U.S. Department of Homeland Security
U. S. Citizenship and Immigration Services
Office of the Director (MS 2000)
Washington, DC 20529-2000

U.S. Citizenship and Immigration Services

July 13, 2018 **PM-602-0163**

Policy Memorandum

SUBJECT: Issuance of Certain RFEs and NOIDs; Revisions to *Adjudicator's Field Manual* (*AFM*) Chapter 10.5(a), Chapter 10.5(b)

Purpose

This Policy Memorandum (PM) provides guidance to U.S. Citizenship and Immigration Services (USCIS) adjudicators regarding the discretion to deny an application, petition, or request without first issuing a Request for Evidence (RFE) or Notice of Intent to Deny (NOID) if initial evidence is not submitted or if the evidence in the record does not establish eligibility.

Previous guidance

This PM rescinds in its entirety the June 3, 2013 PM titled "Requests for Evidence and Notices of Intent to Deny" (2013 PM) regarding an adjudicator's discretion to deny an application, petition, or request without issuing an RFE. This PM incorporates those portions of the 2013 PM which are still intended to govern USCIS adjudications.

Scope

This memorandum applies to, and shall be used, to guide determinations by all U.S. Citizenship and Immigration Services (USCIS) employees.

Effective Date

This updated guidance is effective September 11, 2018 and applies to all applications, petitions, and requests received after the effective date.

Authority

8 CFR 103.2(b)(8).

Background

The June 3, 2013 PM titled "Requests for Evidence and Notices of Intent to Deny" (2013 PM) addressed policies for the issuance of RFEs and NOIDs when the evidence submitted at the time of filing does not establish eligibility for the benefit sought. While the 2013 PM provided that RFEs should be issued "when the facts and the law warrant," it also stated that an adjudicator should issue an RFE unless there was "no possibility" that the deficiency could be cured by submission of additional evidence. The effect of the "no possibility" policy was that only statutory denials (such as a denial where a nonexistent benefit is requested) would be issued without an RFE or a NOID. This new PM clarifies how those filings, as well as filings lacking required initial evidence, should be treated.

The 2013 PM explained that an RFE is not to be issued when the evidence already submitted establishes eligibility or ineligibility in all respects for the particular benefit requested. However, where the record does not establish eligibility or ineligibility, the 2013 PM limited adjudicators' discretion to adjudicate cases based on the record. Yet, 8 CFR 103.2(b)(8) provides that an adjudicator, under the circumstances described in the regulation, may either deny the application, petition, or request, or issue an RFE or a NOID when the record does not establish eligibility.[1] The 2013 PM's "no possibility" policy limited the application of an adjudicator's discretion. The burden of proof, however, is on the applicant, petitioner, or requestor to establish eligibility.[2] The policy implemented in this PM rescinds the 2013 PM's "no possibility" policy and restores to the adjudicator full discretion to deny applications, petitions, and requests without first issuing an RFE or a NOID, when appropriate. This policy is intended to discourage frivolous or substantially incomplete filings used as "placeholder" filings and encourage applicants, petitioners, and requestors to be diligent in collecting and submitting required evidence. It is not intended to penalize filers for innocent mistakes or misunderstandings of evidentiary requirements.

Policy

Statutory Denials

Consistent with USCIS practice and regulations, adjudicators will continue issuing statutory denials, when appropriate, without issuing an RFE or a NOID first. This would include any filing in which the applicant, petitioner, or requestor has no legal basis for the benefit/request sought, or submits a request for a benefit or relief under a program that has been terminated. Examples of cases where the issuance of a denial may be appropriate without prior issuance of an RFE or a NOID include, but are not limited to:

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[1] Per 8 CFR 208.14(d), applications for asylum are not subject to denial pursuant to the provisions at 8 CFR 103.2(b).
[2] Section 291 of the Act, 8 USC 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013).

- Waiver applications that require a showing of extreme hardship to a qualifying relative, but the applicant is claiming extreme hardship to someone else and there is no evidence of any qualifying relative;

- Family-based visa petitions filed for family members under categories that are not authorized by statute.

