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

October 23, 2017 **PM-602-0151**

Policy Memorandum

SUBJECT: Rescission of Guidance Regarding Deference to Prior Determinations of Eligibility in the Adjudication of Petitions for Extension of Nonimmigrant Status

Purpose

This policy memorandum (PM) supersedes and rescinds the April 23, 2004 memorandum titled "The Significance of a Prior CIS Approval of a Nonimmigrant Petition in the Context of a Subsequent Determination Regarding Eligibility for Extension of Petition Validity" and section VII of the August 17, 2015 policy memorandum titled "L-1B Adjudications Policy."

Scope

This PM applies to, and is binding on, all U.S. Citizenship and Immigration Services (USCIS) employees. The updated guidance is effective immediately.

Authority

- Section 291 of the Immigration and Nationality Act (INA), Title 8, United States Code, section 1361.
- Title 8 Code of Federal Regulations (CFR), sections 103.2(b)(1) and 214.1(c)(5).

Policy

On April 23, 2004, USCIS issued a memorandum titled "The Significance of a Prior CIS Approval of a Nonimmigrant Petition in the Context of a Subsequent Determination Regarding Eligibility for Extension of Petition Validity." This memorandum directed adjudicators, when adjudicating petition extensions involving the same parties and underlying facts as the initial

petition, to defer to prior determinations of eligibility, except in certain, limited circumstances.[1] On August 17, 2015, USCIS issued a policy memorandum titled "L-1B Adjudications Policy" which directed USCIS adjudicators, in the context of L-1B petition extensions, to give deference to the prior determinations of eligibility by USCIS, except in certain, limited circumstances.[2]

For the reasons detailed below, USCIS is rescinding the policy of requiring officers to defer to prior determinations in petitions for extension of nonimmigrant status as articulated in the above memoranda. USCIS is also providing updated guidance that is both more consistent with the agency's current priorities and also advances policies that protect the interests of U.S. workers.

In adjudicating petitions for immigration benefits, including nonimmigrant petition extensions, adjudicators must, in all cases, thoroughly review the petition and supporting evidence to determine eligibility for the benefit sought.[3] The burden of proof in establishing eligibility is, at all times, on the petitioner.[4] The fundamental issue with the April 23, 2004 memorandum is that it appeared to place the burden on USCIS to obtain and review a separate record of proceeding to assess whether the underlying facts in the current proceeding have, in fact, remained the same. Not only did this improperly shift the burden of proof to the agency contrary to INA § 291, but it was also impractical and costly to properly implement, especially when adjudicating premium processing requests.

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[1] The April 23, 2004 memo provided in part:

> In matters relating to an extension of nonimmigrant petition validity involving the same parties (petitioner and beneficiary) and the same underlying facts, a prior determination by an adjudicator that the alien is eligible for the particular nonimmigrant classification sought should be given deference. A case where a prior approval of the petition need not be given deference includes where: (1) it is determined that there was a material error with regard to the previous petition approval; (2) a substantial change in circumstances has taken place; or (3) there is new material information that adversely impacts the petitioner's or beneficiary's eligibility. [Footnote omitted]

[2] The August 17, 2015 memo provided in part:

> In matters relating to an extension of L-1B status involving the same parties (i.e., the same petitioner and beneficiary employee) and the same underlying facts, USCIS officers should give deference to the prior determination by USCIS approving L-1B classification. In such cases, USCIS officers should re-examine a finding of L-1B eligibility only where it is determined that: (1) there was a material error with regard to the previous approval for L-1B classification; (2) there has been a substantial change in circumstances since that approval; or (3) there is new material information that adversely impacts the petitioner's or beneficiary's eligibility. [Footnotes omitted]

[3] Adjudicator's Field Manual, Chapter 10.3(a).

[4] INA § 291.

Accordingly, this memorandum makes it clear that the burden of proof remains on the petitioner, even where an extension of nonimmigrant status is sought.[5] While the April 23, 2004 memorandum explicitly acknowledged that USCIS has the authority to review prior adjudicative decisions and deny certain requests for extensions of status, the memorandum unduly limited adjudicators' inherent fact-finding authority in certain cases.[6]

An adjudicator's fact-finding authority, as was the case prior to April 23, 2004, should not be constrained by any prior petition approval, but instead, should be based on the merits of each case. In this regard, USCIS acknowledges that the regulations in certain instances do not require supporting documents to be submitted as initial evidence when an employer files a petition extension without change on behalf of the same alien.[7] However, although these regulatory provisions govern what is required to be submitted at the time of filing the petition extension, they do not limit, and, in fact, reiterate, USCIS' authority to request additional evidence. While adjudicators should be aware of these regulatory provisions, they should not feel constrained in requesting additional documentation in the course of adjudicating a petition extension, consistent with existing USCIS policy regarding requests for evidence, notices of intent to deny, and the adjudication of petitions for nonimmigrant benefits.

Further, because it was viewed as a default position upon beginning review of a filing, the deference policy may, in some cases, have had the effect of limiting the ability of adjudicators to conduct a thorough review of the facts and assessment of eligibility in each case. In addition, that policy likely had the unintended consequence of officers not discovering material errors in prior adjudications. While adjudicators may, of course, reach the same conclusion as in a prior decision, they are not compelled to do so as a default starting point.

In accordance with the foregoing, the above-referenced April 23, 2004 memorandum and section VII of the August 17, 2015 memorandum articulating a default policy of deference are therefore rescinded.

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[5] *See* 8 CFR § 103.2(b)(1) ("An applicant or petitioner must establish that he or she is eligible for the requested benefit at the time of filing the benefit request and must continue to be eligible through adjudication); 8 CFR § 214.1(c)(5) ("Where an applicant or petitioner demonstrates eligibility for a requested extension, it may be granted at the discretion of the Service.")

[6] The following guidance from the April 23, 2004 memo is preserved and hereby incorporated:

> [US]CIS has the authority to question prior determinations. Adjudicators are not bound to approve subsequent petitions or applications seeking immigration benefits where eligibility has not been demonstrated, merely because of a prior approval which may have been erroneous. *Matter of Church Scientology Intl*, 19 I&N Dec. 593, 597 (Commissioner 1988). Each matter must be decided according to the evidence of record on a case-by-case basis. *See* 8 CFR § 103.8(d) [(2011)].

[7] *See, e.g.*, 8 CFR §§ 214.2(h)(14), (l)(14)(i), (o)(11), and (p)(13).

Use

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

U.S. Department of Homeland Security
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U.S. Citizenship and Immigration Services

June 28, 2018 **PM-602-0050.1**

Policy Memorandum

SUBJECT: Updated Guidance for the Referral of Cases and Issuance of Notices to Appear (NTAs) in Cases Involving Inadmissible and Deportable Aliens

Purpose

On January 25, 2017, the President signed Executive Order 13768, *Enhancing Public Safety in the Interior of the United States*. The Executive Order set forth the President's immigration policies for enhancing public safety, and it articulated the priorities for the removal of aliens from the United States.

This Policy Memorandum (PM) outlines how U.S. Citizenship and Immigration Services' (USCIS) Notice to Appear (NTA) and referral policies implement the Department of Homeland Security's (DHS) removal priorities, including those identified in Executive Order 13768, and it provides updates to USCIS' guidelines for referring cases and issuing NTAs. This PM supersedes Policy Memorandum 602-0050, *Revised Guidance for the Referral of Cases and Issuance of Notices to Appear (NTAs) in Cases Involving Inadmissible and Removable Aliens***,** dated November 7, 2011.

Scope

This PM applies to and will be used to guide referrals and the issuance of NTAs by all USCIS employees, unless otherwise specifically provided in this PM or other USCIS policy or guidance documents.

Authority

Immigration and Nationality Act (INA) §§ 101(a)(43), 103(a), 208, 212, 216, 216A, 237, 239, 240, 242, 244, and 318; Homeland Security Act of 2002 § 402(5); Title 8, Code of Federal Regulations (8 CFR) §§ 2.1, 103, 207.9, 208, 216.3(a), 216.6(a)(5), 236.14(c), and pts. 239 and 244.

Background

Executive Order 13768 emphasizes that enforcement of our immigration laws is critically important to the national security and public safety of the United States. The Executive Order also provides that the Federal Government will no longer exempt classes or categories of removable aliens from potential enforcement.

On February 20, 2017, former Secretary of Homeland Security John Kelly issued an implementation memorandum, *Enforcement of the Immigration Laws to Serve the National Interest*,[1] which was related to the President's immigration enforcement priorities. The memorandum sets forth guidance for all DHS personnel regarding the enforcement priorities.

The Executive Order and DHS Implementation Memorandum prioritize the removal of aliens described in INA §§ 212(a)(2), (a)(3), (a)(6)(C), 235, and 237(a)(2) and (a)(4), to include aliens who are removable based on criminal or security grounds, fraud or misrepresentation, and aliens subject to expedited removal. In addition to aliens described in those subsections, the Executive Order and DHS Implementation Memorandum also prioritize removable aliens who, regardless of the basis for removal:

(a) Have been convicted of any criminal offense;
(b) Have been charged with any criminal offense that has not been resolved;
(c) Have committed acts that constitute a chargeable criminal offense;[2]
(d) Have engaged in fraud or willful misrepresentation in connection with any official matter or application before a governmental agency;
(e) Have abused any program related to receipt of public benefits;
(f) Are subject to a final order of removal, but have not departed; or
(g) In the judgment of an immigration officer, otherwise pose a risk to public safety or national security.

