Frequently Asked Questions

New USCIS Guidance on Issuing RFEs and NOIDs

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On July 13, 2018, USCIS issued a policy memorandum titled "Issuance of Certain RFEs and NOIDs; Revisions to Adjudicator's Field Manual (AFM) Chapter 10.5(a), Chapter 10.5(b)" that expands adjudicators' discretion to deny an immigration application, petition, or request without first issuing a Request for Evidence (RFE) or a Notice of Intent to Deny (NOID) pursuant to 8 CFR § 103.2(b)(8).

WHAT DOES THE NEW USCIS GUIDANCE PROVIDE?

The memo rescinds and replaces the previous policy memo on this topic from 2013. It also revises sections (a) and (b) of Chapter 10.5 of the Adjudicator's Field Manual (AFM). The new guidance restores to USCIS adjudicators full discretion to deny an application, petition, or request without first issuing an RFE or NOID when the evidence initially submitted fails to establish eligibility for the benefit requested.

USCIS officials may now issue a denial without sending an RFE or NOID in cases filed without sufficient initial evidence. The memo provides two examples: waiver applications submitted with little or no supporting evidence; and cases in which the statute, regulation, or form instructions require a particular document be submitted at the time of filing but the document is not included. An example of the latter would be when a family-based or employment-based adjustment application that requires an I-864, Affidavit of Support, was filed without an I-864. However, the memo does note that certain regulations or form instructions may specifically allow filing without all required initial evidence or may limit the authority of the USCIS to deny the application based solely on the submission of limited evidence. While the memo does not provide specific examples, one instance might be the instructions for Form I-485, which provide that adjustment applicants are not required to submit the Form I-693 Report of Medical Examination and Vaccination Record at the time of filing due to its time-limited validity.

In addition, the USCIS will continue its practice of "statutory denials," i.e. denying a case without an RFE or NOID, when there is no legal basis for the benefit sought or the relevant program has been terminated. The memo cites two examples of justified statutory denials: a waiver application that requires showing extreme hardship to a qualifying relative where the applicant is claiming hardship to a non-qualifying relative; and a family-based visa petition filed for a relative who does not fall into a relationship authorized by statute.

HOW IS THIS DIFFERENT THAN THE PREVIOUS POLICY FOR ISSUING RFES AND NOIDS?

The previous guidance (set forth in a June 3, 2013 policy memo titled "Requests for Evidence and Notices of Intent to Deny") provided that where the initial evidence failed to establish eligibility or ineligibility for a benefit, an adjudicator should issue an RFE unless he or she determines there is no possibility that additional evidence available to the individual might cure the deficiency. This "no possibility" policy was a more expansive interpretation of the governing regulation on RFEs and NOIDs, 8 CFR § 103.2(b)(8). The prior guidance also advised that it was appropriate to issue a NOID in response to a "skeletal filing" (one including little or no evidence)

or when the applicant has met the threshold eligibility requirements for the benefit but has not established he or she warrants a favorable exercise of discretion. The practical effect of the old guidance on denials was that generally only "statutory denials" (such as a denial where a nonexistent benefit was requested) would be issued without an RFE or NOID.

WHY IS THE USCIS CHANGING ITS POLICY?

The new USCIS memo states that the intent of this policy change is to discourage frivolous filings and incomplete filings submitted as "placeholder" filings. The USCIS hopes that individuals filing applications, petitions, and requests will be more diligent in gathering and submitting the required evidence. According to the memo, its intent is not to penalize applicants for innocent mistakes or failure to understand a particular evidentiary requirement.

WHEN DOES THE NEW GUIDANCE GO INTO EFFECT?

The new policy on denying cases without an RFE or NOID goes into effect on September 11, 2018.

DOES THE NEW POLICY APPLY RETROACTIVELY TO CURRENTLY PENDING APPLICATIONS?

No, the memo provides that the new guidance applies to all applications, petitions, and requests received by the USCIS *after* September 11, 2018.

ARE THERE ANY TYPES OF CASES TO WHICH THE NEW GUIDANCE DOES NOT APPLY?

Yes. All Deferred Action for Childhood Arrivals requests and DACA-related requests continue to be adjudicated on the same terms and conditions in place before the administration announced the termination of DACA on September 5, 2017. For all I-821D requests and related I-765 applications for employment authorization, the USCIS will continue to issue RFEs and NOIDs under the old policy. However, the memo indicates that the USCIS will begin to apply the new guidance to DACA clients if and when the Department of Homeland Security is no longer subject to the court injunctions issued in the *Regents of Univ. of California v. DHS et al.* and *Batalla Vidal et al. v. Nielsen* cases.

