressing the exercise of discretion. If an application is denied as an exercise of discretion, and your decision is overturned, the record necessary for making a decision on eligibility for

¹³ [6 U.S.C. § 275](#).

¹⁴ [8 C.F.R. § 208.13\(b\)\(1\)\(i\)](#). NOTE: This is a different standard than th used in adjudicating refugee claims. For refugee claims an applicant need establish either past persecution or well-founded future fear. See INA 101(a)(42)(A) and (B).

¹⁵ [INS v. Abudu](#), 485 U.S. 94, 105 (1988); [INS v. Bagamasbad](#), 429 U.S. 24, 26 (1976).

the benefit will be incomplete if the adjudicator did not establish eligibility prior to the discretionary analysis. Ideally, if you deny the petition or application, the denial notice will include a determination on both (1) statutory eligibility grounds and (2) discretionary grounds.

In the case of refugee admissions, to be eligible for refugee resettlement, the applicant must first establish that he or she has access to the U.S. Refugee Admissions Program (USRAP), meets the refugee definition, is not firmly resettled and is otherwise admissible to the United States. Most grounds of inadmissibility may be waived for refugee applicants—drug trafficking and certain security and related grounds are the only exceptions¹⁶—but you cannot consider the waiver request until the applicant has first established that he or she has access to the USRAP, is not firmly resettled and meets the definition of refugee. Your decision on the waiver application itself is an exercise of discretion.

2.4.2 Lack of Negative Factors

Absent any negative factors, you will always exercise discretion positively. The fact that an applicant is eligible for a particular benefit is, by itself, a strong positive factor in the weighing process. If there are no negative factors to weigh against that positive factor, denial of the benefit would be an abuse of discretion. This general rule does not apply to waiver adjudications, since the waiver process is predicated on the existence of at least one negative factor.¹⁷

Discretion gives the adjudicator authority to deny a benefit or a form of relief even when the applicant is eligible according to the law, but that power cannot be exercised arbitrarily or capriciously. When you use discretion to deny a claim, you must explain your reasons clearly and cogently.

3 APPLYING DISCRETION

As an adjudicator you have an obligation to evaluate any application that comes before you, but, in the course of your adjudication, you may become aware of negative factors. Discretion is the power that allows you to make a decision to deny the benefit when the applicant is eligible for the benefit, but for other reasons it would not be appropriate to exercise discretion favorably. Discretion is the authority you exercise when weighing any negative factors against the positive factors before you make the final decision on the application.

3.1 Three-Step Process

¹⁶ See [INA § 207\(c\)\(3\)](#).

¹⁷ [Matter of Marin](#), 16 I&N Dec. 581, 586-87 (BIA 1978).

Generally, the process you follow in rendering a decision on an application, when that application is discretionary, is:

- Find the facts
- Apply the law
- Balance any negative factors against positive factors before making a decision.

The third step is the exercise of discretion.¹⁸ Each of the steps has a role in determining what constitutes a reasonable exercise of discretion.

3.1.1 Finding the Facts

Finding the facts is a matter of gathering and assessing evidence. While the focus of fact-finding should be to obtain evidence that will help establish eligibility, you should also elicit information concerning the applicant's background such as family ties that they might have in the United States, any serious medical conditions, or other connections that they have in the community. Part of the reason for eliciting information on the applicant's background is to aid in the exercise of discretion, should it become necessary after eligibility is established. The fact that your discretion has become an issue will generally presuppose some negative factors have emerged in the course of processing the claim, you will need to have some idea of what equities the applicant has in order to properly weigh the factors.

In removal proceedings in immigration court the applicant has an affirmative duty to present evidence showing that a favorable exercise of discretion is warranted for any form of relief where discretion is a factor.¹⁹ In adjudications outside the immigration court, however, there is no such requirement; therefore it is important for you to explore this issue during the interview.

For example, in cases involving possible provision of material support to terrorist groups, where an exemption might be possible, your fact-finding during the interview will be crucial in determining whether an exemption is available and whether to grant the exemption in the exercise of discretion. The testimonial evidence that you elicit during an interview will often be the only evidence upon which to determine "whether the duress exemption is warranted under the totality of the circumstances."²⁰ Your follow-up

¹⁸ Kenneth Culp Davis, *Discretionary Justice: A Preliminary Inquiry*. Baton Rouge: Louisiana State University Press, 1969

¹⁹ [INA §240\(c\)\(4\)\(A\)\(ii\)](#).

²⁰ Scharfen, Jonathan, Deputy Director, USCIS. [Processing the Discretionary Exemption to the Inadmissibility Ground for Providing Material Support to Certain Terrorist Organizations](#), Memorandum to Associate Directors; Chief, Office of Administrative Appeals Chief Counsel, (Washington, DC: 24 May 2007) at p. 7.

questions during the interview must focus on the nature and the circumstances of the applicant's interactions with the suspected terrorist group.²¹

If there appear to be any negative factors present, you should always ask the applicant directly why he or she feels that he or she deserves to have discretion exercised favorably.

3.1.2 Applying the Law

The legal analysis of eligibility may also affect the discretionary determination in your adjudication. If, for example, an applicant for a benefit has been convicted of a crime, it may raise the possibility that the applicant may be inadmissible or, in the case of an asylum applicant, that the applicant is subject to a mandatory bar of asylum for having committed a particularly serious crime.²² In adjudications where admissibility is an issue, the determination whether a particular crime is an aggravated felony will determine whether a waiver is available to the applicant. In some cases the question of whether a particular crime is an aggravated felony will be easily decided; in others it will require a close legal analysis.

3.1.3 Balancing any Negative Discretionary Factors against Positive Factors before Making a Decision

The act of exercising discretion involves balancing any negative factors against positive factors before making a decision. Discretion always consists of a weighing of positive and negative factors. In the immigration context, the goal is generally to “balance the adverse factors evidencing an alien’s undesirability as a resident of the United States with the social and humane considerations presented” in support of the alien’s residence in the United States²³. Since most of the benefits conferred by RAIO are based on humanitarian concepts such as family unity and protection from harm, an interviewee’s eligibility for a benefit is always the main positive factor under consideration. The analysis of the negative factors should focus on what effect the alien’s presence in the United States will have on the general welfare of the community. [[RAD Supplement – Balancing Positive and Negative Factors](#)] [[Asylum Supplement – Balancing Positive and Negative Factors](#)]

3.1.4 Totality of the Circumstances

It is important, when weighing the positive and negative factors, that you do not consider the various factors individually, in isolation from one another.²⁴ When you consider each

²¹ *Id.*

²² See [INA § 208\(b\)\(2\)\(A\)\(ii\)](#).

²³ [Matter of Marin](#), 16 I&N Dec. 581, 586-87 (BIA 1978).

²⁴ [Matter of Pula](#), 19 I&N Dec. 467, 474 (BIA 1987).

factor individually, without considering how all the factors relate to each other, it becomes difficult to weigh the positive and negative factors properly.