Officers should check current policy and the operating procedures for additional guidance, applicable to the particular application, petition, or request. Additionally, cases in any type of litigation or that are subject to any court order or injunction must be addressed under the protocols governing the litigation.[3]

Denials Based on Lack of Sufficient Initial Evidence

If all required initial evidence is not submitted with the benefit request, USCIS in its discretion may deny the benefit request for failure to establish eligibility based on lack of required initial evidence. Examples of filings that may be denied without sending an RFE or a NOID include, but are not limited to:

- Waiver applications submitted with little to no supporting evidence; or

- Cases where the regulations, the statute, or form instructions require the submission of an official document or other form or evidence establishing eligibility at the time of filing and there is no submission. For example, family-based or employment-based categories where an Affidavit of Support (Form I-864), if required, was not submitted with the Application to Register Permanent Residence or Adjust Status (Form I-485).

Officers should check current policy and the operating procedures for additional guidance, applicable to the particular application, petition, or request. Additionally, cases in any type of litigation or that are subject to any court order or injunction must be addressed under the protocols governing the litigation. Furthermore, certain form instructions or regulations may permit applicants, petitioners, or requestors to file a form before all the required initial evidence is available, or may restrict USCIS' authority to deny based solely on the submission of limited evidence.

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[3] For example, as of July 13, 2018, due to preliminary injunctions issued by the U.S. District Court for the Northern District of California in *Regents of Univ. of California v. DHS et al.*, No. 3:17-cv-05211 (N.D. Cal. Jan. 9, 2018) and by the U.S. District Court for the Eastern District of New York in *Batalla Vidal v. Nielsen*, 1:16-cv-04756 (E.D.N.Y. Feb. 13, 2018), USCIS is adjudicating Deferred Action for Childhood Arrivals (DACA) requests on the same terms and conditions in place prior to September 5, 2017. Therefore, this policy memo does not change the RFE and NOID policies and practices that apply to the adjudication of DACA requests while DHS remains enjoined from making changes to the DACA policy. This policy memorandum will apply to DACA or DACA-related requests, however, if and when DHS is no longer subject to these or any future court orders preventing such changes.

Additional Considerations

In some cases, particularly where the response to an RFE opens up new lines of inquiry, a follow-up RFE might be warranted. If possible, however, officers should include in a single RFE all the additional evidence they anticipate having to request. The officer's careful consideration of all the apparent gaps in the evidence will minimize the issuance of multiple RFEs or denials for failure to establish eligibility for the benefit sought. In response to an RFE or a NOID, applicants, petitioners, or requestors must submit all of the requested materials together at one time, along with the original RFE or NOID. If only some of the requested evidence is submitted, USCIS will consider this to be a request for a decision on the record. See 8 CFR 103.2(b)(11). Additionally, failure to submit requested evidence which precludes a material line of inquiry will be grounds for denying the request. See 8 CFR 103.2(b)(14).

Apart from RFEs, officers have the discretion to validate assertions or corroborate evidence and information by consulting USCIS or other governmental files, systems, and databases, or by obtaining publicly available information that is readily accessible. See 8 USC 1357(b). For example, an officer may, in the exercise of discretion, verify information relating to a petitioner's corporate structure by consulting a publicly available state business website. As another example, an officer may attempt to corroborate evidence relating to an individual's history of nonimmigrant stays in the United States by searching a nonpublic, U.S. government database. If relevant, any such additional evidence should be placed in the Record of Proceeding according to the National Background, Identity, and Security Check Operating Procedures Handbook (NaBISCOP) and standard operating procedures (SOPs), unless specifically exempted from inclusion, as is the case for classified materials. For details, please refer to AFM Chapter 10.2, Record of Proceeding, the NaBISCOP, and the applicable SOPs.