USCIS has authority, under the immigration laws,[3] to issue Form I-862, Notice to Appear, which is thereafter filed with the Immigration Court to commence removal proceedings under section 240 of the INA.[4] U.S. Immigration and Customs Enforcement (ICE) and U.S. Customs and Border Protection (CBP) also have authority to issue NTAs. Accordingly, USCIS must ensure that its issuance of NTAs fits within and supports DHS's overall removal priorities – promoting national security, public safety, and the integrity of the immigration system. This PM identifies the circumstances under which USCIS issues NTAs or refers cases to ICE.

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[1] *See* https://www.dhs.gov/sites/default/files/publications/17_0220_S1_Enforcement-of-the-Immigration-Laws-to-Serve-the-National-Interest.pdf.

[2] Chargeable criminal offenses include those defined by state, federal, international, or appropriate foreign law.

[3] *See, e.g.*, INA §§ 103(a), 239; 8 CFR §§ 2.1, 239.1.

[4] *Delegation by the Secretary of Homeland Security to the Bureau of Citizenship and Immigration Services*, Delegation Number 0150.1, Paragraph 2(N). However, international District Directors and officers are not authorized to issue NTAs.

This PM will not apply to the use of discretion in adjudicating cases. Guidance on how the enforcement priorities will affect USCIS' use of discretion in adjudicating cases will be addressed in a separate policy memorandum.

Policy

USCIS is updating its NTA policy to better align with enforcement priorities. It is the policy of USCIS to issue NTAs and Referrals to ICE (RTIs), as outlined below:

I. National Security Cases

These cases fall under the priorities outlined in Executive Order 13768, and they include aliens engaged in or suspected of terrorism or espionage, or those who are otherwise described in INA §§ 212(a)(3) or 237(a)(4). In addition, any removable alien who, in the judgment of a USCIS officer, otherwise poses a risk to national security is considered a priority for removal.

This PM does not affect the handling of cases involving national security concerns.[5] Guidance from the Fraud Detection and National Security Directorate (FDNS)[6] will continue to govern the definition of these cases and the procedures for resolution and NTA issuance.

II. NTA Issuance Required by Statute or Regulation

USCIS will continue to issue NTAs in the following circumstances:

A. Termination of Conditional Permanent Resident Status and Denials of Form I-751, Petition to Remove the Conditions of Residence (8 CFR §§ 216.3, 216.4, 216.5).[7]
B. Termination of Conditional Permanent Resident Status and Denials of Form I-829, Petition by Entrepreneur to Remove Conditions on Permanent Resident Status (8 CFR § 216.6).
C. Termination of refugee status by the District Director (8 CFR § 207.9).
D. Denials of Nicaraguan and Central American Relief Act (NACARA) Section 202 and Haitian Refugee Immigration Fairness Act (HRIFA) adjustment of status applications:
    1. NACARA 202 adjustment denials (8 CFR § 1245.13(m));
    2. HRIFA adjustment denials (8 CFR § 245.15(r)(2)(i)).
E. Asylum,[8] NACARA Section 203,[9] and Credible Fear cases:[10]

[5] National Security Concerns include cases involving Terrorism-Related Inadmissibility Grounds (TRIG) in sections 212(a)(3)(B) and 212(a)(3)(F) of the INA. *See also* INA § 237(a)(4)(B) (corresponding grounds of deportability).

[6] *See Policy for Vetting and Adjudicating Cases with National Security Concerns* (April 11, 2008).

[7] *See* USCIS memorandum, *Adjudication of Form I-751, Petition to Remove Conditions on Residence Where the CPR Has a Final Order of Removal, Is in Removal Proceedings, or Has Filed an Unexcused Untimely Petition or Multiple Petitions* (Oct. 9, 2009); *see also* USCIS memorandum, *I-751 Filed Prior to Termination of Marriage* (Apr. 3, 2009).

1. Asylum referrals (8 CFR § 208.14(c)(1));
2. Termination of asylum or termination of withholding of removal or deportation (8 CFR § 208.24(e));[11]
3. Positive credible fear findings (8 CFR § 208.30(f));
4. NACARA 203 cases, where suspension of deportation or cancellation of removal is not granted and the applicant does not have asylum status or lawful immigrant or nonimmigrant status (8 CFR § 240.70(d));
5. Cases where NACARA 203 was granted to persons who were ineligible to receive suspension of deportation or special rule cancellation of removal at the time that the grant was issued (8 CFR § 246.1).

This PM does not change NTA or notification procedures for Temporary Protected Status (TPS) cases as described in 8 CFR part 244.[12] In individual TPS cases where USCIS denies an initial TPS application or re-registration or withdraws TPS, *and* the individual has no other lawful immigration status or other authorization to remain in the United States, officers will first follow the procedures in the applicable regulations within 8 CFR part 244, where required.

Once the TPS regulatory provisions have been followed or are found to be non-applicable in the specific case, officers will issue an NTA to such an alien who has no other lawful immigration status or authorization to remain in the United States following the final determination to deny or withdraw TPS, unless there is a sufficient reason to delay issuance of, or to not issue the NTA (e.g., ICE or another appropriate law enforcement agency makes a reasonable request that USCIS not immediately issue the NTA, so as not to disrupt an investigation). Where the alien already has an unexecuted final order of removal, the officer should not issue another NTA without consulting with local USCIS counsel.

Independent of this PM, if the Secretary terminates a country's TPS designation, certain former beneficiaries who have been granted TPS under that country's designation, but who do not have other lawful immigration status or authorization to remain in the United States, may become a DHS enforcement priority. In such circumstances, USCIS officers should defer to ICE and CBP regarding the appropriate timing of any NTA issuances to former TPS beneficiaries after the country's TPS designation ends. However, if USCIS issues an unfavorable decision on a benefit request submitted by, or on behalf of, a former TPS

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[8] USCIS may issue an NTA when an asylum applicant withdraws his or her asylum application. See also Section VI of this memorandum for other NTA issuance by the Asylum Division in special circumstances not required by statute or regulation.

[9] This memorandum does not apply to the Asylum Division's initiation of rescission proceedings for lawful permanent residents (LPRs) granted LPR status under NACARA 203 by the Asylum Division.

[10] This memorandum does not apply to the Asylum Division's issuance of Form I-863, Notice of Referral to Immigration Judge.

[11] *See* INA § 208(c)(3) describing removal when asylum is terminated.

[12] *See* USCIS memorandum, *Service Center Issuance of Notice to Appear (Form I-862)* (Sept. 12, 2003).

beneficiary who is not lawfully present in the United States, officers will follow the NTA guidance in Section V below.

III. Fraud, Misrepresentation, and Abuse of Public Benefits Cases

Cases presenting substantiated fraud or misrepresentation are among DHS's enforcement priorities. Aliens falling under INA § 212(a)(6)(C), removable aliens who "have engaged in fraud or willful misrepresentation in connection with any official matter or application before a governmental agency,"[13] and removable aliens who have abused any program related to receipt of public benefits are all priorities for removal.[14]

When fraud, misrepresentation, or evidence of abuse of public benefit programs is part of the record,[15] and the alien is removable, USCIS will issue an NTA upon denial of the petition or application, or other appropriate negative eligibility determination (e.g., withdrawal, termination, rescission). An NTA will be issued against such a removable alien, even if the petition or application is denied for a ground other than fraud, such as lack of prosecution or abandonment, the application or petition is terminated based on a withdrawal by the petitioner/applicant, or where an approval is revoked, so long as the alien is removable and USCIS has determined there is fraud in the record.

USCIS may consider referring groups of cases with articulated suspicions of fraud to ICE prior to adjudication. USCIS will not refer to ICE individual applications or petitions involving suspected fraud, except as agreed upon by USCIS and ICE. When USCIS refers a case to ICE for investigation, USCIS will suspend adjudication for 60 days, but they may resume the administrative process should ICE not respond within that timeframe or provide a Case Closure Notice or case status report within 120 days of accepting the referral. USCIS will ensure proper de-confliction with ICE throughout its administrative process.

While the NTA is not required to include the charge of fraud or misrepresentation (INA §§ 212(a)(6)(C)(i) and/or (ii), 237(a)(1)(A), 237(a)(1)(G), or similar charge), efforts should be made to include these charges whenever evidence in the record supports such a charge. Please consult with USCIS counsel if there are questions determining whether to include a charge of fraud or misrepresentation.

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[13] *See* section 5(d) of the Executive Order: Enhancing Public Safety in the Interior of the United States.

[14] *See* section 5(d) of the Executive Order: Enhancing Public Safety in the Interior of the United States. For purposes of USCIS, enforcement priority 5(d) would necessarily include instances where USCIS has established that the alien is inadmissible under INA § 212(a)(6)(C)(i)), as well as when the fraud or willful misrepresentation was committed in connection with any official matter or application before another government agency.

[15] Adjudicators encountering Statement of Findings should follow current operational guidance regarding their review and resolution.

