How to Deal with “Impossible” Visa Denials and Cancellations

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INTRODUCTION

A consular officer’s discretionary decision to deny a visa under “Reason to Believe,” coupled with “Consular Non-Reviewability” of the denial, may amount to the intractable dilemma of a Gordian Knot. How do you untie the knot and help your client make his or her way back to the United States? In this practice advisory we will explore the “Reason to Believe” standards in Immigration and Nationality Act (INA) 1 §221(g)(3) Nonissuance of Visas, INA §212(a)(2)(C) Controlled Substance Traffickers, and INA §212(a)(3) Security and Related Grounds, together with the “Doctrine of Consular Nonreviewability.” We will address the particular issue of denials based on the visa applicant’s inclusion on INTERPOL, and review specific strategies for resolving this problem. We will also discuss judicial and administrative challenges and solutions for handling cases involving these seemingly “impossible” visa denials.

REASON TO BELIEVE

INA §221(g)(3) Nonissuance of Visas

1 Pub. L. No. 82-414, 66 Stat. 163 (codified as amended at 8 USC §§1101 et seq.).
According to the Foreign Affairs Manual (FAM), all non-immigrant visa applications must either be issued or refused. Visa refusals must root in specific legal grounds such as INA §212(a), (e) or (f), INA §221(g) and others. With this backing, a consular officer may refuse a visa when the consular officer knows or has reason to believe that such alien is ineligible to receive a visa. Although INA 221(g) allows for limited reopening or reconsideration of a denial, typically for failure to provide available documentation, the encompassing INA references, coupled with any other provision of law empower consular officers to rely on reason to believe standards in almost any application circumstance.

Reason to believe lacks an INA definition and its standard or threshold is not defined in INA §221(g)(3), but the regulatory definition demands determinations based on facts or circumstances which would lead a reasonable person to conclude that the applicant is ineligible to receive a visa. Courts and others have attempted to define the standard and its applicability in various INA sections, some of which are examined below.

INA §212(a)(2)(C) Controlled Substance Traffickers

Any alien who the consular officer or the Attorney General knows or has reason to believe – is or has been an illicit trafficker in any controlled substance […] is inadmissible. Here, the INA is quite specific when to call for reason to believe inadmissibility determinations and the FAM devotes an entire section explaining the standard. Specifically, the FAM demands when a consular officer has reason to believe that the alien is or has been engaged in trafficking, the standard of proof is met. The FAM does give some examples and guidance and does instruct consular officers that they must have more than a mere suspicion and there must exist a probability supported by evidence.

A finding of reason to believe under INA §212(a)(2)(C) is sustainable when the alien is or has been a knowing participant in drug trafficking when the finding it is based on reasonable, substantial, and probative evidence. Thus, when the inadmissibility standard is based on reasonable, substantial, and probative evidence, the reason to believe standard in INA §212(a)(2)(C) compares to a probable cause standard. While there is no specific definition of the reason to believe standard in INA §212(a)(2)(C), both the FAM and at least one court agree that a reason to believe might be established by a conviction, an admission, a long record of arrests with a unexplained failure to prosecute by the local government, or several reliable and corroborative reports.

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2 9 FAM 41.121 PN1.1.
3 Id.
4 INA §221(g)(3).
5 Id.
6 22 CFR 40.6.
7 INA §212(a)(2)(C).
8 9 FAM 40.23 N2.
9 Id.
10 Id.
11 Alarcon-Serrano v. INS, 220 F.3d 1116, 1119 (9th Cir. 2000).
12 Garces v. U.S. Att’y Gen., 611 F.3d 1337, 1346 (11th Cir. 2010).
13 Id. at 1346, 9 FAM 40.23 N2(b).
INA §212(a)(3) Security and Related Grounds

Any alien who a consular officer or the Attorney General knows, or has reasonable ground to believe, seeks to enter the United States to engage solely, principally, or incidentally in any activity [...]. Note that the INA uses the term “reasonable ground to believe,” while the FAM restricts its language to “[...] the consular or immigration officer knows or has reason to believe [...]”.

Here, the reasonable ground to believe standard is akin to the familiar probable cause standard. Specifically, a reasonable belief may be formed if the evidence linking an alien to an activity enumerated in INA §212(a)(3) is sufficient to justify a reasonable person to believe that the alien falls within the proscribed category. Therefore, it becomes a probable cause question whether the evidence presented supports a finding of reasonable belief.