Example

The BIA found that while the applicant's circumvention of orderly refugee procedures can be a serious adverse factor in considering an asylum application, "...it should not be considered in such a way that the practical effect is to deny relief in virtually all cases. This factor is only one of a number of factors which should be balanced in exercising discretion, and the weight accorded to this factor may vary depending on the facts of a particular case."²⁵ The BIA went on explain some of the factors that may influence how much weight should be given to the circumvention of orderly refugee procedures:

"Instead of focusing only on the circumvention of orderly refugee procedures, the totality of the circumstances and actions of an alien in his flight from the country where he fears persecution should be examined in determining whether a favorable exercise of discretion is warranted.

Among those factors which should be considered are whether the alien passed through any other countries or arrived in the United States directly from his country, whether orderly refugee procedures were in fact available to help him in any country he passed through, and whether he made any attempts to seek asylum before coming to the United States.

In addition, the length of time the alien remained in a third country, and his living conditions, safety, and potential for long-term residency there are also relevant. For example, an alien who is forced to remain in hiding to elude persecutors, or who faces imminent deportation back to the country where he fears persecution, may not have found a safe haven even though he has escaped to another country.

Further, whether the alien has relatives legally in the United States or other personal ties to this country which motivated him to seek asylum here rather than elsewhere is another factor to consider. In this regard, the extent of the alien's ties to any other countries where he does not fear persecution should also be examined.

Moreover, if the alien engaged in fraud to circumvent orderly refugee procedures, the seriousness of the fraud should be considered. The use of fraudulent documents to escape the country of persecution itself is not a

²⁵ *Id.*

significant adverse factor while, at the other extreme, entry under the assumed identity of a United States citizen with a United States passport, which was fraudulently obtained by the alien from the United States Government, is very serious fraud.” - [Matter of Pula](#), 19 I&N Dec. 467, 473-74 (BIA 1987).

It is clear that all the factors listed by the BIA are interrelated, and it would be difficult to consider any of those factors in isolation from the others and then assign the proper weight to each factor. You must consider all factors together and determine not just whether a particular factor is positive or negative, but how it affects the other factors under consideration. In some cases, one factor will directly cancel out another. A finding that an applicant’s safety was in question may directly explain his/her circumvention of orderly refugee procedures. In other cases, a particular positive factor may just act to balance out a particular negative factor. An applicant’s having relatives in the U.S. may explain why he or she did not attempt to take advantage of orderly refugee procedures in a third country as he or she passed through on the way to the United States.

3.2 Identifying the Factors That May Be Considered in the Exercise of Discretion

Anything about an applicant’s background is potentially a factor to be considered in exercising discretion. However, you must be able to articulate and explain how the factor should be weighed in a particular case. Any facts related to the applicant’s conduct, character, family relations in the United States, other ties to the United States, or any other humanitarian concerns are proper factors to consider in the exercise of discretion. Applicants’ conduct can include how they entered the United States and what they have done since their arrival—such as employment, schooling, or any evidence of criminal activity. Employment history, schooling, and criminal activity may also be relevant factors to consider. It is important to know what family members the applicant may have living in the United States and the immigration status of those family members. Other ties to the United States may include owning real estate or a business. Other humanitarian concerns may include health issues. For example, if an applicant or a family member has a serious illness, can that applicant or family member obtain adequate treatment if removed?

3.2.1 Favorable Factors That May Be Considered

Courts have listed a number of factors that may be considered as favorable or positive factors in the exercise of discretion. There can be no exhaustive list of factors, since almost anything about a person’s background can be considered. It is important to remember that the applicant’s eligibility for the benefit being sought may be the first and strongest positive factor that you should consider. This is especially true in protection cases in which “discretionary factors should be carefully evaluated in light of the unusually harsh consequences which may befall an alien who has established a well-

founded fear of persecution; the danger of persecution should generally outweigh all but the most egregious of adverse factors.”²⁶ Other favorable factors that the BIA has identified include:

[S]uch factors as family ties within the United States, residence of long duration in this country (particularly when the inception of residence occurred while the respondent was of young age), evidence of hardship to the respondent and family if deportation occurs, service in this country’s Armed Forces, a history of employment, the existence of property or business ties, evidence of value and service to the community, proof of a genuine rehabilitation if a criminal record exists, and other evidence attesting to a respondent’s good character (*e.g.*, affidavits from family, friends, and responsible community representatives).²⁷

3.2.2 Negative Factors That May Be Considered

Like the positive factors, it is impossible to list all of the possible negative factors that you may consider in exercise of discretion. Court decisions have referred to a number of factors that they have considered as negative in the exercise of discretion. As a general rule, any information that raises the possibility that an inadmissibility applies, or, in the case of asylum applications, a bar to asylum might apply, might constitute a negative discretionary factor even if it is determined that the inadmissibility or bar does not apply. You should consider carefully any indication that the applicant might pose a threat to public safety or national security. Any criminal conviction is always a negative factor that will weigh heavily against an applicant. Other negative factors that the BIA has looked at in waiver cases include:

[T]he nature and underlying circumstances of the exclusion ground at issue, the presence of additional significant violations of this country’s immigration laws, the existence of a criminal record and, if so, its nature, recency, and seriousness, and the presence of other evidence indicative of a respondent’s bad character or undesirability as a permanent resident of this country.²⁸

3.3 Weighing Positive and Negative Factors

Having established which factors are relevant to your exercise of discretion, the next step is to determine how to weigh them. Some factors are always going to be more important than other factors.

3.3.1 Factors Material to Eligibility Are Given the Most Weight

²⁶ *Matter of Pula*, 19 I&N Dec. 467, 474 (BIA 1987).

²⁷ *Matter of Marin*, 16 I&N Dec. 581, 584-585 (BIA 1978).

²⁸ *Id.* at 585.

Any factor that is material to the applicant's eligibility for the benefit being sought generally should be given the most weight. The applicant's eligibility for the benefit is, by itself, a factor arguing for the benefit to be granted in the exercise of discretion. If there are no negative factors present, then in most instances, eligibility is all that is needed to exercise your discretion to grant a benefit.

However, as an exception to the general rule in the case of asylum, there is regulation that restricts the factors you may look at in a specific circumstance, without regard to underlying eligibility. While an applicant may establish eligibility based on past persecution alone, if you find, by a preponderance of the evidence, that the applicant has no well-founded fear of persecution in the future, regulations instruct you to exercise your discretion negatively to refer the application even when there do not appear to be any negative factors.²⁹ This instruction arises from the fact that the underlying protection basis for the benefit no longer exists. The same regulation also lists two positive factors that may outweigh the lack of future risk to the applicant. Discretion may still be exercised to grant asylum in the absence of well-founded fear if the past persecution suffered by the applicant was so severe that it would not be humane to return the applicant to the country of persecution.³⁰ You may also grant in the absence of well-founded fear if you find that the applicant would suffer some other serious harm, not related to the past persecution.³¹ Both of the factors that would outweigh the lack of well-founded fear are related to the humanitarian goals of the benefit being sought, but only a grant based on severity of past harm is directly related to the underlying eligibility.

