



Practice Pointer: Supreme Court Rules U.S. Citizens Not Entitled to Review of Spouses' Visa Denials

July 2024

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Summary

The Supreme Court issued a decision in June 2024 holding that U.S. citizens do not have a fundamental liberty interest in their noncitizen spouses' ability to be admitted to the United States and, thus, are not constitutionally entitled to a review of the Department of State's visa refusal. Immigration practitioners should be aware of this new ruling and its potential implications for noncitizens and their families to properly advise clients seeking to consular process abroad.

Overview

In a 6-3 decision authored by Justice Barrett, the Supreme Court held that a U.S. citizen does not have a fundamental liberty interest in her noncitizen spouse being admitted to the country. *Department of State v. Munoz*, No. 23-334 (U.S. June 21, 2024). The Court reversed and remanded a Ninth Circuit Court of Appeals decision that ruled that U.S. citizens have a due process right to the government's providing a factual basis for its refusal of their spouse's immigrant visa application. *Munoz v. United States Dep't of State*, 50 F.4th 906 (9th Cir. 2022). Justice Sotomayor (joined by Justices Kagan and Jackson) dissented, arguing that the U.S. citizen had a constitutionally protected interest in her husband's visa application because its refusal burdened her right to marriage.

The petitioner, Ms. Muñoz, is a U.S. citizen who married her husband, Mr. Asencio-Cordero, in 2010. Mr. Asencio-Cordero is originally from El Salvador but lived in the United States for a decade after entering without inspection. He had no criminal history, and he and his wife have a U.S. citizen daughter. After U.S. Citizenship and Immigration Services (USCIS) approved the I-130 petition and granted Mr. Asencio-Cordero an I-601A waiver for unlawful presence, he departed to attend his consular interview in El Salvador. The consular officer, however, refused the visa application, finding Mr. Asencio-Cordero inadmissible under INA § 212(a)(3)(A)(ii). That ambiguous provision of the statute applies where an immigration officer "knows, or has reasonable grounds to believe, [that the applicant] seeks to enter the United States to engage solely, principally, or incidentally in [certain specific offenses or] any other unlawful activity."

The officer provided Mr. Asencio-Cordero with no information regarding the factual basis for the refusal, and there is no waiver for this inadmissibility ground. He assumed the consulate refused his visa on suspicion he was involved with MS-13 gang activity because of his tattoos. He and his wife pressured the consulate to explain or reconsider the officer's finding to no avail.

Ms. Muñoz then sued the Department of States (DOS) seeking some explanation for the refusal. The agency objected to providing further information, asserting the doctrine of consular non-reviewability, which precludes judicial review of consular officers' discretionary visa decisions if the refusal was facially legitimate and bona fide. *See Kleindienst v. Mandel*, 408 U.S. 753 (1972). Unwilling to give up, Ms. Muñoz sought judicial review of the consular decision in the U.S. District Court for the Central District of California arguing that her husband's visa refusal deprived her of protected liberty interests (e.g., living with her spouse in the United States) without due process in violation of the Fifth Amendment. The district court ruled against Ms. Muñoz and her husband, but on appeal the Ninth Circuit reversed, signifying a win for the couple and other applicants for immigrant visas.

The victory, however, was short-lived. The Biden administration chose to seek Supreme Court review, which reversed the appellate court's decision and held that Ms. Muñoz had no constitutional right to seek review of the refusal of her husband's visa application. Ms. Muñoz argued before the Court that DOS abridged her fundamental right to live with her spouse in her country of citizenship. The majority found that the Constitution contains nothing about a U.S. citizen's right to live with their spouse *inside* the United States and that Ms. Muñoz failed to show the right to immigrate a noncitizen spouse was "deeply rooted in this nation's history and tradition."

The Court noted that from the beginning, the admission of noncitizens into the country was characterized as a "favor [and] not of right." It found that while the United States had relatively open borders until the late 19th century, it recognized the Government's sovereign authority to set the terms governing admission and exclusion of noncitizens. The Court highlighted various instances where the Government has made it easier for spouses to immigrate but reiterated that Congress has *not* exempted spouses from inadmissibility grounds like INA § 212(a)(3)(A)(ii)'s unlawful-activity bar.

The Court confirmed that when a consular officer refuses a visa application based on inadmissibility, they must usually provide the applicant with a timely, written notice that: a) states the determination, and b) lists the specific provision(s) of law under which the noncitizen is inadmissible. *See* INA § 212(b)(1). The statute, however, requires no explanation "to any noncitizen inadmissible on certain grounds related to crime and national security." The majority opined that Mr. Asencio-Cordero, indeed, received more explanation that was due to him under the INA when he was provided the inadmissibility provision of law under which the consulate refused his visa.

Implications for Immigrants and Tips for Practitioners

Several organizations and individuals, including [CLINIC](#), members of Congress, former government officials, and legal services providers, filed amicus briefs on behalf respondents arguing primarily that the adjudication of a spousal visa application implicates a U.S. citizen spouse's protected liberty interest

in marriage and family unity. With the Supreme Court's rejection of this argument, advocates, immigrants, and their families, are concerned for the negative consequences this decision will have in foreclosing the right of U.S. citizens to seek judicial review of their spouse's visa refusal. For example, if a consular officer refuses a visa, it will remain unclear if it was due to some inappropriate factor such as bias, or to a mistake in intergovernmental data sharing that erroneously connected the noncitizen to a criminal record in their home country.