Included in INA §212(a)(3) are the terrorism-related inadmissibility grounds (TRIG), which appear at INA §212(a)(3)(B). Inadmissibility under this provision is triggered whenever a consular officer “knows, or has reasonable ground to believe, is engaged in or is likely to engage after entry in any terrorist activity.” “Terrorist activity” is defined to include the types of conduct typically regarded as terrorism (high jacking, assassination, use of explosives, etc.) but also providing “material support” (funds, planning, preparation) for an undesignated “Tier III” terrorist organization – unless the actor can demonstrate by clear and convincing evidence that he or she did not know, and should not reasonably have known, that the group was a terrorist organization.

Visa denials under TRIG are particularly difficult to challenge, because although consular officers generally must provide “timely written notice” of a visa refusal and “specific provisions of law under which the alien is inadmissible,” the statutory notice requirement “does not apply.” The visa applicant often is left entirely in the dark as to why the government apparently believes he or she has engaged in or been supportive of terrorist activities. Overcoming such an inadmissibility determination can feel like trying to disprove a negative in the dark.

In addition, the source of derogatory information that results in a TRIG-related visa denial typically is not the consulate itself or the U.S. Department of State (DOS). Rather, the information originates from database or watchlist information maintained by the Department of Homeland Security (DHS), the FBI, the Drug Enforcement Agency (DEA), and other federal law enforcement and intelligence agencies. Thus, visa denials on terrorism or security grounds frequently involve no consular investigation or discretion, but are compelled by a database

14 INA §212(a)(3).
15 9 FAM 40.31 N2.
18 Id.
21 INA §212(b).
entry—“known or suspected terrorist”—that the consular officer may be powerless to question, much less overrule.

**Practice Pointer**

- Any challenge to a visa denial under TRIG is best brought to the agency (DHS, FBI, DEA, etc.) responsible for the “hit” in the database system. DHS has a formal process, known as DHS TRIP (Traveler Redress Inquiry Program), which can be accessed at www.dhs.gov/dhs-trip. In the authors’ experience, a complaint through DHS TRIP can, in some instances, resolve a watch list or database issue—for example, where the hit resulted from a same or similar name or other error. However, DHS does not inform applicants of the outcome of their inquiries, and often the only way to know whether a problem has been solved is by once again applying for a visa or seeking admission at a port of entry. Again, terrorism-related inadmissibility is rarely overcome simply through a DHS TRIP inquiry, but requires a more searching inquiry and access to the underlying reasons for the inadmissibility determination.

**CONSULAR NONREVIEWABILITY**

**History**

The origins of non-reviewability date back to the Chinese Exclusion Case of the late 19th century. Later, the U.S. Supreme Court established what we know as the Doctrine of Consular Nonreviewability today when the Court established that a consular officer’s decision to deny a visa was not subject to judicial review. The doctrine developed and survived challenges to this day under the umbrella that the power to exclude aliens is inherent in sovereignty, necessary for maintaining normal international relations and defending the nation against foreign encroachments and dangers. Governed by the Supreme Court’s holdings, lower courts have fashioned a doctrine which for all intent and purpose precludes any meaningful judicial review of consular decisions.

**Challenging the Doctrine of Consular Nonreviewability**

In time, courts have recognized a limited exception to consular non-reviewability when a U.S. citizen’s constitutional rights are alleged to have been violated by the denial of a visa to a foreigner. This means, a U.S. citizen raising a constitutional challenge to the denial of a visa is entitled to a limited judicial review concerning the reasons given for the adverse decision, unless the reasons are facially legitimate and bona fide. However, when an applicant is denied under the broad grounds of INA §212(a)(3), without more or any specificity, the denial cannot meet the facially legitimate and bona fide standard because the citation to an entire statute section fails to

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22 130 U.S. 581 (1889), holding the power of the legislative department of the government to exclude aliens from the United States is an incident of sovereignty which cannot be surrendered by the treaty making power.
25 Bustamente v. Mukasey, 531 F.3d 1059 (9th Cir. 2013).
26 Id., Kleindienst at 770.
provide a challengeable factual basis.\textsuperscript{27} The Supreme Court has recognized this legal quandary and is expected to hear arguments during this term.\textsuperscript{28}