Another exception to the general rule would be an I-601 waiver for the 3 and 10 year bars on re-entry for an alien who was unlawfully present and triggered the bars. For waiver of that ground of inadmissibility, the statute specifies that the only positive factor to be considered is extreme hardship to the qualifying relative even though that might not be directly relevant to the underlying benefit (issuance of an immigrant visa).³²

4 DISCRETION IN DECISION WRITING

4.1 Positive Exercise of Discretion

Generally, a positive exercise of discretion does not require a detailed analysis or explanation in the written decision. If no adverse factors at all are present, a simple statement is sufficient, saying that the applicant is eligible, that there are no adverse factors, and that therefore the applicant is granted the benefit in the exercise of discretion.

²⁹ [8 C.F.R. § 208.13\(b\)\(1\)\(i\)](#) (Discretionary referral or denial).

³⁰ [8 C.F.R. § 208.13\(b\)\(1\)\(iii\)\(A\)](#).

³¹ [8 C.F.R. § 208.13\(b\)\(1\)\(iii\)\(B\)](#); see [Matter of L-S-](#), 25 I&N Dec. 705, 714 (BIA 2012).

³² [INA §212\(a\)\(9\)\(B\)\(v\)](#).

You should discuss cases that are less clear cut, particularly those involving criminality or national security issues, with supervisors, who may raise the issue with USCIS counsel; if you do not address the issue in the decision, the file should contain some record of your deliberations. According to USCIS guidance on such cases, “[t]he adjudicator should annotate the file to clearly reflect the favorable factors and consultations that supported the approval in close or complex cases.”³³

Whether addressing the discretionary issues in the written decision or by making an annotation in the file, you should state the rationale for your decision in a clear manner so that it is easily understandable to anyone reviewing the file.

4.2 Negative Exercise of Discretion

The written decision must contain a complete analysis of the factors considered in exercising discretion, with a specific and cogent explanation of why you exercised discretion negatively. Your decision will be reviewed, and it is imperative that those who review your decision are able to understand exactly how you reached it.

Negative factors must never be applied in a blanket fashion. Your decision must address negative factors on an individualized basis, applying the totality of the circumstances to the specific facts of the case. The decision should specify both the positive and negative factors that you identified and considered in coming to your decision and should explain how you weighed the different factors.

5 CONCLUSION

Understanding when and how to exercise discretion in your adjudications is important for all officers within the RAIO Directorate. Not all of the adjudications that you make require an exercise of discretion, but when a decision is discretionary it is essential that you understand how to identify the positive and negative factors you must consider and how to weigh those factors. When discretion is called for in your decision making, a careful application of the principles underlying discretion will help ensure that your decision will be legally sufficient and appropriate.

6 SUMMARY

6.1 Discretion Definition

³³ Devine, Robert C., Acting Director, USCIS. [Legal and Discretionary Analysis for Adjudication](#), Memorandum to Office of Domestic Operations, Office of Refugee, Asylum, and International Operations, and Office of National Security and Records Verification (Washington, DC: 03 May 2006).

As a practical matter, in the immigration context, the BIA has described discretion as a balancing of “the adverse factors evidencing an alien’s undesirability as a permanent resident with the social and humane considerations presented in his behalf to determine whether ... relief appears in the best interests of this country.”³⁴ Congress has provided the Secretary of Homeland Security discretion in making many decisions; the Secretary’s authority to exercise discretion in many instances has been delegated to you, as an officer in USCIS.

6.2 Limitations on Discretion

There is no discretion to grant a claim where eligibility has not been established. If the applicant is eligible, however, you may then consider discretionary factors. Absent any identifiable negative factors you will grant the benefit.

6.3 Applying Discretion

- Find the facts
- Apply the law
- Balance any negative factors against positive factors before making a decision.

The third step is the exercise of discretion.

6.4 Totality of the Circumstances

In considering what factors you may consider in exercising discretion, you must be able to articulate clearly a relationship between a factor and the desirability of having the applicant living in the United States. Remember that the humanitarian concerns present in a particular case should always be considered. If the applicant is eligible for the benefit it should be granted absent any negative factors. When weighing the positive and negative factors you must always consider the totality of the circumstances and not weigh factors in isolation.

6.5 Discretion in Decision Writing

If you are exercising your discretion to grant a benefit, and there are no negative factors present, there is usually no need for further analysis. The fact that the applicant has established eligibility and there are no adverse factors is sufficient to justify the decision to grant a benefit. If you are exercising your discretion to deny a benefit, you must provide a complete analysis of your reasoning, specifying the positive and negative factors you considered, so that others reviewing your decision can clearly understand

³⁴ [*Matter of Marin*](#), 16 I&N Dec. 581, 584 (BIA 1978).

how you reached it. Negative factors should not be applied in a blanket fashion, but always individualized to particular circumstances of the applicant.

PRACTICAL EXERCISES

There are no student materials for practical exercises.

OTHER MATERIALS

There are no Other Materials for this module.

SUPPLEMENT A – REFUGEE AFFAIRS DIVISION

The following information is specific to the Refugee Affairs Division. Information in each text box contains division-specific procedures and guidelines related to the section from the Training Module referenced in the subheading of the supplement text box.

REQUIRED READING

None

ADDITIONAL RESOURCES

None

SUPPLEMENTS

RAD Supplement – Discretion in Refugee Adjudications

The Immigration and Nationality Act provides that “the Attorney General may, **in the Attorney General's discretion**... admit any refugee who is not firmly resettled in any foreign country, is determined to be of special humanitarian concern to the United States, and is admissible.”³⁵ When adjudicating an application for refugee status, you must first determine whether the applicant is statutorily eligible. If the applicant has demonstrated that he or she is statutorily eligible, the ultimate decision on each application for refugee status involves the exercise of adjudicative discretion. As with all elements of the refugee adjudication, the burden of proof rests with the applicant to demonstrate that he or she merits the benefit in the exercise of discretion.

In all cases in which an applicant is otherwise eligible for refugee status, the applicant’s eligibility for refugee status based on past persecution or a well-founded fear of persecution is itself a very strong positive discretionary factor. Some of the positive discretionary factors discussed in case law addressing applicants in removal proceedings (e.g., those relating to the applicant’s length of residence in or ties to the United States) are unlikely to be considerations in overseas refugee cases, and refugee applicants may be

³⁵ [INA § 207\(c\)\(1\)](#).

less likely to be in danger of *refoulement* to their countries of citizenship, depending on their individual situations in their place of residence, than asylum applicants in the United States who may be at risk of removal. Nevertheless, a refugee applicant's past persecution and/or likelihood of future persecution is generally such a strong positive factor that other positive factors are not necessary for the applicant to demonstrate that he or she merits refugee status. The Board of Immigration Appeals has instructed that in protection cases, "the danger of persecution should generally outweigh all but the most egregious of adverse factors."³⁶

Furthermore, the bars, grounds of inadmissibility, and security vetting requirements that apply to refugees are relatively broad. Negative factors that would be sufficiently serious to weigh against the favorable exercise of discretion will generally render the applicant either statutorily ineligible for refugee status or subject to a security-related hold category that would require further review at RAD Headquarters (RAD HQ). For these reasons, the majority of refugee cases that are approvable in the field do not have adverse discretionary factors sufficient to outweigh the positive factors established by substantiation of the refugee claim.