In addition, the memo clarifies that since asylum applications are not subject to denial pursuant to 8 CFR § 103.2(b), these new rules do not apply to asylum applications. See 8 CFR § 208.14(d).

WHAT WILL THIS MEAN FOR CLIENTS WHOSE APPLICATIONS ARE DENIED UNDER THE NEW POLICY?

This increased authority for USCIS officials to deny applications without issuing an RFE or NOID is likely to result in a great number of cases being denied without any opportunity for the applicant to provide additional evidence of eligibility or cure initial lack of or defects in evidence. In the past, upon receiving a denial, a client might have chosen to re-apply for the denied benefit, appeal to the USCIS Administrative Appeals Office (AAO) or the Board of Immigration Appeals (BIA), or file a motion to reopen or reconsider with the USCIS. However, under the June 2018 USCIS policy on the issuance of Notices to Appear (NTAs), anyone whose application is denied and who is not lawfully present in the United States at the time of denial will be placed into immigration court removal proceedings. While in some cases these individuals may still be able to seek administrative review of the denial after an NTA is filed or renew the application before the immigration judge, having to do so during the course of removal proceedings may complicate the process. The stakes of applying for a benefit and being denied are now much higher for individuals without underlying immigration status since the USCIS is likely to issue an NTA after denying the application. Read CLINIC's practice pointers on the new NTA policy here.

This resource provided by the **Catholic Legal Immigration Network, Inc.** For more resources, visit cliniclegal.org. Updated July 24, 2018.

WHAT ARE THE BEST PRACTICES MOVING FORWARD?

- Practitioners should thoroughly screen clients for eligibility for a particular benefit before the individual makes a decision to proceed with that application, petition, or request. In addition, clients must be able to include in the initial application strong documentary evidence addressing each of the eligibility requirements for the relevant benefit. If there is a discretionary element to the adjudication, also consider the strength of the evidence submitted to establish that the client warrants a favorable exercise of discretion.

- Even if a client is deemed eligible for the benefit being sought, practitioners should also assess whether the client has underlying status to fall back on in the event of a denial and/or is eligible for relief that may be asserted in immigration court as a defense to removal, such as cancellation of removal, adjustment of status, or asylum.

- Review final application packets as many times as necessary to make sure all required evidence is included in the initial filing. Prior to submitting the application, make sure you have consulted the relevant law, regulations, and USCIS form instructions. While the USCIS claims its intent is not to penalize someone for an innocent mistake or failure to understand the evidentiary requirements, it is unclear how this determination will be made or whether there will be any effective avenue for challenging an erroneous denial.

- Practitioners should refrain from submitting so-called "skeletal" or "barebones" filings (applications submitted with little or incomplete evidence) in order to save time in the benefit-seeking process. In the past, this was often an effective strategy in certain scenarios where time was of the essence because there would usually be an opportunity to supplement the record later in response to an RFE or NOID. For example, one might file a barebones I-130 petition to establish a beneficiary's priority date or submit a skeletal U visa application because the requisite I-918 Supplement B is about to expire. Similarly, a VAWA self-petitioner might file a barebones I-360 in light of the impending two-year anniversary of the self-petitioner's divorce from the abuser. Or a conditional resident might file a minimal I-751 because the 90-day period before the second anniversary of conditional residence will soon expire. The new policy increases the risk of receiving a denial in such cases.

- Advocates should make sure clients fully understand the risks inherent in filing an affirmative application in the event the application is denied. Ensure that clients are making informed decisions to proceed with submitting a particular application to the USCIS. If necessary, consult with a removal defense practitioner before proceeding in order to assess the potential impact of the filing on the client's eligibility for relief from removal in the event the application is denied and removal proceedings initiated.

IS THERE ANYTHING ELSE PRACTITIONERS CAN DO?

There are a number of unknowns about how this memo will be interpreted and applied by the USCIS once it goes into effect on September 11, 2018. For example, how much supporting evidence must accompany a waiver application to avoid a summary denial based on a finding that it was "submitted with little to no supporting evidence"? Will the new guidance be implemented differently by different service centers, field offices, and individual adjudicators? Will the new standards be applied differently depending on the type of application or petition? CLINIC will be monitoring implementation closely and providing updates as they arise. Please keep us informed about how this guidance is being applied in your individual cases.