The outcome of the case currently before the U.S. Supreme Court, \textit{Kerry v. Din}, No. 13-1402, likely will determine whether even a limited exception to the doctrine of consular non-reviewability exists in the courts, and, if so, the nature and scope of that exception. In the underlying opinion, \textit{Din v. Kerry}, 718 F.3d 856 (9th Cir. 2013), the U.S. Court of Appeals for the Ninth Circuit reiterated that limited review of a consular decision—so-called "Mandel review"\textsuperscript{29}—is available "[w]hen the denial of a visa implicates the constitutional rights of an American citizen."\textsuperscript{30} The Ninth Circuit had previously recognized that, for example, a U.S. citizen sponsor of an immigrant visa whose spouse is prevented from joining her and residing in the United States has standing to seek limited review of that visa decision.\textsuperscript{31} In \textit{Din}, the court ruled that the consular officer had not provided a "facially legitimate and bona fide" reason for denying the immigrant visa, because the mere citation "to a broad section of the INA that contains numerous categories of proscribed conduct, without any assurance as to what the consular officer believes the alien has done" was insufficient and amounts to offering "no reason at all" for refusing the visa.\textsuperscript{32}

The government petitioned for certiorari for the Supreme Court to address the following questions: (1) Whether a consular officer’s refusal of a visa to a U.S. citizen’s alien spouse impinges upon a constitutionally protected interest of the citizen. (2) Whether the U.S. citizen petitioner is entitled to challenge in court the refusal of a visa to her husband and to require the government, in order to sustain the refusal, to identify a specific statutory provision rendering him inadmissible and to allege what it believes he did that would render him ineligible for a visa. \textit{Din v. Kerry} is scheduled for argument on February 23, 2015, and a decision is expected by the summer. Until then, anyone contemplating a judicial challenge to a visa denial should either wait to bring the complaint or file it and seek consent of the government to suspend briefing until after the Supreme Court’s decision. Whereas a restrictive interpretation of the doctrine of consular nonreviewability may all but shut the courthouse doors to future visa challenges, an opinion that reaffirms limited Mandel review, or articulates a different standard, will surely encourage many to seek recourse for visa denials in the federal courts.

In addition to the narrow exceptions under nonreviewability, consular officers’ discretionary decisions are further exacerbated by database and watchlist data, which causes consular officers to deny visas based on information they cannot evaluate or which is not available to them, the result of which renders the exercise of consular discretion meaningless.\textsuperscript{33}

\textbf{Practice Pointer}: If you have a good reason to challenge a consular officer’s decision, be firm but diplomatic. Threatening the post with a lawsuit may prove counterproductive. Keep in mind that your inquiry for documentation or review is

\begin{itemize}
\item [\textsuperscript{27}] \textit{Din v. Kerry}, 718 F.3d 856 (9th Cir. 2013).
\item [\textsuperscript{28}] \textit{Kerry v. Din}, Docket No. 13-1402.
\item [\textsuperscript{29}] Originating from Supreme Court’s 1972 decision in Kleindienst \textit{v. Mandel}, 408 U.S. 753 (1972).
\item [\textsuperscript{30}] \textit{Din}, 718 F.3d at 860.
\item [\textsuperscript{31}] \textit{See Bustamante \textit{v. Mukasey}}, 531 F.3d 1059 (9th Cir. 2008).
\item [\textsuperscript{32}] \textit{Din}, 718 F.3d at 861.
\end{itemize}
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also subject to the following reason to believe standard: […] you must immediately inform the Department if you have reason to believe that the information being requested will be used in litigation against the Department […].34

CASE EXAMPLE: DENIALS DUE TO INCLUSION ON INTERPOL

Introduction

Some consular visa denials or revocations may involve the existence of negative information transmitted about your Client within the INTERPOL Information System.35 INTERPOL, or the International Criminal Police Organization, is headquartered in Lyon, France and is the world’s largest police organization with more than 190 member countries, including the United States.36 Consulates and law enforcement agencies around the world can access a number of INTERPOL databases that regularly transmit information or issue international alerts for fugitives, suspected criminals, or other persons of interest linked to criminal investigations. An INTERPOL “hit” may and often does lead to a seemingly “impossible” visa denial under INA §221(g)(3).

However, while a valid law enforcement purpose exists in most INTERPOL cases, in some INTERPOL actions it may not and the “hit” may be corrected or removed. For example, countries with poor human rights records and weak judicial systems may utilize INTERPOL for unlawful purposes, such as to persecute political opponents.37 Attorneys can advocate both before INTERPOL and DOS to argue that INTERPOL’s diffusion of negative information about their Client is contrary to the INTERPOL Constitution and the Universal Declaration of Human Rights.38