Under 8 CFR 103.2(b)(16)(i), if a decision adverse to the applicant, petitioner, or requestor is based on derogatory information, and the applicant, petitioner, or requestor is unaware that the information is being considered, generally the officer must advise the applicant, petitioner, or requestor, as applicable, of this information and offer an opportunity for rebuttal before the decision is rendered. Any explanation, rebuttal, or information presented by or on behalf of the applicant, petitioner, or requestor must be included in the record of proceeding. There is an exception for certain classified materials.[4]

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[4] Under 8 CFR 103.2(b)(16)(ii) and (iv), a determination of statutory eligibility shall be based only on information that is contained in the record of proceeding and disclosed to the individual, except when the information is classified under Executive Order No. 12356 as requiring protection from unauthorized disclosure in the interest of national security and the classifying authority has not agreed in writing to such disclosure. Whenever the Director of USCIS believes he or she can do so consistently with safeguarding both the information and its source, the Director or his or her designee should direct that the individual be given notice of the general nature of the information and an opportunity to offer opposing evidence. The Director's or his or her designee's authorization to use such classified information shall be made a part of the record. A decision based in whole or in part on such classified information shall state that the information is material to the decision. Under 8 CFR 103.2(b)(16)(iii), where an application may be granted or denied in the exercise of discretion, the decision to exercise discretion favorably or unfavorably may be based in whole or in part on classified information not contained in the record and not made available to the applicant, provided the USCIS Director or his or her designee has determined that such

Implementation

The Adjudicator's Field Manual (AFM) is revised as follows:

☞ (1) Chapter 10.5(a) is revised as follows:

(a) General.

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(2) Considerations Prior to Issuing RFEs.

Initial case review should be thorough. Although the burden of proof is on the applicant, petitioner, or requestor, before issuing an RFE or NOID, an officer may assess whether the information needed is available in USCIS databases or systems. Occasionally, certain evidence or information not submitted with the application, petition, or request may be readily accessible in other USCIS records or otherwise available from external sources. If such information is available in USCIS databases or systems, an officer may obtain the information from these sources rather than issuing an RFE or a NOID. Adjudicators have the discretion to validate assertions or corroborate evidence and information by consulting USCIS or other governmental files, systems, and databases, or by obtaining publicly available information. 8 USC 1357(b).

An officer should not request evidence that is outside the scope of the adjudication or otherwise irrelevant to an identified deficiency. In general, officers may, but are not required to, issue RFEs or NOIDs, and they retain the discretion to deny a request for ineligibility without issuing an RFE or NOID.

When an RFE is appropriate, it should:

(1) identify the eligibility requirement(s) that has not been established and why the evidence submitted was not sufficient;
(2) identify any missing evidence specifically required by the applicable statute, regulation, or form instruction;
(3) identify examples of other evidence that may be submitted to establish eligibility; and
(4) request that evidence.

The RFE should ask for all of the additional evidence the officer anticipates having to request and state the deadline for response. The officer's careful consideration of all the apparent gaps in the evidence will minimize the issuance of multiple RFEs or denials for failure to establish eligibility for the benefit sought. In certain instances the evidence provided in response to an RFE may raise eligibility questions that the adjudicator did not identify during initial case review or open up new lines of inquiry. In such a case, a follow-up RFE or a NOID might be warranted. Failure to submit requested evidence which precludes a material line of inquiry, however, will be grounds for denying the request. 8 CFR 103.2(b)(14).

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information is relevant and is classified under Executive Order No. 12356 as requiring protection from unauthorized disclosure in the interest of national security.

Statutory Denials

Statutory denials should generally be issued without prior issuance of an RFE or a NOID on any application, petition, or request that does not have any basis upon which the applicant, petitioner, or requestor may be approved. This would include any filing in which the applicant, petitioner, or requestor has no legal basis for the benefit/request sought, or a request for a program that has been terminated. Other examples include, but are not limited to:

- Waiver applications that require a showing of extreme hardship to a qualifying relative but the applicant is claiming extreme hardship to someone else and there is no evidence of any qualifying relative;
- Family-based visa petitions filed for family members under categories that are not provided by statute based on the claimed family relationship.

Officers should check the applicable policy and operating procedures for additional guidance, as applicable to the particular application, petition, or request. Additionally, cases in any type of litigation or that are subject to any court order or injunction must be addressed under the protocols governing the litigation.[5] Furthermore, certain form instructions or regulations may permit applicants, petitioners, or requestors to file a form before all required initial evidence is available, or may restrict USCIS' ability to deny based solely on the submission of limited evidence.

