



Practice Alert: The Application of Discretion in USCIS Adjudications

By AILA's USCIS HQ (Benefits Policy) Committee and Administrative Litigation Task Force¹

On July 15, 2020, U.S. Citizenship and Immigration Services (USCIS) released a [Policy Alert \(PA-2020-10\)](#) updating the USCIS Policy Manual in the context of “consolidating existing policy guidance” regarding the application of discretion in benefits adjudications.² The updates include adding a chapter on **Discretionary Analysis**³ to Volume 1: General Policies and Procedures, and a chapter on **Discretion**⁴ relating to employment authorization into Volume 10 of the Policy Manual. These changes went into effect on July 15, 2020 and replace Chapter 10.15 of the Adjudicator’s Field Manual (AFM). AILA members should carefully review this new guidance and how it may be applied by USCIS.

AILA’s USCIS HQ (Benefits Policy) Committee and the AILA Administration Litigation Taskforce (ALTF) note that this guidance in the USCIS Policy Manual is of significant concern in that it is inherently vague and likely to infuse additional confusion, delay, inconsistency, subjectivity and potential abuse of discretion into the already inefficient adjudications process. Although USCIS does indicate that “[i]n short, discretion is defined as the ability or power to exercise sound judgment in decision-making,”⁵ the Policy Manual update provides scant instruction to adjudicators on the application of discretion to benefits adjudications. Significantly, the guidance also injects a discretionary component into applications that have historically involved only an analysis of eligibility criteria (e.g., Form I-765 applications for pending adjustment of status applicants).

Three Step Adjudication Process

The framework setup by this new guidance for benefit types subject to discretion establishes three distinct steps to review. First, officers must engage in fact finding in a benefit request, which will apparently include examining both substantive eligibility documentation and evidence relevant to a determination of whether an exercise of discretion is appropriate. Second, the officer must determine if, after review of the facts, the benefit request meets the applicable adjudicative evidentiary burden for eligibility, which is typically preponderance of the evidence.

¹ Special thanks to AILA members Jeremy Weber, Brian Green, Tracie Klinke, and Michael Turansick for their contributions to this practice alert.

² USCIS Policy Alert “Applying Discretion in USCIS Adjudications” (PA-2020-10) July 15, 2020, <https://www.uscis.gov/sites/default/files/document/policy-manual-updates/20200715-Discretion.pdf>.

³ 1 USCIS-PM E.8 - Chapter 8 - Discretionary Analysis, <https://www.uscis.gov/policy-manual/volume-1-part-e-chapter-8>.

⁴ 10 USCIS-PM A.5 - Chapter 5 – Discretion, <https://www.uscis.gov/policy-manual/volume-10-part-a-chapter-5>.

⁵ See 1 USCIS-PM E.8 - Chapter 8 - Discretionary Analysis, *supra* note 3.

The third step then requires USCIS officers to adjudicate, as a “separate component” of the process, whether the benefit request should be approved as a matter of discretion.⁶ This discretionary review analysis requires officers to “weigh all positive factors present in a particular case against any negative factors in the totality of the record.”⁷ Because of the specific structure of this three-step process, discretionary review will typically only occur after a benefit request has been determined to be substantively approvable. Thus, once the benefit request has reached the discretionary review stage, the adjudications process will morph from an objective analysis of evidence of eligibility into an investigation into whether potential grounds for denial exist.

Despite this patina of structure created by the three-step process, the Policy Manual is vague as to how USCIS officers are supposed to conduct this investigation into potential grounds for denial and, more specifically, how to weigh the positive and negative factors, noting merely that “precedent case law provides guidance” on how to review discretion.⁸ The Policy Manual contains a “non-exhaustive” list of factors to consider that includes, in a striking example of circular reasoning, eligibility for the benefit sought as one of the factors. The “clearest” instruction given to adjudicators is as follows:

*There is no formula for determining the weight to be given a specific positive or negative factor. Officers should not attempt to assign numbers or points to a specific factor to determine if one factor is more or less favorable than another. Officers should consider each factor separately and then all the factors as a whole. The negative and positive factors should be balanced against each other and then evaluated cumulatively. The weight given to each factor may vary depending on the facts of a particular case as well as the relationship of the factor to other factors in the analysis.*⁹

When a benefit is denied based on discretion, the Policy Manual identifies the information that an officer must provide in the denial notice. Specifically, the denial must include:

- Indicate the decision to deny was made as a matter of discretion;
- Identify, specifically, each positive factor presented by the facts of the case;
- Identify, specifically, each negative factor;
- Explain the relative decisional weight given to each negative and positive factor; and
- Explain the cumulative weight given to the negative and positive factors, and the reason for the outcome.¹⁰

Immigration Benefits Categories Subject to Discretionary Review

In Chapter 8 of Volume 1, the Policy Manual indicates the following immigration benefits are subject to this discretionary review framework:

- Petition to classify an alien as a fiancé(e) of a U.S. citizen;
- Application to extend or change nonimmigrant status;
- Advance permission to enter as a nonimmigrant;
- Humanitarian parole;
- Temporary protected status;

⁶ *Id.*

⁷ *Id.*

⁸ *Id.*

⁹ *Id.* (internal footnotes omitted).

