



Recommendation 89-9

Processing and Review of Visa Denials

(Adopted December 15, 1989)

United States consulates around the world complete the processing of some nine million applications for immigrant and nonimmigrant visas each year. Approximately ninety percent are granted; ten percent are denied. Under current practice, the only review of a consular official's denial of a visa may be by a more senior officer in the consulate, or, on points of law, by the Visa Office in the State Department. The Immigration and Nationality Act has been read to preclude administrative review, and the courts, with a few exceptions, have declined to review visa denials.

Immigrant visas are available to persons with close family relationships to U.S. citizens and residents, or with particular abilities or skills that are needed but not otherwise available in the United States. Nonimmigrant visas are available in a long list of classes, ranging from tourists to students to certain types of business personnel to diplomats.

Whatever the visas category or class, there clearly are important interests at stake. These interests are not just those of the applicants themselves, but also of citizens and residents of the United States who are sponsoring the applicant or have some other interest in the applicant's presence in the United States. These interests warrant a close look at whether initial decisions in this important program of mass adjudication should be more fully reviewable than at present.

Federal law and State Department regulations give consular officers substantial discretion in adjudicating visa applications. For example, consular officials exercise absolute discretion in determining whether an applicant may be represented by an attorney or other qualified representative at the visa application interview. Furthermore, although current Department regulations, at 22 CFR 41.121(c), require that a denial of a visa application be reviewed by a more senior officer, the high volume of applications at some posts has resulted in only a random sample of denials being reviewed. Review by a senior official may also be a problem in single-officer posts.

Consular posts send a few hundred cases a year presenting significant legal issues to the Visa Office of the State Department for an advisory opinion that is binding only with respect to legal



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issues. The applicant typically has no notice of this proceeding. Such review affects the results in only a small number of cases, since most visa denials are based on a factual determination.

Current law has been read by some to limit both administrative and judicial review. Section 104(a) of the INA, 8 U.S.C.1104(a), excepts the Secretary of State from the administration or enforcement of "those powers, duties and functions conferred upon the consular officers relating to the granting or refusal of visas." This language has been considered by some to preclude the establishment of a more formal review mechanism within the State Department. Further, courts have generally limited the extent of available judicial review.

The Conference believes that it is important that there be at least some level of review of consular discretion to deny or grant visas. The availability of such review would not only encourage consistency and care in the initial adjudication, but would serve interests of fairness and legitimacy. On the other hand, a review scheme in this area can be crafted in a fashion that keeps procedure to a minimum, takes account of the extremely high volume of visa applications, and avoids over-judicialization of the process.

The Recommendation reflects a two-pronged approach to administrative review of visa denials, aimed both at improving the review at the consular level and at considering the creation of a level of centralized administrative review. The suggestions directed at the consular offices are intended to encourage quick, consistently applied, and cost-effective review that would resolve many of the issues on which review might be requested. The Recommendation also asks the State Department to study the issues, and develop and submit to Congress a proposed process for administrative review of consular actions. The Conference recognizes there are currently competing priorities for resources that might be required by implementation of the Recommendation, but believes these proposals should be implemented as quickly as is feasible under the circumstances.

Recommendation

1. The State Department should adopt a regulation ensuring that applicants may be accompanied by an attorney or other authorized representative during the course of the visa application interview process. To the extent practicable, the State Department should take steps to reply promptly to communications from applicants or authorized representatives and



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to ensure that facilities are available to enable applicants to meet with their representatives during the application interview process.

2. The State Department should require consular officers to provide brief but explicit written statements of the factual and legal bases and reasons for denying a visa application, except where reasons of national security or potential adverse effects on foreign policy dictate otherwise.

3. The State Department should modify its regulations to allow Visa Office advisory opinions to be made available to applicants and their authorized representatives except where national security or potential adverse effects on foreign policy dictate otherwise.

4. The State Department should either comply with its regulation found at 22 CFR 41.121(c) requiring review within a consulate of each denial of a visa application, or examine alternative systems to review visa denials at consular posts. In such a study, the State Department should keep in mind the goal of ensuring consistency in visa adjudications and consider possible alternatives to address exigencies created by busy consular posts, for example, by reviewing random samples of visa denials, or selecting for review certain types of denials.

5. The State Department should, after appropriate study, develop and submit for Congressional review a proposed process for administrative review of consular visa actions.¹

Citations:

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¹ If it is thought that current law precludes such a State Department study, Congress should authorize the State Department to undertake the study.