Challenging the Inclusion of Negative Information About Your Client in INTERPOL

Since the early days of the organization, INTERPOL has recognized and enshrined the importance of respecting human rights. Article 2 of INTERPOL’s Constitution mandates that the Organization ensure and promote international police cooperation “in the spirit of the Universal Declaration of Human Rights.”39 Article 3 of the INTERPOL Constitution reinforces Article 2 because it “strictly forbid[s]” INTERPOL from “undertak[ing] any intervention or activities of a

34 9 FAM 40.4 N6.
35 The “INTERPOL Information System” means “all the structured material resources and software used by the Organization – databases, communications infrastructure, advanced sensor technology and other services – to process data through its channels in the context of international police cooperation.” See INTERPOL, Office of Legal Affairs, INTERPOL’s Rules on the Processing of Data, 7, available at file:///Users/sangrossman/Downloads/20%20e%20rpd%20update%20(14y2089)%20(14y2089)%20(or).pdf.
37 Unfortunately, INTERPOL does not fully pre-screen member country’s request for international cooperation to ensure that they are legitimate. INTERPOL also does not have minimum membership standards and does not require that member countries be functioning democracies.
political, military, religious or racial character." One of the primary objectives of Article 3 is to "protect individuals from persecution." INTERPOL will abstain from intervention where a case against an individual is of pure or predominant political, military, religious, or racial characteristics.

According to Article 40 of the Implementing Rules on the Processing of Information (or the "Implementing Rules"), the relevant information to be considered in applying the "predominance test" of Article 3 includes:

- The nature of the offence;
- The status of the persons concerned;
- The identity of the source of information;
- The position expressed by INTERPOL members;
- INTERPOL’s obligations under international law;
- Implications on INTERPOL’s neutrality; and
- The general context of the case.

Any attorney aiming to remove negative information about a Client from the INTERPOL Information System should argue, much as in an asylum case brought under the INA, that the relevant information under Article 40 establishes the predominantly political, religious, military, or racial nature of the allegations made by a member state.

Legal arguments may be submitted in writing to the Commission for the Control of INTERPOL’s Files (or the “Commission”). The Commission, also located in Lyon, France, acts as an independent monitoring body to ensure INTERPOL’s compliance with its rules and regulations and to protect the rights of individuals that may be included in the INTERPOL Information System.

Practice Pointers

- Get to know and understand INTERPOL’s excellent website and the core legal materials. These are available at: www.interpol.int/About-INTERPOL/Legal-materials/Fundamental-texts.

- Prior to submitting any request before INTERPOL, make sure you are in compliance with any and all admissibility criteria. In particular, familiarize yourself with the Article 10 of the Operating Rules for the Commission for the Control of INTERPOL’s Files. These are available at: www.interpol.int/About-INTERPOL/Structure-and-governance/CCF/Access-to-INTERPOL's-files.

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40 Id. at Art. 3.
42 Id.
- Prepare your Client for a “long road” ahead. INTERPOL hits often take months if not up to a year to successfully resolve. The Commission is only required to meet a minimum of three times a year to review requests for access to INTERPOL’s files. Then, if the negative information is cleared, you must ensure that the information filters back through DOS and the consulates.

- Establish contacts with DOS and submit legal arguments and documents that show that your Client is the victim of an illegitimate persecution, and is not a criminal.

WORKING WITH DOS AND THIRD PARTIES TO ADDRESS INADMISSIBILITY ISSUES IN GENERAL

Whether it involves a possible INTERPOL hit or one of the other grounds of inadmissibility under the INA, as an attorney can work creatively to address the reasons for the denial and hopefully circumvent the doctrine of consular non-reviewability. As a matter of course, most attorneys will independently evaluate an applicant’s grounds of inadmissibility and prepare the applicant accordingly with a memo of law and/or documentation in support of waiving any ground of inadmissibility that may be present. But there are numerous other steps that an attorney can and should take to avoid or reverse a visa denial or revocation.

Determining Inadmissibility

To do so, there are certain preemptive measures that may be taken. A fundamental requirement in many cases, is understanding how a foreign arrest or conviction may impact an applicant’s eligibility for a U.S. visa. This often means working with foreign criminal counsel in the country where the act took place to understand the nuances of the local criminal law. Once this is done, the offence can be evaluated under U.S. immigration law in terms of whether a ground of inadmissibility exists and how best to deal with it.

Communicating with the Consular Post

Following this evaluation, in exceedingly complicated cases – especially those with obscure issues or uncommon offence – it may serve your client well for you to contact the adjudicating consular post and advise them of the issue. Despite the fact that some posts encourage pre-interview communication of high profile or exceedingly complex issues, others may respond only by stating that they do not pre-adjudicate cases. Whatever the response it is generally not prejudicial to your client to advise the post of an upcoming issue; however, the finding of inadmissibility is made only at the interview.

