

provided by:
MARCOS NEGRON & AKAIKE, LLP.
(English site) (Japanese site) - disclaimer -



**U.S. Citizenship
and Immigration
Services**

HQOPRD 70/2

Interoffice Memorandum

To: Regional Directors
Service Center Directors
District Directors
Officers-in-Charge

From: William R. Yates
Associate Director, Operations

Date: February 16, 2005

Re: Requests for Evidence (RFE) and Notices of Intent to Deny (NOID)

Purpose

This memorandum provides guidance to adjudicators on whether to issue a Request for Evidence (RFE) or a Notice of Intent to Deny (NOID) under current regulations at 8 CFR 103.2(b)(8). The memorandum on RFEs of May 4, 2004 is rescinded.

Background

Leading up to the May 4, 2004 memorandum, a review of USCIS practices had revealed that in certain instances adjudicators unnecessarily issued a RFE prior to making a final decision on a petition or application. It is unclear how this practice had evolved and it had resulted in a process that significantly affected limited USCIS resources, increased processing delays, and confused petitioners and applicants.

Based on a more recent review of sample cases, the May 4, 2004 memorandum appears to have created a misimpression that cases could be denied without RFE or NOID even when a RFE or NOID may have given the applicant or petitioner ("filer") a reasonable chance to resolve adjudicators' concerns about lack of evidence or about apparent ineligibility.

As part of its backlog reduction initiatives, USCIS is amending the regulations at 8 CFR 103.2(b)(8) to address when a RFE is required, and it is anticipated that the new regulations will provide greater adjudicative flexibility, guided by policy and procedural memos such as this one. In the interim, this memorandum reiterates that a RFE or NOID is not required for every case prior to adjudication, clarifies when an adjudicator may approve or deny an application or petition without issuing a RFE or NOID, and explains how to choose between a RFE and NOID.

Procedural Guidance

- Approval or Denial of an Application or Petition without RFE or NOID Issuance

An application or petition may be approved or denied without a request for evidence or notice of intent to deny in the following instances:

(1) *Denial with Evidence of Clear Ineligibility*

On one end of the spectrum, 8 CFR 103.2(b)(8) provides that an application or petition may be denied if there is clear evidence of ineligibility, notwithstanding the lack of initial evidence. Clear ineligibility exists when the adjudicator can be sure that an applicant or petitioner cannot meet a basic statutory or regulatory requirement, even if the filer were to be given the opportunity to present additional information.

Inability to meet a basic statutory or regulatory requirement includes circumstances where the evidence submitted by the applicant or petitioner clearly establishes that the filing is categorically ineligible for approval. Examples include:

- An applicant seeking to file for naturalization who is under the age of 18 (INA § 334(b));
- A petitioner seeking to file a Form I-130 who is not a qualifying relative, such as a grandparent or niece for whom there is no visa category (INA 204);
- A petitioning company seeking to file an L-1 petition clearly states that the petitioner has no relationship to a foreign company abroad (INA 101(a)(15)(L)).

Inability to meet a basic statutory or regulatory requirement also includes circumstances where the evidence submitted clearly establishes that a substantive requirement cannot be met. Examples include:

- An H-1B petition filed for a position such as a factory machine operator that cannot possibly support the necessary baccalaureate degree (or equivalent) requirement (INA 101(a)(15)(H)(i)(b));
- An E-1 treaty trader or E-2 treaty investor petition filed on behalf of a beneficiary who is not a national of a country with a qualifying treaty with the United States (8 CFR 214.2(e)(6) and (7)); or
- An employer seeking to file an H-2B petition on behalf of an H-2B alien who has been physically present in the U.S. in H-2B status for the entirety of the preceding three years without a six-month absence (8 CFR 214.2(h)(12)(iv)).

In all such instances, the petition or application may be denied, without issuance of a RFE or NOID, based on evidence of clear ineligibility, in that additional evidence or explanation could not perfect the filing. Even if initial evidence is missing, a denial without RFE or NOID would be appropriate in the above instances.