IV. Criminal Cases

Criminal cases fall under the priorities outlined in Executive Order 13768, as follows:

- Aliens described in INA §§ 212(a)(2) or 237(a)(2), Criminal and Related Grounds;
- Removable aliens convicted of any criminal offense;
- Removable aliens charged with any criminal offense that has not been resolved; and
- Removable aliens who committed acts that constitute a chargeable criminal offense.

A. Egregious Public Safety (EPS) Cases and Non-Egregious Public Safety (Non-EPS) Cases

Executive Order 13768 does not contain language regarding Egregious Public Safety (EPS) or Non-Egregious Public Safety (Non-EPS) cases. However, this PM uses the terminology to assist in triaging cases for investigation and the issuance of NTAs.

An EPS case is defined by USCIS and ICE[16] as a case where information indicates the alien is under investigation for, has been arrested for (without disposition), or has been convicted of, any of the following:

- Murder, rape, or sexual abuse of a minor, as defined in INA § 101(a)(43)(A);
- Illicit trafficking in firearms or destructive devices, as defined in INA § 101(a)(43)(C);
- Offenses relating to explosive materials or firearms, as defined in INA § 101(a)(43)(E);
- Crimes of violence for which the term of imprisonment imposed, or where the penalty for a pending case, is at least one year, as defined in INA § 101(a)(43)(F);
- An offense relating to the demand for, or receipt of, ransom, as defined in INA § 101(a)(43)(H);
- An offense relating to child pornography, as defined in INA § 101(a)(43)(I);
- An offense relating to peonage, slavery, involuntary servitude, and trafficking in persons, as defined in INA § 101(a)(43)(K)(iii);
- An offense relating to alien smuggling, as described in INA § 101(a)(43)(N);
- Human Rights Violators, known or suspected street gang members, or Interpol hits; or
- Re-entry after an order of exclusion, deportation or removal subsequent to conviction for a felony where a Form I-212, Application for Permission to Reapply for Admission into the United States after Deportation or Removal, has not been approved.

[16] See *Memorandum of Agreement Between United States Citizenship and Immigration Services and United States Immigration and Customs Enforcement On the Issuance of Notices to Appear to Aliens Encountered During an Adjudication* (June 15, 2006).

A Non-EPS criminal case is defined by USCIS as a case where information indicates the alien is under investigation for, has been arrested for (without disposition), or has been convicted of any crime not listed above.

1. EPS Cases

Executive Order 13768 and the implementing guidance provide that DHS personnel should take enforcement actions in accordance with applicable law, and they support that DHS personnel have full authority to initiate removal proceedings against any alien who is removable. As a result, USCIS will issue an NTA against removable aliens in all cases meeting the EPS definition, regardless of the existence of a conviction, if the application or petition is denied and the alien is removable. USCIS should refer an EPS case to ICE prior to adjudication and before an NTA is issued if there are circumstances that warrant such action. If the case is referred, ICE will have an opportunity to decide if, when, and how to issue an NTA or detain the alien. For Form I-90 applications, and any adjudications involving EPS concerns where USCIS has not issued an NTA, USCIS will refer these cases to ICE after adjudication.

If USCIS does not receive notification of the acceptance or declination of an EPS referral to ICE after 60 days, USCIS will resume adjudication of the case.

2. Non-EPS Criminal Cases

USCIS will issue NTAs in all Non-EPS criminal cases if the application or petition is denied and the alien is removable. Where USCIS does not issue an NTA, USCIS should refer Non-EPS cases to ICE prior to final adjudication if the alien appears inadmissible to or deportable from the United States based upon a criminal offense not included on the EPS list.[17]

3. N-400 Denials

USCIS will issue NTAs on all N-400 cases if the N-400 has been denied on good moral character (GMC) grounds based on the underlying criminal offense, and provided the alien is removable.

V. Aliens Not Lawfully Present in the United States or Subject to Other Grounds of Removability

USCIS will issue an NTA where, upon issuance of an unfavorable decision on an application, petition, or benefit request, the alien is not lawfully present in the United States.

[17] A Non-EPS case referred to ICE prior to adjudication will be treated in the same manner as an EPS case referral, subject to the suspense period and notification requirements.

For aliens removable under any other grounds not specifically addressed in this PM, USCIS will ensure all grounds for removability supported by the record are addressed and result in the issuance of an NTA, whenever appropriate.

VI. Special Circumstances for NTA Issuance

A. In limited and extraordinary circumstances, USCIS may issue an NTA if a removable alien requests that an NTA be issued, either before or after the adjudication of an application or petition, in order to seek lawful status or other relief in removal proceedings. The request must be made in writing to the USCIS office that has jurisdiction over the case, and USCIS retains discretion to deny such a request.

B. An Asylum Office may issue an NTA in the following situations:
   1. An asylum applicant who has been issued an NTA may request issuance for family members not included on the asylum application as dependents for family unification purposes. The request must be made in writing, and USCIS retains discretion to deny such a request.
   2. An asylum applicant issued a denial while in lawful immigration status may request that the Asylum Office issue an NTA after he or she falls out of lawful immigration status. The request must be made in writing and USCIS retains discretion to deny such a request.
   3. The Asylum Office may issue an NTA after rescinding asylum status, based on a determination that USCIS did not have jurisdiction to grant asylum status, if the applicant does not currently have an outstanding order of removal or is not otherwise in removal proceedings.
   4. If the Asylum Office dismisses NACARA 203 because the NACARA applicant was not removable and the applicant subsequently falls out of lawful immigration status, the applicant may request the issuance of an NTA. The request must be made in writing, and USCIS retains discretion to deny such a request.

C. USCIS may issue NTAs in connection with a Form N-400 filing in the following situations, in addition to the situations described above in paragraph IV.A.3:
   1. When the applicant may be eligible to naturalize, but is also deportable under INA § 237. Examples include applicants convicted of aggravated felonies prior to November 29, 1990, or applicants convicted of deportable offenses after obtaining lawful permanent resident (LPR) status that do not preclude GMC or otherwise make an applicant ineligible for naturalization; or
   2. When it is determined that the applicant was inadmissible at the time of adjustment or admission to the United States, and thus deportable under INA § 237, and ineligible for naturalization under INA § 318.[18]

[18] In the Third Circuit *only* (Pennsylvania, New Jersey, Delaware, and the U.S. Virgin Islands), based on the holding in *Garcia v. Att'y Gen*., 553 F.3d 724 (3d Cir. 2009), if the alien has been an LPR for at least 5 years, the alien

Unless USCIS exercises prosecutorial discretion in favor of the alien, as described below in Section VIII, an NTA will be issued in these two situations before adjudication.[19] If an NTA has been issued in any case while the N-400 is pending, the N-400 will be placed on hold until removal proceedings have concluded. Once proceedings have concluded, the adjudication of the N-400 will resume.

D. In cases involving the confidentiality protections at 8 U.S.C. § 1367(a)(2),[20] USCIS must follow the guidelines established in this PM, once the benefit request has been denied.[21] 8 U.S.C. § 1367 does not preclude USCIS from serving an NTA upon the attorney of record or safe mailing address. However, USCIS cannot serve the NTA on the physical address of the applicant or petitioner unless Section 1367 protections have been terminated.

In following the guidelines established in this PM, USCIS must also comply with the provisions at 8 U.S.C. § 1367(a)(1), which, with limited exception, prohibits DHS employees and contractors from making adverse determinations of admissibility or deportability using information furnished solely by prohibited sources. Unlike the confidentiality provisions of 8 U.S.C. § 1367(a)(2), which expire once the benefit request has been denied and all opportunities for appeal have been exhausted, this prohibition on adverse determinations of admissibility or deportability using information furnished solely by prohibited sources does not expire upon denial of the benefit petition or application and applies regardless of whether any application or petition has been filed.[22]

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cannot be placed in removal proceedings for fraud or willful misrepresentation of a material fact at time of adjustment, if USCIS could have learned of the fraud or misrepresentation through reasonable diligence before the 5-year rescission period expired. Please consult with USCIS counsel if there are questions regarding the applicability of this precedent.

[19] In the Ninth Circuit *only* (Alaska, Arizona, California, Commonwealth of the Northern Mariana Islands (CNMI), Guam, Hawaii, Idaho, Montana, Nevada, Oregon, and Washington), based on the decision in *Yith v. Nielsen*, 881 F.3d 1155 (2018), please consult with counsel before issuing an NTA in these cases.

[20] The confidentiality protections in 8 USC § 1367(a)(2) extend to applicants and petitioners for, and beneficiaries of, benefit requests covered by the following form types: Form I-360, Petition for Amerasian, Widow(er), or Special Immigrant, processed under the Violence Against Women Act (VAWA); Form I-485 based on VAWA, T or U nonimmigrant status; Form I-751 under the battered spouse or child waiver; Form I-914, Application for T Nonimmigrant Status; Form I-918, Petition for U Nonimmigrant Status; Form I-765V, Application for Employment Authorization for Abused Nonimmigrant Spouse; Form I-485, Application to Register Permanent Residence or Adjust Status, processed under VAWA amendments to the Cuban Adjustment Act; and all related ancillary forms with a VAWA Form I-360, VAWA Cuban Adjustment Act Form I-485, Form I-914, or Form I-918. These confidentiality protections generally continue indefinitely for individuals granted covered immigration relief or benefits and cover information contained in prior and subsequent applications filed by protected individuals, including petitions for derivative beneficiaries, applications for adjustment of status, and naturalization.