Therefore, when you are approving a case (or recommending approval, pending required holds), RAD policy does not require you as an adjudicating officer to document all the positive and negative factors in the case or your ultimate decision to exercise discretion in the applicant's favor on the Refugee Application Assessment. If you approve or recommend approval of a case, you are finding that the applicant merits refugee status in the exercise of discretion because the positive factors outweigh the negative factors in the case. Officers adjudicating refugee cases in the field are not permitted to deny cases in the exercise of discretion without written concurrence from RAD HQ, which should be included in the file.

Nevertheless, the exercise of discretion is involved in every refugee adjudication. It is important for adjudicating officers to be aware of how a discretionary analysis may impact the ultimate adjudication. In cases that require holds for derogatory information uncovered through security checks or because there is a national security concern in the case, the Security Vetting and Program Integrity (SVPI) Branch at RAD HQ will review the case and make a recommendation as to whether the case should be granted or denied in the exercise of discretion. In cases in which the applicant is found to be inadmissible, but found eligible for a discretionary exemption to one of the Terrorism-Related

³⁶ [Matter of Pula](#), 19 I&N Dec. 467, 474 (BIA 1987).

Inadmissibility Grounds (TRIG) or for a discretionary waiver of one of the other inadmissibility grounds for which a waiver is available under INA § 207(c)(3), you must elicit testimony regarding positive and negative factors and document the reasons for any recommendation of an exemption or waiver based on these factors. In cases where the applicant is found to be statutorily eligible, but significant adverse discretionary factors not related to national security issues are present, you must elicit testimony regarding those factors. If you find that the adverse factors outweigh the positive factors, you should recommend the case for discretionary denial and place the case on hold for HQ review. These types of cases are discussed in more detail below.

Cases with Derogatory Information from Security Checks

All refugee applicants are subject to a range of biographic and biometric security checks that must be cleared before their cases may be approved.³⁷ If security checks return derogatory information about the applicant, the case must be placed on hold, and SVPI personnel will review the information to determine how it may affect the adjudication. Although SVPI personnel do not adjudicate refugee applications, they do routinely recommend final outcomes on applications when derogatory information is found in security checks and when national security concerns are involved.

As a matter of policy, USCIS's security vetting partners have set thresholds for determining when derogatory information from security checks will cause a not clear (NCL) result. In such cases, the derogatory information is a very significant negative discretionary factor, and in general, the applicant will not be able to demonstrate that he or she merits refugee status in the exercise of discretion. SVPI personnel will review derogatory information to verify that it relates to the applicant whose security check has a negative result. If the derogatory information that caused an NCL result is found to relate to the applicant, SVPI will generally recommend a discretionary denial, and that case will be denied.

Example

- When reviewing an applicant's security check results prior to the interview, you notice that the applicant's inter-agency check (IAC) is not clear (NCL). In Section

³⁷ For additional information about the security checks refugee applicants must undergo and possible results, see RAIO Lesson Plan, [National Security](#), and RDOTC Lesson Plan, [Security Checks](#).

VI of the Assessment, you will place the case on IAC hold, indicate that the IAC for the applicant is NCL, and indicate that you would recommend approval or denial for the applicant if IAC were to clear. An SVPI officer will review the derogatory information to confirm that it relates to the applicant and, if so, recommend the case for a discretionary denial. An adjudicating officer will deny the case in the exercise of discretion.

Cases with National Security Concerns

The Controlled Application Review and Resolution Program (CARRP) is the USCIS policy under which cases with national security concerns are identified, vetted, and adjudicated.³⁸ A national security concern exists in the case when an individual or organization has an articulable link to prior, current, or planned involvement in, or association with, an activity, individual, or organization described in sections 212(a)(3)(A), (B), or (F), or 237(a)(4)(A) or (B) of the INA. If you identify national security indicators in a case during your case file review or in the refugee interview, you must elicit testimony and develop the record to determine whether a national security concern exists. If you determine that a national security concern exists, you must develop the record as to positive and negative factors that are relevant to the concern and place the case on hold for CARRP even if you have determined that the applicant is not eligible for refugee status for a different reason.³⁹ If you believe, based on the record before you, that the negative factors outweigh the positive factors relevant to the national security concern, you should recommend that the case be discretionarily denied upon the completion of CARRP. If you believe that the positive factor relating to the concern outweigh the negative factors and the applicant is otherwise eligible for refugee status, you should recommend approval, contingent on a positive resolution of the issues reviewed during CARRP. If the applicant is not statutorily eligible for refugee status for a reason unrelated to the national security concern, you should indicate that the applicant is not eligible, but the case must be placed on hold for CARRP due to the national security concern; you should then recommend that the case be denied if the concern is

³⁸ See "[Policy for Vetting and Adjudicating Cases with National Security Concerns](#)," Memorandum, Jonathan R. Scharfen, Deputy Director (April 11, 2008).

³⁹ For additional information about USCIS-wide CARRP policy and RAD-specific policies and procedures, see RAO Lesson Plan, [National Security](#), and RAD Standard Operating Procedure, [National Security Concerns in Refugee Cases](#).

resolved.

After you place the case on hold for CARRP, an SVPI officer will conduct additional vetting. The SVPI officer will review the record in its entirety and balance negative factors against positive factors material to the national security concerns present in the case in order to determine whether the national security concern can be resolved. The SVPI officer will conduct an analysis of whether the concern is resolved in the totality of the circumstances.⁴⁰

If the SVPI officer determines that the national security concern is resolved, SVPI will lift the CARRP hold, and the case can be approved or denied in the field according to the adjudicating officer's decision. If the SVPI officer determines that more information is needed to determine whether the national security concern can be resolved, SVPI will remand the case for re-interview by an officer in the field.

Under RAD CARRP policy, an unresolved national security concern is an adverse discretionary factor that will not be outweighed by any positive discretionary factors elsewhere in the case. If the SVPI officer determines that a national security concern is unresolved, the officer will clearly articulate the discretionary analysis in internal systems by setting forth the positive and negative factors considered and the reasons the negative factors outweigh the positive and recommend that the case be denied in the exercise of discretion. An adjudicating officer will then issue a discretionary denial.