(2) *Record is Complete and Case is Approvable.*

The other end of the spectrum is a case in which all of the required evidence has been submitted, and the case is approvable. An applicant or petitioner must establish eligibility for the requested benefit, but when eligibility has been established, the case should be approved. 8 CFR 103.2(b)(1). If the record is complete with respect to all of the required initial evidence as specified in the regulations and on the application or petition and accompanying instructions, the USCIS adjudicator is not required to issue a RFE to obtain further documentation to support an approval based on that record.

From review of recent cases, it has appeared that adjudicators too often issue a RFE for additional types of evidence that could tend to eliminate all doubt and all possibility for fraud. This tendency is understandable in light of the “zero tolerance memo” issued by INS Commissioner Ziglar in 2002 in the wake of “9/11.” That memo, however, has been rescinded. See comments of Deputy Director Michael Petrucelli contained in transcript of the September 8, 2003 USCIS Town Hall meeting. USCIS is determined to protect the integrity of its adjudications, but USCIS must also facilitate lawful immigration, and has a responsibility to process cases efficiently and reasonably. Therefore, when a case is approvable based on initial evidence, and there is not evidence justifying a particular concern to support a RFE or a referral to Fraud Detection and National Security (FDNS), the case should be approved without RFE or NOID.

- The standard to be met by the petitioner or applicant is “preponderance of the evidence,” which means that the matter asserted is more likely than not to be true. Filings are not required to demonstrate eligibility beyond a reasonable doubt. If you suspect fraud, refer the case to the local FDNS Immigration Officer (IO) per the procedures established in the Fraud Detection Standard Operating Procedures located on the FDNS website at <http://powerport.uscis.dhs.gov/uscisfdns/index.htm>, under “Templates and Forms.” All referrals must be based on some sort of conflicting or otherwise derogatory information that would lead a reasonable person to question the veracity of the applicant, petitioner, and/or other entities associated with the benefit(s) sought. For additional guidance, refer to the December 14, 2004 memorandum entitled *Criteria for Referring Benefit Fraud Cases*.

- Issuance of a RFE or NOID

In all other instances, such as when the evidence raises underlying questions regarding eligibility or does not fully establish eligibility, issuance of a RFE or NOID is usually discretionary but strongly recommended.

USCIS adjudicators must recognize that our customers find our procedures and requirements sometimes difficult to follow, and denial of a case that ultimately could have been approved can cause significant delay and inconvenience to a customer. Therefore, unless the case is clearly ineligible for approval (i.e., denial decision) or the filer has

demonstrated eligibility by the preponderance of evidence without special cause for concern (i.e., approval decision), adjudicators normally should issue a RFE or a NOID, whichever is more appropriate. The amount of time USCIS adjudicators must give for a response to a RFE or NOID are currently dictated to some extent by regulations.¹

(1) **RFE**

A RFE is most appropriate when a particular piece or pieces of necessary evidence are missing, and the highest quality RFE is one that limits the request to the missing evidence. Generally it is unacceptable to issue a RFE for a broad range of evidence when, after review of the record so far, only a small number of types of evidence is still required. “Broad brush” RFEs tend to generate “broad brush” responses (and initial filings) that overburden our customers, over-document the file, and waste examination resources through the review of unnecessary, duplicative, or irrelevant documents. While it is sensible to use well articulated templates that set out an array of common components of RFEs for a particular case type, it is not normally appropriate to “dump” the entire template in a RFE; instead, the record must be examined for what is missing, and a limited, specific RFE should be sent, using the relevant portion from the template. The RFE should set forth what is required in a comprehensible manner so that the filer is sufficiently informed of what is required. If a filing is so lacking in initial evidence that a “wholesale” RFE from a template seems appropriate, an adjudicator should confirm this with a supervisor before doing so.

It can be helpful to customers to articulate how and why information already submitted is not sufficient or persuasive on a particular issue. Customers can become confused and frustrated when they receive general requests for information that they believe they have already submitted. The effort it takes to assess existing evidence helps either to spur the customer to provide persuasive evidence, or to form the basis of a convincing denial notice in the absence of such new evidence.