There are, however, several tips and considerations for practitioners to consider when representing immigrant visa applicants:

- **Carefully screen clients for any potential grounds of inadmissibility.**
 - CLINIC created this [sample intake form](#) for practitioners to use when conducting an initial consultation with a prospective client. For more CLINIC case management tools/forms, please visit <https://www.cliniclegal.org/toolkits/case-management/other-tools-and-forms>.

- **File all relevant FOIA requests, including any criminal background checks, with the appropriate government agency.** Most immigration related FOIA requests can be filed online.
 - For USCIS records, file the request online via <https://www.uscis.gov/records/request-records-through-the-freedom-of-information-act-or-privacy-act>
 - Visit the [SecureRelease](#) portal to submit a FOIA request with CBP and ICE, among other immigration agencies.
 - For DOS records, register and submit the request via <https://pal.foia.state.gov/app/Home.aspx>.
 - EOIR records can be submitted by registering and submitting a request via the [Public Access Link](#) (PAL), <https://foia.eoir.justice.gov/app/Home.aspx>

- **Ask the client questions that could potentially raise a red flag for consular officers abroad.** Practitioners must know as many details as possible about their client's past and/or current history *before* they depart for the consular interview. That way they can properly advise and assess the risks of their visa being refused. Below are a few suggested questions to ask a client seeking to consular process abroad. While these questions can be sensitive, they are still important to ask.
 - Do you have any tattoos/markings and, if so, what is their significance?
 - What does this specific tattoo mean to you?
 - Why and when did you obtain it?
 - Have you ever engaged in, been involved with, or had any connection to (including via friends/family members) a gang or criminal organization?
 - If so, did you have any direct or indirect participation in the organization or group, including any monetary payments, such as extortion payments?
 - Have you ever engaged in any drug use, including consuming marijuana? (note that questions pertaining to drug use are asked during the medical exam abroad)

- Are you active on any social media platforms? If so, have you posted any photos, messages, or other content an immigration officer might find questionable or concerning? The practitioner should also inform the noncitizen that immigration officials often review the social media of applicants and to be sure there is no damaging or prejudicial content.
- **Inform the client of the doctrine of visa non-reviewability by consular officers, explaining the officer’s broad discretion to refuse a visa if they, for whatever reason and without explanation, believe the client will commit “any” crime, including at some unknown point in the future.** This is in no way to scare the client, but to inform them of the law and to properly understand the risk of departing the United States. In a case involving a U.S. citizen spouse petitioning for a noncitizen who seeks to consular process, the advocate should inform the clients that the U.S. citizen spouse *does not* have a constitutionally protected right to seek review of a visa refusal and, if refused, no explanation is required.
- **Lastly, and most importantly, carefully screen for other forms of relief that can *avoid* the departure to consular process abroad.** Most notably, on June 18, 2024, President Biden announced the implementation of executive actions to keep families together. See [Fact Sheet: President Biden Announces New Actions to Keep Families Together](#). The new program will allow certain spouses and children of U.S. citizens to apply for “parole-in-place” from USCIS, thus avoid having to leave the U.S. to consular process abroad. Beginning on **August 19, 2024**, DHS will accept applications filed by eligible noncitizens. This benefit will be awarded on a case-by-case basis, and individuals must meet the following criteria:
 - Be present in the United States without admission or parole;
 - Have been continuously present in the United States for at least 10 years as of **June 17, 2024**;
 - Be married to a U.S. citizen as of **June 17, 2024**;
 - Not pose a threat to public safety or national security;
 - Have no disqualifying criminal history;
 - Be eligible to apply for adjustment of status; and
 - Merit a favorable exercise of discretion.

For practitioners and the public to remain up-to-date on the process, USCIS launched a new webpage, [Process to Promote the Unity and Stability of Families](#). In the meantime, eligible noncitizens are encouraged to take the following steps in preparation for filing their application:

- Gather documentation establishing that they have been continuously present in the United States for at least 10 years as of June 17, 2024, such as:
 - Rent receipts or utility bills;
 - School records (letters, report cards, etc.);
 - Hospital or medical records;
 - Attestations of residence by religious entities, unions, or other organizations, identifying them by name;

- Official records from a religious entity confirming participation in a religious ceremony;
- Money order receipts for money sent into or out of the United States;
- Birth certificates of children born in the United States;
- Dated bank transactions;
- Automobile license receipts, title, or registration;
- Deeds, mortgages, or rental agreement contracts;
- Insurance policies; or
- Tax returns or tax receipts.
- Gather evidence of a legally valid marriage to a U.S. citizen as of June 17, 2024, such as a marriage certificate;
- Gather documentation of identity;
- Gather evidence of spouse's U.S. citizenship, such as a passport, birth certificate or Certificate of Naturalization;
- Gather evidence of favorable discretionary factors; and
- Open or update your MyUSCIS account at <https://my.uscis.gov/>.

For noncitizen children of U.S. citizens, evidence of eligibility could include:

- Evidence of the child's relationship to the parent, such as a birth certificate or adoption decree;
- Evidence of the parent's legally valid marriage to a U.S. citizen as of June 17, 2024, such as a marriage certificate; and
- Evidence of the child's presence in the United States as of June 17, 2024.

This new program is welcoming news to U.S. citizens and their noncitizen family members and hopefully will help to avoid the tragic separation that many families have had to endure and that some, like Ms. Muñoz and her husband, continue to endure after leaving the country to consular process abroad.