Example

- An Iraqi applicant testifies that he has been arrested on eight occasions in Anbar Province, Iraq between 2007 and 2015: three times by the Sahwa/Awakening Movement and five times by the Iraqi government. On each occasion, he was held for several weeks and accused of being a terrorist, being affiliated with particular terrorist organizations including al-Qaeda in Iraq and the Islamic Army in Iraq, and involvement in particular terrorist activities, such as the bombing of a police station and an attack on his neighbor's house. Three of the applicant's brothers have also been arrested and accused of similar activities. When you question the applicant in detail about each arrest, the applicant testifies that he and his brothers were innocent of all of these accusations and has no idea why they were targeted for arrest and accused of specific activities so many times. Because the applicant

⁴⁰ See [RAD CARRP Lines of Inquiry](#) for examples of factors that may be considered in the SVPI officer's discretionary analysis.

has been accused of affiliation with an organization and activity described in INA § 212(a)(3)(B), you find that there is a national security concern in the case and place it on hold for CARRP, recommending discretionary denial. An SVPI officer will review the record (and may conduct further research or recommend additional interviews) to determine whether the national security concern is resolved.

As the applicant and several close family members were arrested multiple times over a period of several years and accused of affiliations with specific terrorist organizations and multiple specific terrorist activities in the context of the insurgency against American and multinational forces in Iraq, the negative discretionary factors relating to this concern would be significant absent testimony or other evidence that conclusively demonstrates that the applicant and his family members were falsely accused. Lacking such, the SVPI officer will find that the national security concern is unresolved and recommend a discretionary denial. An adjudicating officer will lift the CARRP hold and deny the case in the exercise of discretion.

As a matter of policy, cases which are cross-referenced in processing are reviewed through CARRP together. If a national security concern exists in a case, all cross-referenced cases must be placed on hold for CARRP. When any single national security concern is unresolved for any applicant (principal or derivative) on any case in a cross-referenced group of cases, the unresolved national security concern will be considered as a negative discretionary factor in the other cross-referenced principal applicants' cases as well and will generally result in a determination that a national security concern is unresolved in each case.

Cases Eligible for TRIG Exemption

As discussed in the RAIO Lesson Plan, *National Security*, some applicants who are inadmissible under the INA § 212(a)(3)(B) terrorism-related grounds of inadmissibility are eligible for discretionary exemptions of these grounds.⁴¹ After you have determined that an applicant is inadmissible under INA § 212(a)(3)(B), you must then determine whether the applicant meets the threshold requirements for all exemptions and whether the applicant meets the criteria articulated in the exercise of authority for any specific

⁴¹ [INA § 212\(d\)\(3\)\(B\)\(i\)](#).

exemption. If the applicant is eligible for an exemption, you must exercise your discretion to determine whether the applicant merits the exemption in the totality of the circumstances. A non-exhaustive list of appropriate factors to consider includes:

- The nature of the TRIG activity, (e.g., if the applicant provided material support to a terrorist organization, the amount and type of support provided, and its frequency);
- The nature of activities committed by the terrorist organization;
- The applicant's awareness of those activities;
- The length of time that has passed since support was provided;
- The applicant's conduct since support was provided;
- Any other relevant factor.

Under RAD policy, certain categories of exemptions may be adjudicated in the field, with one or two lines of supervisory review (depending on the specific exemption). Other exemptions, including second-line review of cases processed by the International Operations Division, require review at RAD Headquarters. All denials based solely on TRIG, whether because the applicant does not meet the threshold requirements for any exemption or because you have determined that the exemption should not be granted in the exercise of discretion, require review at RAD Headquarters.

All discretionary exemptions are adjudicated on the TRIG Exemption Worksheet, and your discretionary analysis should be documented both in Section IV of the Refugee Application Assessment and in Section IV of the Worksheet. If you have determined that the applicant qualifies for an exemption and merits the exemption in the totality of the circumstances, you should indicate in Section V of the Worksheet that your recommendation is to grant the exemption. If the exemption is granted after going through the requisite lines of review, the applicant is no longer inadmissible.

If you have determined that the applicant is eligible for the exemption but that, considering the totality of the circumstances, the exemption is not warranted in the exercise of discretion, you should indicate that your recommendation is to deny the exemption, checking the appropriate box in Section V of the worksheet.

Example

- A Sri Lankan applicant testifies that she was forcibly recruited by the Liberation Tigers of Tamil Eelam (LTTE), a designated Tier I terrorist organization, in 2006.

She was held by them for three years, until the end of the Sri Lankan Civil War in 2009. She cooked and served food, and she cared for injured LTTE soldiers on a regular basis. She also received military-type training from the LTTE and, on three occasions, carried a weapon to defend herself and the LTTE during battles against the Sri Lankan government, although she never actually used or threatened to use the weapon. She testified that she did not want to do these things, but that she would have been beaten if she refused; on two occasions, she tried to escape, but was captured and beaten by the LTTE both times. After her release, the applicant married a man whose brother and sister were both voluntary members of the LTTE. She and her husband are frequently, voluntarily, in contact with the brother and sister.

This applicant is inadmissible under INA § 212(a)(3)(B)(i)(I) for having engaged in terrorist activity by providing material support to a terrorist organization and under INA § 212(a)(3)(B)(i)(VIII) for having received military-type training for a terrorist organization. Both activities were under duress, so the applicant meets the eligibility requirements for situational exemptions for these inadmissibility grounds. However, the length of time the applicant was involved in terrorist activities, the nature of her involvement (including the fact that she carried a weapon during three instances of LTTE combat against the Sri Lankan government) and her continuing associations with voluntary members of a terrorist organization, are significant adverse discretionary factors that must be considered. Although there are compelling positive discretionary factors in the case, it would be appropriate for you to find that the applicant has not met her burden to demonstrate that she merits the discretionary exemption in the totality of the circumstances and recommend that it be denied. You would then place the case on hold for HQ TRIG review as well as for CARRP, because the applicant's past involvement in the LTTE and continuing association with LTTE members are national security concerns that have not been resolved.

Cases Eligible for Waivers of Inadmissibility Grounds

All refugees must be admissible to the United States in order for their applications to be approved; you do not have discretion to approve an applicant who is inadmissible. Under section 207(c)(3) of the INA, though, refugee applicants who are inadmissible under many of the non-TRIG grounds of inadmissibility are eligible for waivers of

inadmissibility “for humanitarian purposes, to assure family unity, or when it is otherwise in the public interest.”⁴² Waivers of inadmissibility for refugees are adjudicated on Form I-602, Application by Refugee for Waiver of Grounds of Excludability. The waiver adjudication is discretionary in nature.⁴³

I-602 waivers are usually adjudicated by officers from the International Operations Division, but Refugee Officers may also be called upon to adjudicate them in the course of their duties. In general, because an applicant cannot apply for a waiver until the applicant has been found inadmissible, you as the officer adjudicating the refugee case will not adjudicate the same applicant’s waiver application. The officer adjudicating the I-602 waiver will generally not re-interview the applicant; he or she will make a decision based on your interview notes and the evidence of record. Accordingly, if you are the officer interviewing a refugee case in which the applicant is inadmissible but a waiver is statutorily available, you must be sure to elicit sufficient testimony regarding both positive and negative discretionary factors for the officer adjudicating the waiver to make a determination.