[21] Officers should look to operational guidance for instructions on the handling of cases for which 1367(a)(2) protections have been terminated.

[22] For additional information, see USCIS Policy Memorandum, *Identification and Disclosure of Section 1367 Information*, PM-602-0136 (Aug. 25, 2016), and DHS Instruction No. 002-02-001, *Implementation of Section 1367 Provisions* (Nov. 7, 2013).

VII. Preservation of Administrative Review

Except as specifically provided by law,[23] the issuance, service, or filing of an NTA to commence removal proceedings does not negate any right to seek administrative review, whether by motion to the USCIS office that issued the unfavorable decision, or by appeal to the USCIS Administrative Appeals Office. USCIS will continue to conduct its administrative review during the course of removal proceedings. If USCIS takes favorable action upon motion or appeal, such that an individual is no longer removable, USCIS should advise ICE counsel so that appropriate action can be taken in removal proceedings.

VIII. Exercise of Prosecutorial Discretion

Executive Order 13768 and the implementing guidance provide that DHS personnel should take enforcement actions in accordance with applicable law, and they support that DHS personnel have full authority to initiate removal proceedings against any alien who is removable. NTAs will be issued in cases where the individual is a priority for removal under this PM, as outlined above, except in very limited circumstances involving the exercise of prosecutorial discretion, as described here. The Executive Order and implementing guidance also provide that prosecutorial discretion may be exercised on a case-by-case basis in consultation with the head of the relevant field office of the component that initiated or will initiate the enforcement action, regardless of which entity actually files any applicable charging documents: CBP Chief Patrol Agent, CBP Director of Field Operations, ICE Field Office Director, ICE Special Agent-in-Charge, USCIS Field Office Director, Director of the National Benefits Center, International Operations Chief, or Service Center Director.[24] Given the high level of concurrence required, prosecutorial discretion to not issue an NTA should only be exercised on a case-by-case basis after considering all USCIS and DHS guidance, DHS's enforcement priorities, the individual facts presented, and any DHS interest(s) implicated (e.g., federal court litigation-related considerations or deconfliction with law enforcement priorities of other agencies).

To facilitate the exercise of prosecutorial discretion, a Prosecutorial Review Panel must be maintained in each office authorized to issue NTAs. The Prosecutorial Review Panel must include a local supervisory officer[25] and a local USCIS Office of Chief Counsel attorney (to serve in an advisory role for legal sufficiency review) to determine whether to recommend

[23] *See, e.g.*, INA 318 (precluding consideration of an application for naturalization if there are pending removal proceedings pursuant to a warrant of arrest (NOTE: this is subject to *Yith* in the Ninth Circuit)); 8 CFR § 244.10(c)(2) (precluding administrative appeal when NTA is issued after certain denials of TPS, but providing for *de novo* determination of TPS eligibility in removal proceedings).

[24] See John F. Kelly, Secretary of Homeland Security, *Enforcement of the Immigration Laws to Serve the National Interest* (Feb. 20, 2017).

[25] In cases involving Form N-400, the NTA Panel must be represented by at least one local supervisory officer who is an expert in naturalization laws, policies, and procedures.

the exercise of prosecutorial discretion not to issue an NTA in the aforementioned cases. The Prosecutorial Review Panel will make a recommendation regarding the positive exercise of prosecutorial discretion, as described above. A Field Office Director, an Associate Service Center Director, the Assistant Center Director of the National Benefits Center, or the Deputy Chief of International Operations must concur with the recommendation to exercise prosecutorial discretion.

Implementation

Components should refer to their operational guidance for specific processing of cases in accordance with this memorandum. Each office must create processes for referrals of cases, both pre- and post-adjudication, and the completion of RTIs. A document outlining these processes must be sent to the appropriate District Office, Service Center, or International Operations Division Branch within 30 days of the issuance of this memorandum.

Use

This PM is intended solely for the guidance of USCIS personnel in the performance of their official duties. 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

Questions or suggestions regarding this PM should be addressed through appropriate channels to the Field Operations Directorate, Service Center Operations Directorate, or the Refugee, Asylum, and International Operations Directorate.

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

August 9, 2018 **PM-602-1060.1**

Policy Memorandum

SUBJECT: Accrual of Unlawful Presence and F, J, and M Nonimmigrants

Purpose

This Policy Memorandum (PM) provides guidance to U.S. Citizenship and Immigration Services (USCIS) officers and assists USCIS officers in the calculation of unlawful presence of those in student (F nonimmigrant), exchange visitor (J nonimmigrant), or vocational student (M nonimmigrant) status and their dependents while in the United States. The PM also revises previous policy guidance in the USCIS Adjudicator's Field Manual (AFM) relating to this issue.

Authority

- INA 212(a)(9)(B)
- INA 212(a)(9)(C)

Background

Since the creation of the U.S. Department of Homeland Security (DHS), USCIS has followed the former Immigration and Naturalization Service's (INS) various policies on the accrual of unlawful presence. In 2009, USCIS consolidated its prior policy guidance in AFM Chapter 40.9.2.[1]

According to that policy—to be superseded by this policy memorandum—foreign students and exchange visitors (F and J nonimmigrants, respectively) who were admitted for, or present in the United States in, duration of status (D/S) started accruing unlawful presence on the day after USCIS formally found a nonimmigrant status violation while adjudicating a request for another immigration benefit or on the day after an immigration judge ordered the applicant excluded, deported, or removed (whether or not the decision is appealed), whichever came first. F and J nonimmigrants, and foreign vocational students (M nonimmigrants), who were admitted until a specific date (date certain) accrued unlawful presence on the day after their Form I-94 expired, on the day after USCIS formally found a nonimmigrant status violation while adjudicating a request for another immigration benefit, or on the day after an immigration judge ordered the

[1] See USCIS Interoffice Memorandum, "Consolidation of Guidance Concerning Unlawful Presence for Purposes of Sections 212(a)(9)(B)(i) and 212(a)(9)(C)(i)(I) of the Act" (May 6, 2009).

applicant excluded, deported, or removed (whether or not the decision was appealed), whichever came first.[2]

The former INS policy, as consolidated in the AFM, went into effect in 1997, prior to the creation of some of the technologies and systems currently used by DHS to monitor nonimmigrants who are admitted to the United States in or otherwise acquire F, J, or M nonimmigrant status. Over the years, DHS also has made significant progress in its ability to identify and calculate the number of nonimmigrants who have failed to maintain status, including certain F, J, and M nonimmigrants.[3]

For example, since the creation of the policy, the Student and Exchange Visitor Information System (SEVIS)—the DHS system used to monitor F, J, and M nonimmigrants—has provided USCIS officers additional information about an alien's immigration history, including information that indicates that an alien in F, J, or M nonimmigrant status may have completed or ceased to pursue his or her course of study or activity, as outlined in Form I-20, Certificate of Eligibility for Nonimmigrant Student Status, and related forms, or Form DS-2019, Certificate of Eligibility for Exchange Visitor (J-1) Status. For FY 2016, DHS calculated that a total of 1,457,556 aliens admitted in F, J, and M nonimmigrant status were either expected to change status or depart the United States. Of this population, it was estimated that the total overstay rate was 6.19 percent for F nonimmigrants, 3.80 percent for J nonimmigrants, and 11.60 percent for M nonimmigrants.[4][5]

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[2] Under the former policy, an alien admitted for duration of status who overstayed or violated such status did not immediately begin accruing a period of unlawful presence for purposes of INA 212(a)(9)(B). Nevertheless, such alien was illegally present in the United States and would be amenable to removal proceedings under INA 237(a)(1)(C), which renders deportable aliens who violate their nonimmigrant status or any condition of their entry. Moreover, such aliens could be charged and ultimately convicted of any criminal offense requiring the alien to be illegally or unlawfully present in the United States as an element of the offense. For example, aliens who were admitted for duration of status and either violated or overstayed such status were treated as being illegally or unlawfully present in the United States for purposes of criminal culpability under the firearms provisions at 18 U.S.C. §§ 922(a)(6) and 922(g)(5). See *United States v. Rehaif*, 888 F.3d 1138 (11th Cir. 2018) (holding that a student who was academically dismissed, failed to depart the United States immediately, and therefore violated the terms of his F-1 status was unlawfully present for purposes of 18 U.S.C. § 922(g)(5)(A)); *United States v. Atandi*, 376 F.3d 1186, 1188 (10th Cir. 2004) ("Rather, we hold that an alien who is only permitted to remain in the United States for the duration of his or her status (as a student, for example) becomes 'illegally or unlawfully in the United States' for purposes of § 922(g)(5)(A) upon commission of a status violation."); *United States v. Bazargan*, 992 F.2d 844, 847 (8th Cir. 1993) ("A nonimmigrant alien F-1 student becomes an illegal alien subject to deportation by failing to comply with the transfer procedures set forth in the INS regulations."); *United States v. Igbatayo*, 764 F.2d 1039, 1040 (5th Cir. 1985) (per curiam) ("After failing to maintain the student status required by his visa, Igbatayo was without authorization to remain in this country.").