¹⁰ *Id.*

- Refugee status (noting an exception for following-to-join refugee adjudications which do not contain discretion in the adjudication of such benefits);
- Asylum;
- Petition to classify an alien as an employment-based immigrant;
- Petition to classify an alien as an immigrant investor;
- Adjustment of status (noting some exceptions: Nicaraguan Adjustment and Central American Relief Act of 1997 (NACARA); refugee-based adjustment under INA 209(a)(2); adjustment of status based on Haitian Refugee Immigration Fairness Act of 1998 (HRIFA); adjustment of status based on Liberian Refugee Immigration Fairness (LRIF));
- Waivers of inadmissibility;
- Consent to reapply for admission after deportation or removal; and
- Employment authorization (noting an exception for asylum applicants filing under 8 CFR 274a.12(c)(8)).

This section of the Policy Manual also indicates that the following benefits requests generally do not contain discretion but that there may have some exceptions:

- Petition to classify an alien as a nonimmigrant worker (with some exceptions, but no specific exceptions are listed);
- Petition to classify an alien as a family-based immigrant (with some exceptions, but no specific exceptions are listed); and
- Removal of conditions on permanent residence (noting that an I-751 waiver request is a discretionary decision).

Issues Specific to the Adjudication of Form I-765 Applications

In a departure from long-established agency interpretation, the Policy Guidance at Volume 10, Part A, Chapter 5 imposes the three-step process for discretionary analysis on nearly all categories of employment authorization documents (EADs) within 8 CFR §2741.12(c), as well as applications for EAD filed on or after August 25, 2020 by applicants for asylum.¹¹ This is a deviation from long-established agency interpretation. Given both the inherent ambiguity of the guidance on applying discretionary analysis referenced above and the specific and disparate circumstances of several employment authorization categories, serious concerns arise.

Some categories of EAD applicants will naturally have one or more negative factors. For example, while the majority of adjustment of status applicants will have a lawful entry, a positive factor, those receiving Deferred Action for Childhood Arrivals (DACA) or other types of Deferred Action have often entered without inspection, a negative factor. Will these applicants ultimately be eligible for adjustment of status but ineligible for the employment authorization that may enable them to survive economically while that application is pending? Also, for EAD applications based on DACA, will negative factors not considered for substantive eligibility for adjustment of status need to be addressed with positive supporting documents for EAD eligibility?

Also, if someone is granted discretion in receiving the underlying benefit, there should not be a separate discretion analysis for the EAD from which it derives. If the facts are the same, the outcome should be as well. For example, once the threshold decision has been made to approve

¹¹ See 10 USCIS-PM A.5 - Chapter 5 – Discretion, *supra* note 4.

a DACA application, why must an officer again go through the analysis for the employment authorization application? This is inefficient and unwise for applicants and USCIS.

With respect to adjustment of status applicants who may have an inadmissibility issue, there are different views on whether to submit a Form I-601 proactively or wait for an interviewing officer to make the determination. For example, if someone has an arrest that may or may not be a crime involving moral turpitude (CIMT) and they are waiting to argue it at the interview, will the EAD be denied because the adjudicator finds the applicant inadmissible prior to submission of the waiver request? Chapter 5 of the USCIS Policy Manual is ambiguous as to whether the need for a waiver is disqualifying, although it recognizes that waivers can be submitted later, so the Policy Manual provides adjudicators with no clarity as to how this should actually be adjudicated.

For applicants who have negative factors (e.g., prior removal order, EWI, etc.), how much positive factor documentation is needed to warrant the exercise of discretion? The Policy Manual provides adjudicators with only the instruction quoted above. Other ambiguities abound. For example, Chapter 5 of the Policy Manual cites one factor that may be considered as hardship due to an adverse decision but is silent as to what level of hardship is required and who must experience it.

General Reminder

AILA members are reminded to review the Immigration and Nationality Act (INA), associated regulations, and other authorities relevant to the extent to which an exercise of discretion is applicable to a specific immigration benefit, if any, before filing the application or petition with USCIS. Given the new Policy Manual changes, if a benefit does indicate the use of discretion in adjudication, even if USCIS practice previously was not to apply an evaluation of discretion to that benefit, it would be advisable at a minimum to outline why your client should receive a favorable exercise of discretion based on the totality of the circumstances and submit it with the benefit filing.

Comment Period

USCIS is accepting comments from stakeholders on this policy manual change. Comments must be submitted before August 14, 2020. For details on how to submit a comment to USCIS regarding this policy manual change, please visit: <https://www.uscis.gov/outreach/feedback-opportunities/policy-manual-for-comment>.

Call for Case Examples

AILA's Administration Litigation Taskforce (ALTF) is looking at this USCIS policy manual update closely to evaluate potential litigation options. To that end, ALTF is seeking case examples to help inform the ALTF regarding potential litigation strategies. Specifically, ALTF is seeking examples of requests for evidence (RFEs), Notices of Intent to Deny (NOIDs) and denials issued by USCIS since July 15, 2020, that involve a discretionary analysis as imposed by the USCIS Policy Manual when the action taken by USCIS is not discretionary as a matter of statute or regulation. To submit your case example, please visit: <https://www.aila.org/advo-media/agency-liaison/case-examples/call-for-examples-rfes-noids-and-denials>.