The positive and negative discretionary factors that should be considered for the purposes of the waiver adjudication are generally the same as those that are considered in the adjudication of the refugee application. Positive factors would include the humanitarian, family unity, or public interest considerations that led to a finding that the applicant is statutorily eligible, such as the severity of the past persecution and the well-founded fear of persecution and the applicant’s family ties in the United States, as well as the applicant’s credible acknowledgment of and remorse for wrongfulness of the act that led to a finding of inadmissibility and evidence of rehabilitation.

Negative factors will generally relate to the ground of inadmissibility, including the severity and consequences of the negative act(s) that led the applicant to be found inadmissible, the frequency of negative conduct, the likelihood of recidivism, and the applicant’s circumvention of established procedures. Officers will also consider such factors as the distance in time since the negative act(s), the applicant’s explanation of the circumstances, whether the negative conduct was compelled or under duress, the age of

⁴² Waivers are available to refugee applicants for all inadmissibility grounds that apply to refugees except those at INA §§ 212(a)(2)(C) (illicit trafficking in controlled substances), 212(a)(3)(A) (national-security related grounds), 212(a)(3)(B) (terrorism-related grounds), 212(a)(3)(C) (foreign policy), and 212(a)(3)(E) (Nazi persecution, genocide, torture, and extrajudicial killing).

⁴³ For additional guidance on I-602 adjudications, see International Operations SOP, [Form I-602: Application by Refugee for Waiver of Grounds of Excludability](#).

the applicant, and any other unique characteristics specific to the applicant's case.

The Attorney General has held that in cases where the applicant is inadmissible for having committed a violent or dangerous crime, the applicant may not be granted a waiver in the exercise of discretion unless the applicant can demonstrate extraordinary circumstances, such as foreign policy or national security considerations, or exceptional and extremely unusual hardship to the applicant and/or family members if the waiver is not granted. Depending on the gravity of the criminal offense, even such a showing may not be sufficient.⁴⁴

In assessing whether a crime is "violent or dangerous," you must consider whether the crime meets the definition of a "crime of violence" as defined in 18 U.S.C. § 16 and is an "aggravated felony" under INA § 101(a)(43). If so, the crime should be presumed to be "violent or dangerous." However, "violent or dangerous" crimes are not limited to those that meet the "crime of violence" definition, and you must also consider the common meanings of the terms "violent" and "dangerous" and assess whether the criminal statute or the circumstances of the crime entail violent or dangerous conduct.

In order for an applicant to show that he or she (or a relative) would suffer "exceptional and extremely unusual hardship" if the waiver is denied, the applicant must show that the level of hardship would be "substantially beyond that which would ordinarily result" from a denial.⁴⁵ Factors to be considered in assessing the level of hardship the applicant or a relative would suffer if his or her case were denied may include age, health, family ties in the United States and the country of residence, the applicant's individual circumstances in the country of residence, and the risk of *refoulement* to the country of citizenship.⁴⁶ In general, a lower standard of living, diminished educational opportunities, poor economic conditions, and other adverse country conditions commonly experienced by refugees in the applicant's country of residence will be insufficient, in themselves, to constitute "exceptional and extremely unusual hardship."⁴⁷

As the interviewing officer, after you analyze the applicable grounds of inadmissibility and determine that a waiver is available, you should clearly indicate in Section IV of the

⁴⁴ *Matter of Jean*, 23 I&N Dec. 373, 383 (AG 2002); see also [8 C.F.R. § 212.7\(d\)](#) (applying this principle in the context of asylum applications, waivers of inadmissibility under INA § 209(c), and waivers under INA § 212(h)). The same principle is applied to waivers of inadmissibility under INA § 207(c)(3) and to refugee adjudications as a matter of program policy.

⁴⁵ *Matter of Monreal*, 23 I&N Dec. 56, 59 (BIA 1999).

⁴⁶ *Id.* at 63.

⁴⁷ *Matter of Andazola-Rivas*, 23 I&N Dec. 319, 323-324 (BIA 2002).

Refugee Application Assessment whether you recommend that a waiver be granted. The adjudicating officer is not bound by your recommendation, but he or she will consider it when he or she adjudicates the waiver.

Example

- A Syrian applicant living in Lebanon testifies that he previously entered the United States on a student visa, was convicted of armed robbery in California in 1999, when he was 19 years old, and was removed as an aggravated felon after serving a two-year prison sentence. In your interview, he demonstrates a well-founded fear of persecution in Syria. He candidly acknowledges his wrongdoing and expresses remorse for the crime, and he demonstrates significant evidence of rehabilitation: he has had no criminal issues in Syria or Lebanon since, and he now has a family and is gainfully employed as a construction worker. He states that life is difficult for him in Lebanon because, like most Syrian refugees, he is unable to find a well-paying job, and the educational opportunities for his children are limited.

You find that the applicant is inadmissible under INA § 212(a)(2)(A)(i)(I) for having been convicted of a crime involving moral turpitude and INA § 212(a)(9)(A)(ii)(II) for having been previously removed as an aggravated felon, and a waiver is available for both grounds. However, you would not recommend that the waiver be granted. Even considering the significant positive discretionary factors in the case (the applicant's demonstrated well-founded fear, the applicant's acknowledgment of wrongdoing, the evidence of rehabilitation, and the length of time since the crime was convicted), the fact that the applicant has been convicted of a violent aggravated felony is a significant adverse factor that would require the applicant to demonstrate extraordinary circumstances or exceptional and extremely unusual hardship to be overcome. The applicant has not made such a showing, so the waiver should be denied in the exercise of discretion.

Other Cases with Adverse Discretionary Factors

In some circumstances, you may interview refugee applicants who are admissible, otherwise eligible for refugee status, and not subject to any security-related holds, but

nevertheless have significant adverse discretionary factors that should be considered in the adjudication. In such cases, you must thoroughly explore both positive and negative discretionary factors in the interview. If you believe that the negative discretionary factors outweigh the positive discretionary factors and could result in a discretionary denial, in Section VI of your Assessment, you should place the case on HQ Review hold so that an officer at RAD Headquarters can review your determination. If the officer concurs with your determination, RAD Headquarters will issue a discretionary denial. You should clearly articulate in the Justification section of the Assessment the positive and negative factors you have considered and why you recommend that the case be denied in the exercise of discretion.

Such cases may include those in which there is evidence that the applicant has committed a serious crime, but the applicant cannot be found to be inadmissible, either because the applicant's conduct is not criminal in the country where the crime was committed, because the particular statute under which the applicant was convicted (or of which the applicant admits to the essential elements) does not meet the definition of a crime involving moral turpitude (CIMT), or because the applicant falls within a statutory exception to applicable inadmissibility grounds.