[3] See Fiscal Year 2016 Entry/Exit Overstay Report, Department of Homeland Security, *available at* https://www.dhs.gov/publication/entryexit-overstay-report.

[4] See Fiscal Year 2016 Entry/Exit Overstay Report, Department of Homeland Security, page 12, *available at* https://www.dhs.gov/publication/entryexit-overstay-report.

[5] On August 7, 2018, DHS issued the Fiscal Year 2017 Entry/Exit Overstay Report as this memorandum was being finalized for publication. For FY2017, DHS calculated that a total of 1,662,369 aliens admitted in F, J, and M nonimmigrant status were expected either to change status or depart the United States, and estimated that the total overstay rate was 4.07 percent for F nonimmigrants, 4.17 percent for J nonimmigrants, and 9.54 percent for M nonimmigrants. These figures continue to be significantly higher than those for other nonimmigrant categories. See Fiscal Year 2017 Entry/Exit Overstay Report, Department of Homeland Security, page 11, available at

To reduce the number of overstays and to improve how USCIS implements the unlawful presence ground of inadmissibility under INA 212(a)(9)(B) and INA 212(a)(9)(C)(i)(I), USCIS is now changing its policy on how to calculate unlawful presence for F-1, J-1, and M-1 nonimmigrants, and their dependents (F-2, J-2, and M-2).

Effective Date

This new guidance on the accrual of unlawful presence with respect to F, J, and M nonimmigrants will take effect on August 9, 2018. The policy for determining unlawful presence for aliens present in the United States who are not in F, J, or M nonimmigrant status remains unchanged.

This guidance supersedes any prior guidance on this topic, including in its entirety the May 10, 2018 PM titled "Unlawful Presence and F, J, and M Nonimmigrants."

Policy

The new policy clarifies that F, J, and M nonimmigrants, and their dependents, admitted or otherwise authorized to be present in the United States in duration of status (D/S) or admitted until a specific date (date certain), start accruing unlawful presence as outlined below.[6]

F, J, or M nonimmigrants who failed to maintain nonimmigrant status before August 9, 2018.

F, J, or M nonimmigrants who failed to maintain their nonimmigrant status[7] before August 9, 2018 start accruing unlawful presence based on that failure on August 9, 2018,[8] unless the alien had already started accruing unlawful presence on the earliest of the following:

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https://www.dhs.gov/publication/fiscal-year-2017-entryexit-overstay-report. Accordingly, USCIS believes that the data presented in the FY2017 report continues to support this policy change.

[6] Unless the nonimmigrant is otherwise protected from accruing unlawful presence, as outlined in AFM Chapter 40.9.2.

[7] The day the alien failed to maintain status may be determined by a DHS officer. For example, an F, J, or M nonimmigrant may fail to maintain status if he or she no longer is pursuing the course of study or the authorized activity before completing his or her course of study or program, or engages in an unauthorized activity. An F, J, or M nonimmigrant also may fail to maintain his or her status if the alien remains in the United States after having completed the course of study or program (including any authorized practical training plus any authorized grace period, as outlined in 8 CFR 214.2). Additionally, an F, J, or M nonimmigrant who is admitted for a date certain on his or her Form I-94, Arrival/Departure Record and remains in the United States beyond that date may fail to maintain his or her status. In accordance with 8 CFR 103.2(b)(16), if an adverse decision will result from a DHS officer's inadmissibility determination under INA 212(a)(9)(B) or INA 212(a)(9)(C)(i)(I), and that determination is based on derogatory information of which the alien is unaware, the officer generally will give the alien an opportunity to rebut that derogatory information.

[8] An F, J, or M nonimmigrant who failed to maintain status before the effective date of this memorandum and remains in the United States without maintaining lawful status is generally present in violation of U.S. immigration laws. Nevertheless, if DHS makes the inadmissibility determination under INA 212(a)(9)(B) or INA 212(a)(9)(C)(i)(I) on or after August 9, 2018, unlawful presence for such an alien begins accruing on August 9, 2018 and may continue to accrue for as long as the alien remains in unlawful status in the United States, unless the alien is or becomes otherwise protected from accruing unlawful presence, as outlined in this AFM Chapter 40.9.2.

- The day after DHS denied the request for an immigration benefit, if DHS made a formal finding that the alien violated his or her nonimmigrant status while adjudicating a request for another immigration benefit;[9]

- The day after the Form I-94, Arrival/Departure Record, expired, if the F, J, or M nonimmigrant was admitted for a date certain; or

- The day after an immigration judge ordered the alien excluded, deported, or removed (whether or not the decision is appealed).

F, J, or M nonimmigrants who failed to maintain nonimmigrant status on or after August 9, 2018

An F, J, or M nonimmigrant begins accruing unlawful presence, due to a failure to maintain his or her status[10] **on or after** August 9, 2018, on the earliest of any of the following:

- The day after the F, J, or M nonimmigrant no longer pursues the course of study or the authorized activity, or the day after he or she engages in an unauthorized activity;

- The day after completing the course of study or program (including any authorized practical training plus any authorized grace period, as outlined in 8 CFR 214.2);

- The day after the Form I-94 expires, if the F, J, or M nonimmigrant was admitted for a date certain; or

- The day after an immigration judge orders the alien excluded, deported, or removed (whether or not the decision is appealed).

When assessing whether an F, J, or M nonimmigrant accrued unlawful presence and was no longer in a period of stay authorized, the USCIS officer should consider information relating to the alien's immigration history, including but not limited to:

- Information contained in the systems available to USCIS;

- Information contained in the alien's record;[11] and

[9] Note that the policy for determining when unlawful presence begins to accrue remains unchanged for F, J, and M nonimmigrants for whom DHS made a formal finding of violation of nonimmigrant status before August 9, 2018.
[10] The day the alien failed to maintain his or her status may be determined by a DHS officer. In accordance with 8 CFR 103.2(b)(16), if an adverse decision will result from a DHS officer's inadmissibility determination under INA 212(a)(9)(B) or INA 212(a)(9)(C)(i)(I) and that determination is based on derogatory information of which the alien is unaware, the officer, shall give the alien an opportunity to rebut that derogatory information.
[11] This includes the alien's admissions regarding his or her immigration history or other information discovered during the adjudication.

- Information obtained through a Request for Evidence (RFE) or Notice of Intent to Deny (NOID), if any. The officer should follow current USCIS guidance on the issuance of RFEs or NOIDs.[12]

The period of stay authorized for an F-2, J-2, or M-2 nonimmigrant dependent (spouse or child) admitted for D/S or for a date certain is contingent on the F-1, J-1, or M-1 nonimmigrant remaining in a period of stay authorized. An F-2, J-2, or M-2 nonimmigrant's period of stay authorized ends when the F-1, J-1, or M-1 nonimmigrant's period of stay authorized ends. In addition, an F-2, J-2, or M-2 nonimmigrant's period of stay authorized may end due to the F-2, J-2, or M-2 nonimmigrant dependent's own conduct or circumstances.

This new guidance on the accrual of unlawful presence with respect to F, J, and M nonimmigrants will take effect on August 9, 2018. The policy for determining unlawful presence for aliens present in the United States who are not in F, J, or M nonimmigrant status remains unchanged.

This guidance supersedes any prior guidance on this topic.

Implementation

Chapter 40.9.2 of the AFM is revised by:

- Adding "Other than F, J, or M Nonimmigrants" to the heading of section 40.9.2(b)(1)(E)(i);
- Adding "Other Than F or J Nonimmigrants" to the heading of section 40.9.2(b)(1)(E)(ii);
- Creating a new section 40.9.2(b)(1)(E)(iii);
- Redesignating current section 40.9.2(b)(1)(E)(iii) as section 40.9.2(b)(1)(E)(iv) and amending the text; and
- Revising the text of section 40.9.2(b)(3)(D).

These revised AFM Chapter 40.9.2 sections, as amended, read as follows:

* * *

(b) Determining When an Alien Accrues Unlawful Presence

* * *

(1) Aliens Present in Lawful Status or as Parolees

[12] The USCIS assessment is made under the preponderance of the evidence standard. See *Matter of Chawathe*, 25 I&N Dec. 369, 375-376 (AAO 2010).