While, according to a former Secretary of the U.S. Department of State (DOS) Madeline Albright in a cable to all U.S. consular posts in 1999

> “[t]he best immigration attorneys know the law very well. They know the regulations. If an attorney insists that something can be done for

44 Working Constructively With Immigration Attorneys, 99 State 21138.
his/her client based on his or her interpretation of the law, ask for a citation. Let the attorney work with you … if you can show that her attorney where he or she erred in the interpretation, he or she will learn from you.”

Such a robust exchange of ideas and interpretations between the lawyer and the consular officer is not always the case. In cases where the consular officer’s interpretation differs so much that it results in a refusal, there are avenues that can be pursued to continue advocating for the applicant. When an applicant is found ineligible or a visa and the officer makes a legal determination that either no waiver of this is available or refuses to recommend a waiver to the U.S. Department of Homeland Security, the first step in challenging this determination is directly with the consular post.

Practice Pointers:

- As soon as you have reviewed the refusal letter and spoken to the applicant to determine what transpired at the interview contact with the post should be made to request that the application be reviewed by a consular manager or the chief of the relevant visa section.
- This communication should not be adversarial but should simply state your interpretation of the relevant legal provision(s) and should request that a manager review the application.
- Each post has its own method of communication from dedicated email addresses to online submission forms and the post’s preferred method should be used. Using the methods that have been set up for communication with the post usually ensures that the communication is routed to the appropriate person.
- If, however, a reasonable time passes with no response, communication can be escalated and a consular manager or section chief may be contacted directly.
- While there is no listing of consular email addresses, the AILA overseas chapters’ listservs are an excellent source of this information.

LegalNet and the Public Inquiries Office

DOS has a dedicated email address (legalnet@state.gov) that was established so that attorneys could communicate with the Visa Office in Washington, DC directly on matters of legal interpretation. While LegalNet will not review findings of fact made by consular officers, it is the next step in advocating points of law on behalf of your client after dealing with the consular post directly. Under 9 FAM 40.6 N2.1, an Advisory Opinion should be sought by consular officers “in any case where there is a question exists regarding the interpretation or application of law or regulation” during which time the application is suspended pending review by the Visa Office. 45 In cases where this opinion was not sought, the attorney may seek it directly by corresponding with LegalNet. It is important to note that a response from LegalNet can take several weeks to several months, depending on the issue, which is why it is always best to communicate with the consular post directly as a first response to a refusal.

Practice Pointer:

45 9 FAM 40.6 N2.2.
For cases where a response from LegalNet is not forthcoming or for cases that are undergoing prolonged Administrative Processing, further information may be obtained by contacting the Public Inquiries Office at the Department of State. The Bureau of Consular Affairs Public Inquiries Line (202) 485-7600 is staffed by experts in consular issues and, while the officers can not adjudicate underlying issues, they are often instrumental in moving cases through the proper channels until a resolution is reached.

AILA Liaison

AILA’s DOS Liaison committee serves several functions on behalf of AILA members, two of which are direct case liaison and advocacy of legal issues to the Visa Office. For direct case liaison, where a case has been pending beyond the stated review periods (generally 60 to 90 days) a submission to the appropriate liaison committee can be made online at http://liaison.aila.org and it will be forwarded to a liaison committee member with expertise in the underlying issue who will review the matter and, if necessary, advocate on behalf of the AILA member with the Visa Office. In instances where the issue represents a change in policy or the application of law and policy that seems to contravene the Foreign Affairs Manual or other legal provisions, the liaison committee may raise the legal issue directly with the legal staff of the Visa Office.

Congressional Assistance

In certain cases, especially urgent cases or those with a humanitarian aspect, that are languishing in Administrative Processing or where an Advisory Opinion is causing a significant delay, contacting a member of Congress may work to move the case through the system. Congressional assistance is generally an option in cases where there is a U.S. based petitioner who can show either financial or personal hardship based on the absence of the foreign national from the U.S. In such cases, the petitioner’s member of Congress’ office may liaise directly with the Department of State to escalate the matter being reviewed. Congressional assistance should not be combined with any other form of liaison as the use of multiple avenues of inquiry creates confusion for the agency and may cause unnecessary delay.

CONCLUSION

Reversing a consular visa denial or revocation may seem like an insurmountable problem. Nevertheless, a multi-faceted approach, combining zealous advocacy and knowledge on what resources you can access as an attorney to help your client, may just detangle the Gordian Knot.