



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

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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 discretion.”⁷ The exercise of discretion is specifically provided in statute for certain benefits. Some mandatory benefits may have a discretionary component, while other

⁴ *The American Heritage Dictionary of the English Language*, Fourth Edition Houghton Mifflin Company (2000), available at: <http://www.thefreedictionary.com/discretion> (last visited October 20, 2011).

⁵ *Collins English Dictionary – Complete and Unabridged*, HarperCollins Publishers 2003, available at <http://www.thefreedictionary.com/discretion> (last visited October 20, 2011).

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

⁷ *Immigration and Naturalization Service v. Doherty*, 502 U.S. 314 (1992).

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 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

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

⁹ Morton, John, Director, ICE. *Exercising Prosecutorial Discretion Consistent with the Civil Immigration Enforcement Priorities of the Agency for the Apprehension, Detention, and Removal of Aliens*.

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, but 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.

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.

Memorandum to All Field Office Directors, All Special Agents In Charge and All Chief Counsel,
(Washington, D.C. June 17, 2011.

¹⁰ 8 CFR § 208.14(c).

¹¹ INA § 207(c)(1).

¹² See, 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—...).

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 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

¹³ 6 U.S.C. § 275.

¹⁴ 8 CFR § 208.13(b)(1)(i); NOTE: This is a different standard than is 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. Rios-Pineda*, 471 U.S. 444 (1985); *INS v. Bagamasbad*, 429 U.S. 24 (1976).

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

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.

¹⁶ See INA §207(c)(3).

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

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 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

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.

²¹ *Id.*

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 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:

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).

²⁵ *Ibid.*

“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 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. Recent guidance published by ICE, on the subject of prosecutorial discretion, lists 19 factors that may be taken into account and then ends with the statement, "[t]his list is not exhaustive and no one factor is determinative."²⁶ 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."²⁷ 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

²⁶ Morton, John, Director, ICE. *Exercising Prosecutorial Discretion Consistent with the Civil Immigration Enforcement Priorities of the Agency for the Apprehension, Detention, and Removal of Aliens*. Memorandum to All Field Office Directors, All Special Agents In Charge and All Chief Counsel, (Washington, D.C. June 17, 2011

²⁷ *Matter of Pula*, 19 I&N Dec. 467, 474 (BIA 1987).

exists, and other evidence attesting to a respondent's good character (*e.g.*, affidavits from family, friends, and responsible community representatives).²⁸

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.²⁹

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

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.³⁰ This instruction arises from the fact that the underlying protection

²⁸ *Matter of Marin*, 16 I&N Dec. 581 (BIA 1978).

²⁹ *Ibid.*

³⁰ 8 CFR § 208.13(b)(1)(i) (Discretionary referral or denial).

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.³¹ 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.³² 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).³³

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.

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.”³⁴

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.³⁵

4.2 Negative Exercise of Discretion

³¹ 8 CFR § 208.13(b)(1)(iii)(A).

³² 8 CFR § 208.13(b)(1)(iii)(B); see *Matter of L-S-*, 25 I&N Dec. 705, 714 (BIA 2012).

³³ INA §212(a)(9)(B)(v).

³⁴ 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).

³⁵ See USCIS Basic Lesson, *Exercising Discretion*, July 2009, page 11.

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

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.”³⁶ 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

³⁶ *Matter of Marin*, 16 I&N Dec. 581 (BIA 1978).

- 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 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 – Balancing Positive and Negative Factors

One of the most common applications of discretion you will be called upon to make is the adjudication of form I-602, Application by Refugee for Waiver of Grounds of Excludability. Refugee Officers may be called upon to adjudicate I-602 Waivers in the course of their normal duties adjudicating I-590 applications (Classification as a Refugee). Authority for International Operations Officers to adjudicate I-602 Waivers is delegated in the regulations.³⁷ The following is an explanation of the factors you should consider in adjudicating I-602 Waivers.

- First you should make certain that the person filing the application is a refugee. The applicant may be classified as a refugee following an interview by a qualified officer from USCIS, or the applicant may be the immediate relative of a refugee who is entitled to derivative status. In addition to having been classified as a refugee, the applicant must be subject to at least one ground of inadmissibility.
- After the eligibility of the applicant to file form I-602 is established, you must consider the specific sections of 212(a) that apply, keeping in mind that sections 212(a)(4), 212(a)(5), and 212(a)(7)(A) do not apply to refugees pursuant to section 207(c)(3). Also remember that

³⁷ 8 CFR § 207.3(a).

inadmissibility under sections 212(a)(2)(C), 212(a)(3)(A), (B), (C), and (E) is not eligible for a waiver.³⁸

- In considering the application for a waiver you must weigh the positive and negative factors presented. In adjudicating a discretionary waiver application under § 207(c) of the INA, the humanitarian, family unity, or public interest considerations must be balanced against the seriousness of the offense that rendered the applicant inadmissible.
- In making this determination, the officer should recognize that the applicant, if the principal refugee, has established past or a well-founded fear of future persecution, which is an extremely strong positive discretionary factor.
- If an applicant is inadmissible under section 212(a)(2) of the Act because he or she committed a crime involving moral turpitude, the officer should not grant a waiver under section 207(c) of the INA except in extraordinary circumstances, such as those involving national security or foreign policy considerations, or cases in which an applicant clearly demonstrates that denying refugee status would result in exceptional and extremely unusual hardship. In considering whether the seriousness of the applicant's crime you may look to the definition of "aggravated felony" in the Act.³⁹ If the conviction seems to fit the definition of an aggravated felony, you should assume that it was a serious crime. If the crime does not meet the definition of aggravated felony, another factor you may consider in making the determination of whether the applicant was convicted of a serious crime is whether the type and circumstances of the crime indicate that the alien will be a danger to the community. In making such a determination you should consider:
 - the nature of the conviction
 - the sentence imposed
 - the circumstances and underlying facts of the conviction
- Positive factors to be considered in exercising discretion might include:
 - Likelihood of well-founded fear
 - Family unity
 - Medical needs of the applicant or family members
 - Risk of *refoulement* by the country of first asylum

³⁸ INA § 207(c)(3).

³⁹ INA § 101(a)(43).

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.⁴⁰ 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.⁴¹
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 remove a reasonable possibility of future persecution.⁴²
4. Next, you look to see if the applicant can reasonably relocate within his/her

⁴⁰ 8 CFR § 208.13(b)(1).

⁴¹ 8 CFR § 208.13(b)(1)(i).

⁴² 8 CFR § 208.13(b)(1)(i)(A).

country of persecution and thereby avoid any future persecution.⁴³

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 the officer's 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.⁴⁴
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.⁴⁵ 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 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.⁴⁶ If so, you may grant asylum in the absence of a well-founded fear of persecution.⁴⁷ 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

⁴³ 8 CFR § 208.13(b)(1)(i)(B).

⁴⁴ 8 CFR § 208.13(b)(1)(ii).

⁴⁵ 8 CFR § 208.13(b)(1)(iii)(A); see also, *Matter of Chen*, 20 I&N Dec. 16 (BIA 1989).

⁴⁶ *Matter of L-S-*, 25 I&N Dec. 704, 714 (BIA 2012).

⁴⁷ 8 CFR § 208.13(b)(1)(iii)(B); see also, *Matter of H-*, 21 I.&N. Dec. 337 (BIA 1996).

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.

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).