(2) **NOID**

A NOID is more appropriate than a RFE when initial evidence is predominantly present, but:

- the filing does not appear to establish eligibility by the preponderance of the evidence;
- the case appears to be ineligible for approval but not necessarily incurable; or

¹ The amounts of time within which an applicant or petitioner must respond to a RFE or a NOID are currently dictated to large degree by regulation. For example, 8 CFR 103.2(b) provides that an applicant or petitioner be given 12 weeks to respond to a request for evidence. In the family-sponsored petition context, 8 CFR 204.1(h) affords petitioners 60 days (which can be extended) to respond to a request for additional evidence. Where codified, USCIS regulations normally allow petitioners and applicants 30 days to respond to a NOID. *See, e.g.*, 8 CFR 214.2(h)(10)(ii), 245a.20(a)(2). Where a NOID is issued as a courtesy to the customer and not pursuant to a regulatory requirement, or where the regulatory requirement to issue a NOID does not prescribe a response time, the amount of time within which the petitioner or applicant must reply can be established on a case-by-case basis but should always afford the applicant or petitioner a reasonable amount of time to respond under the circumstances, which very rarely should be less than 30 days and often should be longer.

- the adjudicator intends to rely for denial on evidence not submitted by the filer.²

The NOID is designed to provide a poignant taste of denial without its immediate consequences, so that the filer can understand why the evidence submitted has not been persuasive and can have the best chance to overcome the deficiency if possible. If the response to the NOID is not sufficient, then, after review of the entire record, the preparation of the denial decision often will require limited editing of the NOID, although sometimes the response will require more detailed analysis for denial. It is possible to combine, in a sense, a RFE and a NOID, requesting additional evidence on certain points and explaining an anticipated basis for denial on others. Considerations above concerning the avoidance of templates and the assessment of existing evidence apply equally to writing NOIDs.

Importantly, under current regulations, a denial notice in certain types of cases cannot be issued under any circumstances without first issuing a NOID.³ The regulations limiting adjudicators' discretion in this regard will be the subject of a new rulemaking, but in the meantime the existing regulations must be followed.

(3) *Evaluation of Responses to RFE or NOID*

Upon receipt of response to a RFE or NOID, an adjudicator should review all relevant evidence, which may include evidence previously submitted and now supplemented. It is not normally appropriate to review the response without reference to the existing record. Normally, it should be appropriate to approve or deny a case without further RFE. Sometimes, however, a RFE response opens a new line of inquiry requiring a new RFE or NOID. In other cases, a RFE response may provide the missing initial evidence, but now the combined record requires notice to the filer why the record appears unpersuasive, so that a NOID is required. It should be rare to follow a NOID with a new RFE or NOID, rather than approval or denial.

Denials

USCIS is committed to providing quality decisions. Adjudicating officers must evaluate records of proceeding in their entirety and are required by regulation to clearly explain the specific reasons for denial. Denials should be written with sufficient specificity to withstand judicial scrutiny and must include proper notice of any applicable appeal process to the applicant or petitioner. In complex situations, consultation with supervisors or USCIS counsel may be appropriate and is encouraged.

² See, e.g., 8 CFR 103.2(b)(16)(i) (filing generally); 8 CFR 214.2(h)(10)(ii), (k)(10)(iii), (l)(8)(i), (o)(7)(i) and (p)(9)(i) (H, L, O, and P nonimmigrant petitions and K nonimmigrant extension of stay applications); and 8 CFR 335.5 (permitting USCIS to reopen a naturalization application based on derogatory information with notice to the applicant). Normally, 30 days is the shortest time that can be given for response.

³ A NOID is currently required by regulation before the denial of certain petitions and applications including: VAWA petitions (8 CFR 204.2(c)(3)(ii) and (e)(3)(ii)), adjustment of status applications involving certain physicians (8 CFR 245.18(i)), and certain legalization applications (8 CFR 245a.20(a)(2)).

Re: Requests for Evidence (RFE) and Notices of Intent to Deny (NOID)

Notice

This memorandum is intended solely for guiding USCIS personnel in performance of their professional duties. It is not intended to be, and may not be relied upon, to create any right or benefit, substantive or procedural, enforceable at law by any individual or other party in removal proceedings, in litigation with the United States, or in any other form or manner.

Attachment