Rebutting the U.S. Department of State's 221(g) Arguments with…Facts

By Brian S. Green

The U.S. Department of State ("DOS") has been facing an onslaught of lawsuits challenging unreasonable delays in the adjudication of nonimmigrant and immigrant visa applications. Recently, the agency has attempted to avoid judicial review of the delays of visa applications by arguing that (1) 221(g) visa refusals are "denials" and "final agency actions" that are immune from judicial review, and (2) that these final agency actions are immune from judicial review under the court-made "doctrine of consular nonreviewability." This Practice Advisory shares my strategy for rebutting these arguments with the U.S. Department of State's own statistics, i.e., facts.

221(g) Visa Refusals

At an interview for a U.S. visa, the visa applicant executes the visa application by signing it before a U.S. consular officer, who then reviews and adjudicates the application and determines the noncitizen's eligibility for the requested visa. *See* 22 C.F.R. §§ 40.1(l); 42.61, 42.62; 8 U.S.C. §§ 1201(a)(1), 1202(a), (b). *See also* Foreign Affairs Manual ("FAM") 9 FAM 403.10-2(A) (U) Visa to be Issued or Refused (for nonimmigrant visas) and 9 FAM 504.11-2(A)(a) and (b) Visa Issued or Refused if Application Properly Completed and Executed (for immigrant visas).

At the conclusion of the visa interview, the consular officer must decide to either issue the visa or refuse it. *See* 8 U.S.C. § 1201(g); 22 C.F.R. § 42.81(a) ("When a visa application has been properly completed and executed before a consular officer . . . the consular officer must issue the visa (or) refuse the visa under INA 212(a) or 221(g) or other applicable law.) A quasi-refusal may not be used as the sole ground for a refusal. *See* 9 FAM 403.10-2(A)(a) and 9 FAM 504.11-2(A)(b).

The DOS's own Foreign Affairs Manual explicitly includes instructions for the "reactivation" of visa applications that have been refused under INA 221(g)/8 U.S.C. § 1201(g). The FAM states that:

> An applicant who has been refused under INA 221(g) need not complete a new [nonimmigrant visa] application form or pay the machine readable visa (MRV) fee again if less than one year has elapsed since the latest refusal. When the requested information is submitted by the applicant or the necessary clearances received, you should not the new information or results of the clearance process, and issue or refuse the visa. If one year or more has elapsed since the latest refusal, the applicant must submit a new Form DS-160 and pay the MRV fee again for the case to proceed. If the cause of the delay leading to the 221(g) refusal is a lack of U.S. Government action or U.S. Government error the period of reapplication is extended indefinitely. Hence, the MRV fee is not charged again when the application is pursued.

See 9 FAM 403.10-4(A)(b) (Reactivation of Case Refused Under INA 221(g)).

The FAM goes on to advise consular officers that:

> You should find that an applicant has overcome an [nonimmigrant visa] refusal under INA 221(g) in two instances: when the applicant has presented additional evidence that allows you to re-open and re-adjudicate the case, or when the administrative processing on a case is completed.

See 9 FAM 403.10-4(B)(a) (Overcoming Post Refusals).

Despite the obvious guidance to consular officers that they can "reopen" and approve visa applications after a 221(g) refusal, and our common experience as U.S. immigration lawyers where thousands of our clients have received visas after first receiving a 221(g) denial, the U.S. Department of State has chosen to argue, in federal courts, that a 221(g) is a final decision and that no action is required after such a decision is issued.

FOIA Response

Rather than trying to get discovery showing that the agency' argument was unfounded, I filed a Freedom of Information Act ("FOIA") request seeking:

> The percentage of visa applications (both nonimmigrant and immigrant) that were approved after receiving a 221(g) refusal between January 1, 2020 and January 1, 2025.

The FOIA response that I received stated that:

> Among all [nonimmigrant visa] applications that that (sic) received a 221(g) refusal and were adjudicated between Jan 1, 2020 and Jan 1, 2025, **approximately 71.2% were ultimately issued.** In the case of [immigrant visa] applications that had a 221(g) refusal and were adjudicated during this time frame, **78.3% were ultimately issued.**

(emphasis added).

Notice of Supplemental Facts

Unfortunately, by the time I received this FOIA response, briefing on a motion to dismiss had been completed in several of my pending visa delay lawsuits. But I had advised the judges in each of these lawsuits that my FOIA request was pending and that I expected to be able to produce evidence, from the U.S. Department of State itself, that showed that literally millions of visa applications have been approved after receiving a 221(g) refusal. In these lawsuits, I filed a "Notice of Supplemental Facts" and attached the FOIA response in its entirety as an exhibit to the notice. In the ECF system, I filed this notice under the "Notice – Other" event, because it is not a "Notice of Supplemental Authority" (which is reserved for filing notices of Circuit Court or Supreme Court decisions). Redacted copies of a motion to dismiss and a notice of supplemental facts are provided with this advisory.