Denials Based on Lack of Sufficient Initial Evidence

In the case of a filing that lacks initial evidence, the application, petition, or request may be denied without issuing an RFE or NOID. Examples of filings in which the issuance of a denial may be appropriate without prior issuance of an RFE or a NOID include, but are not limited to:

- Waiver applications submitted with little to no supporting evidence; or

- Cases where the regulations, the statute, or form instructions require the submission of an official document or other form or evidence establishing eligibility at the time of filing and there is no submission. For example, family-based or employment-based categories where an Affidavit of Support (Form I-864), if required, was not submitted with the Application to Register Permanent Residence or Adjust Status (Form I-485).

[5] For example, as of July 13, 2018, due to preliminary injunctions issued by the U.S. District Court for the Northern District of California in *Regents of Univ. of California v. DHS et al.*, No. 3:17-cv-05211 (N.D. Cal. Jan. 9, 2018) and by the U.S. District Court for the Eastern District of New York in *Batalla Vidal v. Nielsen*, 1:16-cv-04756 (E.D.N.Y. Feb. 13, 2018), USCIS is adjudicating Deferred Action for Childhood Arrivals (DACA) requests on the same terms and conditions in place prior to September 5, 2017. Therefore, the RFE and NOID policies and practices that were in effect as of September 5, 2017 continue to apply to the adjudication of DACA requests while DHS remains enjoined from making changes to the DACA policy. This policy memorandum will apply to DACA or DACA-related requests, however, if and when DHS is no longer subject to these or any future court orders preventing such changes.

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☞ (2) Chapter 10.5(b) is revised as follows:

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(4) Notice of Intent to Deny (NOID).

A NOID may be based on evidence of ineligibility or on derogatory information known to USCIS, but the applicant, petitioner, or requestor is either unaware of the information or may be unaware of its impact on eligiblity. When an adverse decision is based on derogatory information that is unknown to the applicant, petitioner, or requestor, generally, an opportunity to rebut that information shall be provided in accordance with 8 CFR 103.2(b)(16)(i). In that situation, a NOID provides an applicant, petitioner, or requestor with adequate notice and sufficient opportunity to respond and the opportunity to review and rebut derogatory information of which he/she/it is unaware. While not required in other situations, a NOID also provides an applicant, petitioner, or requestor with adequate notice and sufficient opportunity to respond to an intended denial on other substantive grounds.[6]

When a preliminary decision has been made to deny an application or petition and the denial is not based on lack of initial evidence or a statutory denial as discussed in Chapter 10.5(b), and 8 CFR 103.2(b)(16)(i) applies, the adjudicator must issue a written NOID to the applicant, petitioner, or requestor providing up to a maximum of 30 days to respond to the NOID. The NOID must include the required response date.

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☞ (5) The *AFM* **Transmittal Memoranda** button is revised by adding, in numerical order, a new entry to read:

PM-602-0163 July 13, 2018	**Chapter 10.5(a); and Chapter 10.5(b)**	Amends standards for issuance of certain requests for evidence and notices of intent to deny.

[6] Note that this does not apply to filing deficiencies such as signatures, which are subject to the regulations at 8 CFR 103.2(a)(7)(ii) and the policy memorandum, "Signatures on Paper Applications, Petitions, Requests, and Other Documents field with U.S. Citizenship and Immigration Services, PM-602-0134.1, dated February 16, 2018, and effective beginning on March 17, 2018

Use

This PM is intended solely for the training and guidance of USCIS personnel in performing their duties relative to the adjudication of applications and petitions. It is not intended to, does not, and may not be relied upon to create any right or benefit, substantive or procedural, enforceable at law or by any individual or other party in removal proceedings, in litigation with the United States, or in any other form or manner.

Contact Information

If USCIS adjudicators have questions or suggestions regarding this PM, they should direct them through their appropriate chains of command to the Office of Policy and Strategy.