* * *

(E) Lawful Nonimmigrants

The period of stay authorized for a nonimmigrant may end on a specific date or may continue for "duration of status (D/S)." Under current USCIS policy, nonimmigrants begin to accrue unlawful presence as follows:

(i) Nonimmigrants Admitted Until a Specific Date (Date Certain) Other Than F, J, or M Nonimmigrants

* * *

(ii) Nonimmigrants Admitted for Duration of Status (D/S) Other Than F or J Nonimmigrants

* * *

(iii) F or J Nonimmigrants Admitted for Duration of Status (D/S) or F, J, or M Nonimmigrants Admitted Until a Specific Date (Date Certain)

Background

Since the creation of the U.S. Department of Homeland Security (DHS), USCIS has followed the former Immigration and Naturalization Service's (INS) various policies on the accrual of unlawful presence. In 2009, USCIS consolidated its prior policy guidance in this AFM chapter.[13]

According to that policy—now superseded by this guidance—foreign students and exchange visitors (F and J nonimmigrants, respectively) admitted for, or present in the United States in, duration of status (D/S) started accruing unlawful presence on the day after USCIS formally found a nonimmigrant status violation while adjudicating a request for another immigration benefit or on the day after an immigration judge ordered the applicant excluded, deported, or removed (whether or not the decision is appealed), whichever came first. F and J nonimmigrants, and foreign vocational students (M nonimmigrants), admitted until a specific date (date certain) accrued unlawful presence on the day after their Form I-94 expired, or on the day after USCIS formally found a nonimmigrant status violation while adjudicating a request for another immigration benefit, or on the day after an immigration judge ordered the applicant excluded, deported, or removed (whether or not the decision was appealed), whichever came

[13] See USCIS Interoffice Memorandum, "Consolidation of Guidance Concerning Unlawful Presence for Purposes of Sections 212(a)(9)(B)(i) and 212(a)(9)(C)(i)(I) of the Act" (May 6, 2009).

first. [14]

The former INS policy, as consolidated in the AFM, went into effect in 1997 prior to the creation of some of the technologies and systems currently used by DHS to monitor nonimmigrants who are admitted to the United States in or otherwise acquire F, J, or M nonimmigrant status. Over the years, DHS has also made significant progress in its ability to identify and calculate the number of nonimmigrants who have failed to maintain status, including certain F, J, or M nonimmigrants.[15]

For example, since the creation of the policy, the Student and Exchange Visitor Information System (SEVIS)—the DHS system used to monitor F, J, and M nonimmigrants—has provided USCIS officers additional information about an alien's immigration history, including information that indicates that an alien in F, J, or M nonimmigrant status may have completed or ceased to pursue his or her course of study or activity, as outlined in Form I-20, Certificate of Eligibility for Nonimmigrant Student Status, and related forms, or Form DS-2019, Certificate of Eligibility for Exchange Visitor (J-1) Status. For FY 2016, DHS calculated that a total of 1,457,556 aliens admitted in F, J, and M nonimmigrant status were either expected to change status or depart the United States. Of this population, it was estimated that the total overstay rate was 6.19 percent for F nonimmigrants, 3.80 percent for J nonimmigrants, and 11.60 percent for M nonimmigrants.[16]

To reduce the number of overstays and to improve how USCIS implements the unlawful presence ground of inadmissibility under INA 212(a)(9)(B) and INA 212(a)(9)(C)(i)(I), USCIS changed its policy on how to calculate unlawful presence for F-1, J-1, and M-1 nonimmigrants, and their dependents (F-2, J-2, and M-2) effective on August 9, 2018.

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[14] Under the former policy, an alien admitted for duration of status who overstayed or violated such status did not immediately begin accruing unlawful presence for purposes of INA 212(a)(9)(B). Nevertheless, such alien was illegally present in the United States and would be amenable to removal proceedings under INA 237(a)(1)(C), which renders deportable aliens who violate their nonimmigrant status or any condition of their entry. Moreover, such aliens could be charged and ultimately convicted of any criminal offense requiring the alien to be illegally or unlawfully present in the United States as an element of the offense. For example, aliens who were admitted for duration of status and either violated or overstayed such status were treated as being illegally or unlawfully present in the United States for purposes of criminal culpability under the firearms provisions at 18 U.S.C. §§ 922(a)(6) and 922(g)(5). *See United States v. Rehaif*, 888 F.3d 1138 (11th Cir. 2018) (holding that a student who was academically dismissed, failed to depart the United States immediately, and therefore violated the terms of his F-1 status was unlawfully present for purposes of 18 U.S.C. § 922(g)(5)(A)); *United States v. Atandi*, 376 F.3d 1186, 1188 (10th Cir. 2004) ("Rather, we hold that an alien who is only permitted to remain in the United States for the duration of his or her status (as a student, for example) becomes 'illegally or unlawfully in the United States' for purposes of § 922(g)(5)(A) upon commission of a status violation."); *United States v. Bazargan*, 992 F.2d 844, 847 (8th Cir. 1993) ("A nonimmigrant alien F-1 student becomes an illegal alien subject to deportation by failing to comply with the transfer procedures set forth in the INS regulations."); *United States v. Igbatayo*, 764 F.2d 1039, 1040 (5th Cir. 1985) (per curiam) ("After failing to maintain the student status required by his visa, Igbatayo was without authorization to remain in this country.").

[15] See Fiscal Year 2016 Entry/Exit Overstay Report, Department of Homeland Security, available at https://www.dhs.gov/publication/entryexit-overstay-report.

[16] See Fiscal Year 2016 Entry/Exit Overstay Report, Department of Homeland Security, page 12, available at https://www.dhs.gov/publication/entryexit-overstay-report.

Policy

Foreign students (F-1 nonimmigrants), exchange visitors (J-1 nonimmigrants), and vocational students (M-1 nonimmigrants), and their dependents, admitted or otherwise authorized to be present in the United States in duration of status (D/S) or admitted until a specific date (date certain) (in accordance with 8 CFR 214.2(f), 8 CFR 214.2(j), or 8 CFR 214.2(m)) start accruing unlawful presence as outlined below.[17]

When assessing whether an F, J, or M nonimmigrant accrued unlawful presence and was no longer in a period of stay authorized, the USCIS officer should consider information relating to the alien's immigration history, including but not limited to:

- Information contained in the systems available to USCIS;
- Information contained in the alien's record;[18] and
- Information obtained through a Request for Evidence (RFE) or Notice of Intent to Deny (NOID), if any. The officer should follow current USCIS guidance on the issuance of RFEs or NOIDs.[19]

F, J, or M nonimmigrants who failed to maintain nonimmigrant status before August 9, 2018

F, J, or M nonimmigrants who failed to maintain their nonimmigrant status[20] before August 9, 2018 start accruing unlawful presence based on that failure on August 9, 2018**,** [21] unless the alien had already started accruing unlawful presence on the earliest of the following:

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[17] Unless the nonimmigrant is otherwise protected from accruing unlawful presence, as outlined in AFM Chapter 40.9.2.

[18] This includes the alien's admissions regarding his or her immigration history or other information discovered during the adjudication.

[19] The assessment is made under the preponderance of the evidence standard. See *Matter of Chawathe*, 25 I&N Dec. 369, 375-376 (AAO 2010).

[20] The day the alien failed to maintain status may be determined by a DHS officer. For example, an F, J, or M nonimmigrant may fail to maintain status if he or she no longer is pursuing the course of study or the authorized activity before completing his or her course of study or program, or engages in unauthorized activity. An F, J, or M nonimmigrant also may fail to maintain his or her status if the alien remains in the United States after having completed the course of study or program (including any authorized practical training plus authorized grace period, as outlined in 8 CFR 214.2). Additionally, an F, J, or M nonimmigrant who is admitted for a date certain on his or her Form I-94, Arrival/Departure Record and remains in the United States beyond that date may fail to maintain his or her status. In accordance with 8 CFR 103.2(b)(16), if an adverse decision will result from a DHS officer's inadmissibility determination under INA 212(a)(9)(B) or INA 212(a)(9)(C)(i)(I) and that determination is based on derogatory information of which the alien is unaware, the officer generally will give the alien an opportunity to rebut that derogatory information.

[21] An F, J, or M nonimmigrant who failed to maintain status before the effective date of this memorandum and remains in the United States without maintaining lawful status is generally present in violation of U.S. immigration

- The day after DHS denied the request for the immigration benefit, if DHS made a formal finding that the alien violated his or her nonimmigrant status while adjudicating a request for another immigration benefit;[22]

- The day after the Form I-94, Arrival/Departure Record expired, if the F, J, or M nonimmigrant was admitted for a date certain; or

- The day after an immigration judge ordered the alien excluded, deported, or removed (whether or not the decision is appealed).

F, J, or M nonimmigrants who failed to maintain nonimmigrant status on or after August 9, 2018

An F, J, or M nonimmigrant begins accruing unlawful presence, due to a failure to maintain his or her status[23] **on or after** August 9, 2018, on the earliest of any of the following:

- The day after the F, J, or M nonimmigrant no longer pursues the course of study or the authorized activity, or the day after he or she engages in an unauthorized activity;

- The day after completing the course of study or program (including any authorized practical training plus any authorized grace period, as outlined in 8 CFR 214.2);

- The day after the Form I-94 expires, if the F, J, or M nonimmigrant was admitted for a date certain; or

- The day after an immigration judge orders the alien excluded, deported, or removed (whether or not the decision is appealed).

Foreign students (F nonimmigrant) generally do not accrue unlawful presence in certain situations, including but not limited to:

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laws. Nevertheless, if DHS makes the inadmissibility determination under INA 212(a)(9)(B) or INA 212(a)(9)(C)(i)(I) on or after August 9, 2018, unlawful presence for such an alien begins accruing on August 9, 2018 and may continue to accrue for as long as the alien remains in unlawful status in the United States, unless the alien is or becomes otherwise protected from accruing unlawful presence, as outlined in this AFM Chapter 40.9.2.

[22] Note that the policy for determining when unlawful presence begins to accrue remains unchanged for F, J, and M nonimmigrants for whom DHS made a formal finding of violation of nonimmigrant status before August 9, 2018.