As noted above, the Attorney General has held that an applicant who has committed a "violent or dangerous" crime should not be granted discretionary benefits unless the applicant can demonstrate extraordinary circumstances, such as foreign policy or national security considerations, or that he or she will suffer exceptional and extremely unusual hardship if his or her application is not approved, and that if the criminal offense is sufficiently serious, even a showing of any may not be sufficient.⁴⁸ This principle should be applied to refugee adjudications even if the applicant's violent or dangerous conduct, which would be criminal in the United States, is not criminal in the country where it was committed and/or does not render the applicant inadmissible.

Examples

- An Iranian applicant testifies that her ex-husband, whom she divorced two years ago and who is also a refugee applicant on a different case, regularly beat her with his fists during their marriage. She gives you permission to confront her ex-husband with the adverse information. Later in your circuit ride, you interview the

⁴⁸ *Matter of Jean*, 23 I&N Dec. 373, 385 (AG 2002).

ex-husband, and he establishes that he was persecuted in the past and has a well-founded fear of persecution. When you confront him with the information his ex-wife provided, the applicant admits that he beat his wife during their marriage but that he is sorry for his actions and does not intend to engage in any violent activities in the future. Domestic violence is a serious criminal issue that has generally been held to constitute a CIMT in the United States; however, Iran does not have a statute that criminalizes domestic violence, and no Iranian statute that applies to the applicant's conduct would constitute a CIMT.

In such a case, it would be appropriate for you to find that the applicant's admission that he engaged in domestic violence is a significant adverse discretionary factor, aggravated by the fact that his conduct was regular and relatively recent. Although the applicant's statutory eligibility for refugee status and his candor and remorse for his actions are positive discretionary factors, the applicant has admitted to violent activity that would be considered criminal if committed in the United States. If he has not established extraordinary circumstances or that he will suffer exceptional or extremely unusual hardship, you should place the case on HQ Review Hold and recommend discretionary denial.

- A Bhutanese applicant in Nepal testifies that fifteen years before your interview, when he was 16 years old, he was convicted of raping a four-year-old child under Chapter 14, No. 1, of the Nepali Criminal Code, Chapter on Rape. He was sentenced to 5 years in prison and released after serving 2.5 years. The applicant testifies that he has not committed or been convicted of any other crimes, and he expresses remorse for his crime. The applicant establishes that he has a well-founded fear of persecution in Bhutan, and furthermore, medical documents in the record establish that the applicant has a serious medical condition for which treatment is not available in Nepal.

The applicant is not inadmissible, because although he has been convicted of a CIMT, he falls within the juvenile offense exception: he was convicted of only one crime, it occurred when he was under 18, and more than five years have passed since the applicant was released from confinement. There are significant positive discretionary factors in the case (the applicant's statutory eligibility, his remorse for the crime, and the length of time that has passed), and the applicant's health and the unavailability of medical treatment in his country of residence may

lead to the finding that the applicant has shown that he would suffer exceptional and extremely unusual hardship if his case is denied. However, the crime is a serious adverse discretionary factor, and you would find that the gravity of the crime of raping a child is so serious that even a showing of exceptional and extremely unusual hardship is insufficient for the applicant to demonstrate that he merits refugee status in the exercise of discretion. As such, you should place the case on hold for HQ Review and recommend discretionary denial.

Another situation in which a discretionary denial may be appropriate for non-national security-related reasons would be a case in which an applicant has an association or current, prior, or planned involvement with criminal activity or a criminal organization, but the applicant is not inadmissible on the basis of his or her own activities. For instance, an applicant's affiliation with a transnational criminal gang, or employment by a business that engages in organized criminal activities, is an indicator that the applicant is a potential danger to public safety and would be a significant adverse discretionary factor even in the absence of evidence that the applicant himself or herself has committed a crime.

An applicant's association or relationship with an individual or organization involved in criminal activities would also be an adverse discretionary factor. When evaluating the weight that the relationship or association would carry in the discretionary determination, you should consider such factors as the nature of the relationship, the closeness of the relationship, whether or not the association is continuing (and, if not, the length of time that has passed since it ended), the seriousness of the criminal activities, and the likelihood that the applicant would engage in criminal activities that pose a danger to public safety in the United States.

Examples

- A Salvadoran applicant testifies that her current boyfriend, the father of her son, is a member of the Mara Salvatrucha (MS-13) criminal gang. She states that her boyfriend was forcibly recruited and would like to leave the gang, but is unable to do so; she has encouraged him to try to leave MS-13 and has received threats from other MS-13 members because of her relationship with him. He has not told her anything about his activities with them. Although the applicant does not agree with the MS-13's activities and has never done anything to support her boyfriend or other MS-13 members in their criminal behavior, she testifies that she loves her boyfriend and would like for him to join her in the United States eventually so

that he can leave MS-13.

The applicant's association with her boyfriend is a significant adverse discretionary factor. The nature of their relationship is close and continuing, and although the applicant is not aware of her boyfriend's specific activities, MS-13's violent criminal activities are very serious. The applicant's desire for her boyfriend to join her in the United States is also a negative factor, as she would be able to petition for him if they married and his entry would pose a public safety concern. It is unlikely that the positive discretionary factors in this case would be found to outweigh these negative factors, and it would be appropriate for you to place the case on hold for HQ Review and recommend discretionary denial.

- An applicant from the Central African Republic testifies that his uncle owned a business there and was involved in the illicit diamond trafficking industry. When the applicant was a young man, from 2001 to 2003, he worked for his uncle performing clerical tasks. The applicant was aware at the time that his uncle's company abused its workers and that his uncle paid millions of dollars to the regime of former President Ange-Félix Patassé in order to continue operating illegally, but he states that he never objected to these activities because it was simply how things worked under the Patassé regime. The applicant and his uncle both left the Central African Republic after the Patassé regime collapsed, but the applicant's uncle remains involved in the illicit diamond industry in Cameroon, and the applicant is still in contact with him and has a good relationship with him.

The applicant's relationship with his uncle and his prior employment are adverse discretionary factors in this case. The applicant's relationship with his uncle is close and continuing, and his uncle is continuing to engage in very serious criminal activity involving both labor abuses and large-scale corruption. Although the applicant's prior involvement probably could not lead to a finding that the applicant is inadmissible, the applicant was involved in his uncle's business for a long period of time and was aware of the criminal nature of his activities. These are significant negative discretionary factors that would be unlikely to be outweighed by positive factors in the case, and it would be appropriate for you to place the case on hold for HQ Review and recommend discretionary denial.

If a case with a national security concern also has non-national security-related adverse discretionary factors such that you are recommending a discretionary denial, you should place the case on hold both for CARRP and for HQ Review. The CARRP reviewer at

SVPI will review the national security concern and positive and negative discretionary factors material to the concern to determine whether the concern is resolved. If it can be resolved, the HQ reviewer will review all positive and negative discretionary factors in the record in its entirety and make the final determination as to whether the applicant merits discretionary approval of refugee status.