[23] The day the alien failed to maintain his or her status may be determined by a DHS officer. In accordance with 8 CFR 103.2(b)(16), if an adverse decision will result from a DHS officer's inadmissibility determination under INA 212(a)(9)(B) or INA 212(a)(9)(C)(i)(I) and that determination is based on derogatory information of which the alien is unaware, the officer shall give the alien an opportunity to rebut that derogatory information.

- During the period permitted under 8 CFR 214.2(f)(5)(i) (period of up to 30 days before the program start date listed on the F-1 nonimmigrant's Form I-20);

- While the F-1 nonimmigrant is pursuing a full course of study at an educational institution approved by DHS for attendance by foreign students, and any additional periods of authorized pre- or post-completion practical training, including authorized periods of unemployment under 8 CFR 214.2(f)(10)(ii)(E);

- During a change in educational levels as outlined in 8 CFR 214.2(f)(5)(ii), provided the F-1 nonimmigrant transitions to the new educational level according to transfer procedures outlined in 8 CFR 214.2(f)(8);

- While the F-1 nonimmigrant is in a cap gap period under 8 CFR 214.2(f)(5)(vi), that is, during an automatic extension of an F-1 nonimmigrant's D/S and employment authorization as provided under 8 CFR 214.2(f)(5)(vi) for a beneficiary of an H-1B petition and request for a change of status that has been timely filed and states that the employment start date for the F-1 nonimmigrant is October 1 of the following fiscal year;

- While the F-1 nonimmigrant's application for post-completion Optional Practical Training (OPT) remains pending under 8 CFR 214.2(f)(10)(ii)(D);

- While the F-1 nonimmigrant is pursuing a school transfer provided that he or she has maintained status as provided in 8 CFR 214.2(f)(8);

- The period of time a timely-filed[24] reinstatement application under 8 CFR 214.2(f)(16) is pending with USCIS;

- The period of time an F-1 nonimmigrant was out of status if he or she applies for reinstatement under 8 CFR 214.2(f)(16), provided that the application is ultimately approved;

- During annual vacation permitted under 8 CFR 214.2(f)(5)(iii) if the F-1 nonimmigrant is eligible and intends to register for the next term;

- During any additional grace period as permitted under 8 CFR 214.2(f)(5)(iv) to prepare for departure:

    - 60 days following completion of a course of study and any authorized practical training;

[24] For purposes of tolling unlawful presence, a reinstatement application will be considered to be timely-filed if the applicant has not been out of status for more than 5 months at the time of filing the request for reinstatement.

  - 15 days if the designated school official (DSO) authorized the withdrawal from classes (SEVIS termination reason: authorized early withdrawal); or

  - No grace period if the F-1 nonimmigrant failed to maintain a full course of study without the approval of the DSO or otherwise failed to maintain status.

- Emergent circumstances as outlined in 8 CFR 214.2(f)(5)(v), in which any or all of the requirements for on-campus or off-campus employment are suspended by a *Federal Register* notice and the student reduces his or her full course of study as a result of accepting employment based on the *Federal Register* notice; and

- During a period of reduced course load, as authorized by the DSO under 8 CFR 214.2(f)(6)(H)(iii).

Foreign exchange visitors (J nonimmigrants) generally do not accrue unlawful presence in certain situations, including but not limited to:

- The period of time annotated on Form DS-2019 as the approved program time plus any grace period, either before the program start date or after the conclusion of the program as outlined in 8 CFR 214.2(j)(1)(ii);

- Any extension of program time annotated on Form DS-2019 as outlined in 8 CFR 214.2(j)(1)(iv);

- While the J-1 nonimmigrant is in a cap gap period as outlined in 8 CFR 214.2(j)(1)(vi);[25] and

- The period of time a J-1 nonimmigrant was out of status, if he or she is granted reinstatement under 22 CFR 62.45.

Foreign vocational students (M nonimmigrants) generally do not accrue unlawful presence in certain situations, including but not limited to:

- The period of admission as indicated on Form I-94, plus up to 30 days before the report or start date of the course of study listed on the Form I-20 as outlined in 8 CFR 214.2(m)(5);

- Any authorized grace period as outlined in 8 CFR 214.2(m)(5);

[25] This is a discretionary provision in which the USCIS Director may, by notice in the *Federal Register*, bridge the gap for J-1 nonimmigrants.

- During the time the M-1 nonimmigrant completes authorized practical training as outlined in 8 CFR 214.2(m)(14);

- The period of time a timely-filed[26] reinstatement application under 8 CFR 214.2(m)(16) is pending with USCIS; and,

- The period of time an M-1 nonimmigrant was out of status if he or she applies for reinstatement under 8 CFR 214.2(m)(16), provided that the application is ultimately approved.

The period of stay authorized for an F-2, J-2, or M-2 nonimmigrant dependent (spouse or child) admitted for D/S or for a date certain is contingent on the F-1, J-1, or M-1 nonimmigrant remaining in a period of stay authorized. An F-2, J-2, or M-2 nonimmigrant's period of stay authorized ends when the F-1, J-1, or M-1 nonimmigrant's period of stay authorized ends. In addition, an F-2, J-2, or M-2 nonimmigrant's period of stay authorized may end due to the F-2, J-2, or M-2 nonimmigrant dependent's own conduct or circumstances.

An alien under 18 years of age does not accrue unlawful presence.[27] Therefore, any F, J, or M nonimmigrant who is under 18 years of age does not accrue unlawful presence. Additionally, the F, J, or M nonimmigrant may be otherwise protected from accruing unlawful presence, as outlined in this chapter.

(iv) Non-Controlled Nonimmigrants (for example, Canadian B-1/B-2)

Nonimmigrants who are not issued a Form I-94, Arrival/Departure Record, are treated as nonimmigrants admitted for D/S (as addressed in Chapter 40.9.2(b)(1)(E)(ii)) for purposes of determining unlawful presence.

(F) Other Types of Lawful Status

* * *

(2) Aliens Present in Unlawful Status Who Do Not Accrue Unlawful Presence by Statute for Purposes of Section 212(a)(9)(B) of the Act (Statutory Exceptions)

* * *

(3) Aliens Present in Unlawful Status Who Do Not Accrue Unlawful Presence by Virtue of USCIS Policy for Purposes of Sections 212(a)(9)(B) and (C)(i)(I) of the Act

[26] For purposes of tolling unlawful presence, a reinstatement application will be considered to be timely-filed if the applicant has not been out of status for more than 5 months at the time of filing the request for reinstatement.
[27] See INA 212(a)(9)(B)(iii)(I).

* * *

(D) Nonimmigrants – Effect of a Decision on the Request for Extension of Status (EOS) or Change of Status (COS) on Unlawful Presence

The following information pertains to applications requesting EOS or COS, or petitions that include requests for EOS or COS.

(i) Approved Requests

* * *

(ii) Denials Based on Frivolous Filings or Unauthorized Employment

If a request for EOS or COS is denied because it was frivolous or because the alien engaged in unauthorized employment, the EOS or COS application does not protect the alien from accruing unlawful presence. The alien accrues unlawful presence as outlined in Chapter 40.9.2(b)(1)(E), Lawful Nonimmigrants.

(iii) Denials of Untimely Applications

If a request for EOS or COS is denied because it was not timely filed, the EOS or COS application does not protect the alien from accruing unlawful presence. The alien accrues unlawful presence as outlined in Chapter 40.9.2(b)(1)(E), Lawful Nonimmigrants.

(iv) Denials for Cause of Timely Filed, Non-Frivolous Applications for EOS or COS

* * *

Use

This PM is intended solely for the guidance of USCIS personnel in the performance of their official duties. 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 officers have questions or suggestions regarding this PM, they should direct them through their appropriate chains of command to the Office of Policy and Strategy.

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.

* * *

(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).

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[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.

* * *

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

* * *

(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.

* * *

☞ (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.

U.S. Citizenship and Immigration Services

I-539, Application To Extend/Change Nonimmigrant Status

ALERT: On March 8, 2019, we published the revised Form I-539, Application to Extend/Change Nonimmigrant Status. We will reject any Form I-539 with an edition date of 12/23/16 or earlier that is received by USCIS after close of business on March 21, 2019. Starting on March 22, 2019, we will only accept the revised Form I-539 with an edition date of 02/04/19. We also published a new Form I-539A, Supplemental Information for Application to Extend/Change Nonimmigrant Status, on March 8 (replacing Supplement A of Form I-539). Read more here: UPDATE: USCIS to Publish Revised Form I-539 and New Form I-539A on March 8.

The following groups use this form:

- Certain nonimmigrants extending their stay or changing to another nonimmigrant status;
- CNMI residents applying for an initial grant of status;
- F and M nonimmigrants applying for reinstatement; and,
- Persons seeking V nonimmigrant status or an extension of stay as a V nonimmigrant.

Form I-539 (PDF, 468 KB)

Instructions for Form I-539 (PDF, 302 KB)

Form I-539A, Supplemental Information for Application to Extend/Change Nonimmigrant Status (PDF, 376 KB)

Instructions for Form I-539A, Supplemental Information for Application to Extend/Change Nonimmigrant Status (PDF, 178 KB)

Form M-752, Helpful Filing Tips for Form I-539 (PDF, 99 KB)

Form G-1145, E-Notification of Application/Petition Acceptance (PDF, 238 KB)

Number of Pages

I-539 Form 7; I-539 instructions 17. I-539A Form 4; I-539A instructions 3.