If you are placing a case on hold for HQ Review because of adverse discretionary factors, all cross-referenced cases should also be placed on HQ Review hold so that all cases that may potentially be affected by the adverse discretionary factor may be reviewed together. In cases where the adverse discretionary factor is an applicant's association with criminal gangs or organizations that may pose a risk to public safety, cross-referenced applicants may also have an association with such organizations that may be an adverse discretionary factor in their cases. In cases where the adverse discretionary factor relates to a single individual's criminal acts, the cross-referenced cases' relationship with this individual will likely be less significant as an adverse factor. You may recommend approval or denial pending HQ review, but if any case is recommended for denial, HQ must still review all cross-referenced cases for consistency and to ensure that discretion is being weighed appropriately.

DNA Pilot Program Cases

In 2008, the U.S. Refugee Admissions Program conducted a DNA pilot program for certain Priority 3 and Priority 1 cases. For cases that were conditionally approved but then refused or failed to appear for DNA testing after this was made a program requirement, and for DNA pilot cases in which at least one claimed family relationship was not supported by DNA results and the family then did not appear for a re-interview, USCIS denied the cases as a matter of discretion.

If you encounter a case with unique issues where you believe there are other adverse factors that weigh against approval in the exercise of discretion, it is appropriate to consult with your Team Lead and, through your chain of command, with appropriate points of contact at the RAD Policy Branch.

SUPPLEMENT B – ASYLUM DIVISION

The following information is specific to the Asylum Division. Information in each text box contains division-specific procedures and guidelines related to the section from the Training Module referenced in the subheading of the supplement text box.

REQUIRED READING

None

ADDITIONAL RESOURCES

None

SUPPLEMENTS

ASM Supplement – Balancing Positive and Negative Factors

The most common situation in which you, as an Asylum Officer, will exercise discretion to deny an asylum claim, and a situation that does not require HQ review, involves those cases where eligibility is established by past persecution alone and it is determined that there is an absence of well-founded fear. The regulations provide clear guidance of how you should proceed.⁴⁹ This is an explanation of how you should apply that guidance:

1. The applicant has presented evidence that establishes that he meets the requirements of the refugee definition by virtue of having suffered past persecution. The applicant, having proven that he or she suffered persecution in the past has no further burden of proof in establishing eligibility and enjoys a presumption that their fear of persecution in the future is well-founded.
2. You must next consider whether there is evidence that rebuts the presumption of a well founded fear of persecution in the future.⁵⁰
3. First you consider any changed circumstances, having to do with the conditions in the country of persecution, or the applicant's personal situation, that would

⁴⁹ [8 C.F.R. § 208.13\(b\)\(1\)](#).

⁵⁰ [8 C.F.R. § 208.13\(b\)\(1\)\(i\)](#).

remove a reasonable possibility of future persecution.⁵¹

4. Next, you look to see if the applicant can reasonably relocate within his/her country of persecution and thereby avoid any future persecution.⁵²
5. If you find that either of those conditions exists, the presumption that the applicant has a well-founded fear of persecution may be rebutted.
6. It is your burden of proof, in rebutting the presumption of well-founded fear that the applicant enjoys, to show by a preponderance of the evidence that the applicant would face no risk of persecution in the future.⁵³
7. If you, the officer, are able to show, by a preponderance of the evidence, that the applicant no longer has a well-founded fear of persecution in the future, except in two very narrow circumstances detailed below, you are required to exercise your discretion to deny or refer the application. The basis of this regulation is the fact that the humanitarian concern that underlies the benefit no longer exists. The applicant is no longer in need of protection from persecution. In these cases the lack of risk of persecution is treated as a negative discretionary factor by the regulations.
8. The regulations also require that you consider two possible positive countervailing factors to the discretionary denial/referral of a claim based on past persecution with no well-founded fear. These two countervailing positive factors would allow for a grant of asylum in the absence of well-founded fear.
9. One countervailing factor is if the applicant presents evidence that indicates that there are compelling reasons for being unwilling or unable to return to the country of origin arising out of the severity of the past persecution, you may grant asylum.⁵⁴ While the humanitarian concerns that the benefit is meant to address no longer exist, there are other humanitarian concerns to consider as positive factors in weighing discretion.
10. Another countervailing factor is if the applicant presents evidence that he or she

⁵¹ [8 C.F.R. § 208.13\(b\)\(1\)\(i\)\(A\)](#).

⁵² [8 C.F.R. § 208.13\(b\)\(1\)\(i\)\(B\)](#).

⁵³ [8 C.F.R. § 208.13\(b\)\(1\)\(ii\)](#).

⁵⁴ [8 C.F.R. § 208.13\(b\)\(1\)\(iii\)\(A\)](#); *see also* [Matter of Chen](#), 20 I&N Dec. 16 (BIA 1989).

would suffer some other serious harm if returned. While the other serious harm must rise to the level of persecution, no nexus to a protected ground is required.⁵⁵ If so, you may grant asylum in the absence of a well-founded fear of persecution.⁵⁶ Once again, risk to the applicant is the main positive factor to be considered in the exercise of discretion.

Officers should go through these steps in any case where the applicant is only able to establish eligibility through past persecution.

Remember, in order to rebut the presumption that the applicant has a well-founded fear of persecution after the applicant has established that he or she has suffered persecution in the past, the officer must be able to meet the preponderance of the evidence standard in showing that the applicant no longer has a well-founded fear of persecution. Before proceeding with a discretionary denial/referral based on a lack of well-founded fear in the future, the officer must also consider whether there are compelling reasons for the applicant being unwilling or unable to return to the country of origin arising out of the severity of the past persecution, or whether the applicant would suffer some other serious harm if returned.

⁵⁵ *Matter of L-S-*, 25 I&N Dec. 704, 714 (BIA 2012).

⁵⁶ [8 C.F.R. § 208.13\(b\)\(1\)\(iii\)\(B\)](#); see also *Matter of H-*, 21 I&N Dec. 337 (BIA 1996).

SUPPLEMENT C – INTERNATIONAL OPERATIONS DIVISION

The following information is specific to the International Operations Division. Information in each text box contains division-specific procedures and guidelines related to the section from the Training Module referenced in the subheading of the supplement text box.

REQUIRED READING

SUPPLEMENT A – REFUGEE AFFAIRS DIVISION

ADDITIONAL RESOURCES

None

SUPPLEMENTS

IO Supplement – Common Forms Requiring Adjudicative Discretion

Officers within the International Operations Division will exercise discretion during the adjudication of a variety of immigration benefit requests. Some of the most common requests involving discretion include:

- Form I-601, Application for Grounds of Inadmissibility
- Form I-730, Refugee/Asylee Relative Petition
- Form I-602, Application by Refugee for Waiver of Grounds of Excludability

Additional training on discretion will be provided during the International Operations Division Training Course (IODTC).