Edition Date

02/04/19. Starting on March 22, 2019, we will **only** accept the revised Form I-539 with an edition date of 02/04/19, and will reject any Form I-539 or Form I-539A with an edition date of 12/23/16 or earlier. You can find the edition date at the bottom of the page on the form and instructions.

Where to File

For a complete list of mailing addresses, visit our Form I-539 Direct Filing Addresses webpage.

If filing at a Lockbox, please read our filing tips.

Filing Tips for Form I-539, Application To Extend/Change Nonimmigrant Status

Complete **all sections** of the form. We will reject the form if these fields are missing:

- Part 1 – Information About You
  - Family Name
  - Mailing Address
  - Date of Birth
  - Current nonimmigrant status

- Part 2 – Application Type
  - I am applying for (1., 2.. or 3.a.)
  - The status I am requesting (3.b or 3.c)
  - Total number of People Included in This Application.

Filing Tips for Form I-539A, Supplemental Information for Application To Extend/Change Nonimmigrant Status

- Part 1 – Information About the Person filing Form I-539A
  - Family Name

Don't forget to sign your form! We will reject any unsigned form.

Filing Fee

$370. You and each co-applicant must also pay an $85 biometric services fee. Exceptions: Individuals changing into or out of A-1, A-2, A-3, G-1, G-2, G-3, G-4, G-5, NATO-1, NATO-2, NATO-3, NATO-4, NATO-5, or NATO-6 status are not required to submit either the filing fee or the biometric services fee.

You may pay the fee with a money order, personal check, or cashier's check. When filing at a USCIS Lockbox facility, you may also pay by credit card using Form G-1450, Authorization for Credit Card Transactions. If you pay by check, you must make your check payable to the U.S. Department of Homeland Security. Please note that service centers are not able to process credit card payments.

When you send a payment, you agree to pay for a government service. Filing and biometric service fees are final and non-refundable, regardless of any action we take on your application, petition, or request, or if you withdraw your request.

Checklist of Required Initial Evidence (for informational purposes only)

View the checklist of required initial evidence.

Special Instructions

Nonimmigrant Type	Additional Instructions
Commonwealth of Northern Mariana Islands (CNMI) residents	• Initial grant of status Guidance • Use your CNMI P.O. Box as your address • File at the California Service Center
B nonimmigrant extension	• Form M-752, Helpful Filing Tips for Form I-539 (PDF, 99 KB)
B1 or B2 nonimmigrants	• Special Instructions for B-1/B-2 Visitors Who Want to Enroll in School
K-3/4 nonimmigrants	• File Form I-539 to extend your status while your permanent resident case is pending. • You may file Form I-765 with Form I-539. • You may travel outside of the United States and be readmitted as a K-3/4, if you have a valid passport and K-3/4 visa.

Nonimmigrant Type	Additional Instructions
V nonimmigrants	• You may file Form I-765 with Form I-539. • You may travel outside of the U.S. and be readmitted as a V nonimmigrant, if you have a valid passport and obtain a V visa from the Department of State.

E-Notification: If you want to receive an email and/or text message that your Form I-539 has been accepted at a USCIS Lockbox facility, complete Form G-1145, E-Notification of Application/Petition Acceptance, and clip it to the first page of your application.

Related Links

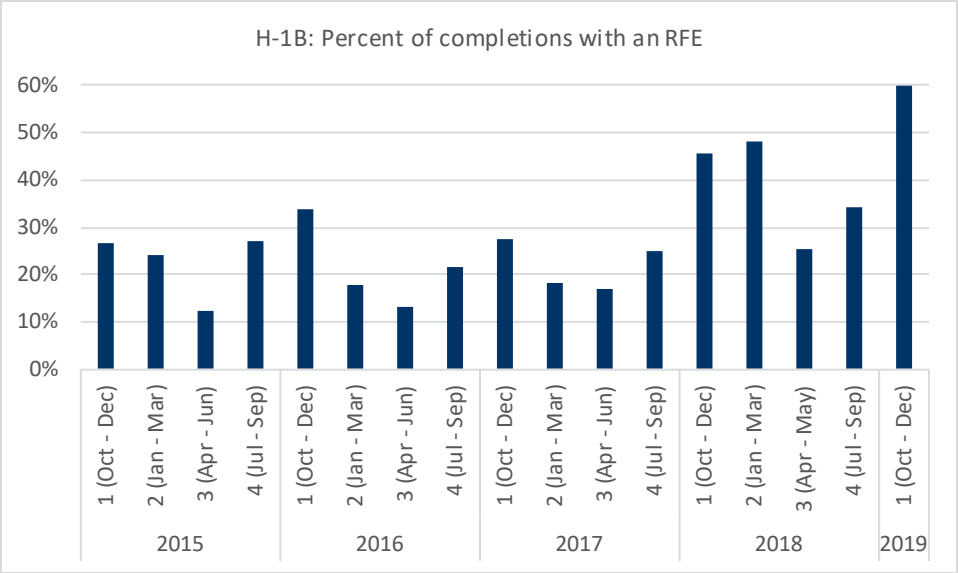
Related Links

- USCIS to Publish Revised Form I-539 and New Form I-539A on March 8
- How Do I Extend My Nonimmigrant Stay in the U.S.? (PDF, 121 KB)
- How Do I Change to Another Nonimmigrant Status? (PDF, 483 KB)

Filing Information

- Filing Addresses for Form I-539, Application to Extend/Change Nonimmigrant Status
- Lockbox Filing Tips
- Grants of Status
- Changing to a Nonimmigrant F or M Student Status

Last Reviewed/Updated: 03/08/2019


H-1B: Percent of completions with an RFE
60%
50%
40%
30%
20%
10%
0%
1 (Oct - Dec)
2 (Jan - Mar)
3 (Apr - Jun)
4 (Jul - Sep)
1 (Oct - Dec)
2 (Jan - Mar)
3 (Apr - Jun)
4 (Jul - Sep)
1 (Oct - Dec)
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3 (Apr - May)
4 (Jul - Sep)
1 (Oct - Dec)
2015
2016
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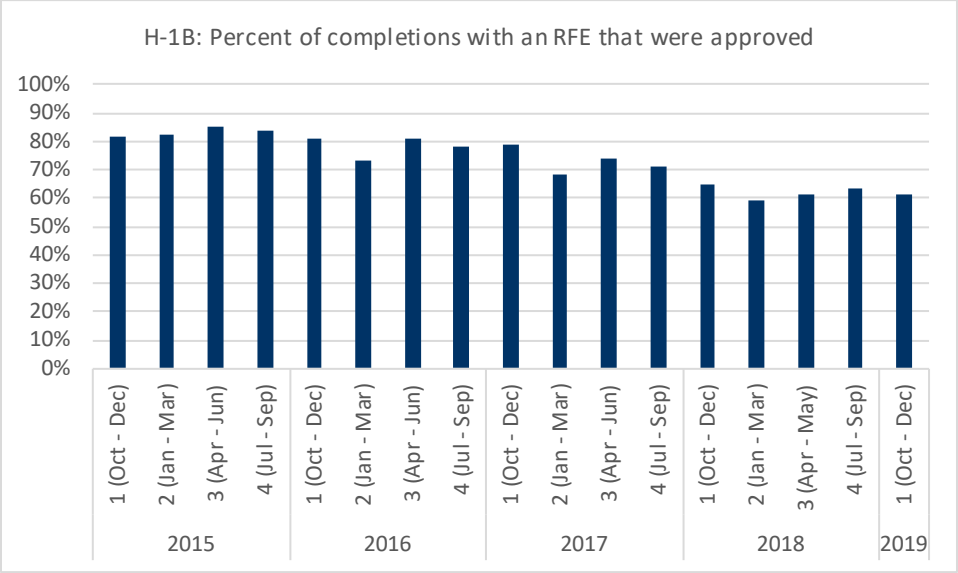
2019


H-1B: Percent of completions with an RFE that were approved
100%
90%
80%
70%
60%
50%
40%
30%
20%
10%
0%
1 (Oct - Dec)
2 (Jan - Mar)
3 (Apr - Jun)
4 (Jul - Sep)
1 (Oct - Dec)
2 (Jan - Mar)
3 (Apr - Jun)
4 (Jul - Sep)
1 (Oct - Dec)
2 (Jan - Mar)
3 (Apr - Jun)
4 (Jul - Sep)
1 (Oct - Dec)
2 (Jan - Mar)
3 (Apr - May)
4 (Jul - Sep)
1 (Oct - Dec)
2015
2016
2017
2018
2019

H-1B approvals for the top 30 employers with the most initial and continuing approvals, fiscal year 2018

	Fiscal Year	Employer	Tax ID	State	City	ZIP	Initial Approvals	Initial Denials	Continuing Approvals	Continuing Denials	Total Completions (A+B+C+D)	Approval Percent (A+C)/E
							A	B	C	D	E	F
1	2018	COGNIZANT TECH SOLUTIONS US CORP	4155	TX	COLLEGE STATION	77845	500	790	8,746	3,548	13,584	68%
2	2018	TATA CONSULTANCY SVCS LTD	9806	MD	ROCKVILLE	20850	528	152	8,232	1,744	10,656	82%
3	2018	INFOSYS LIMITED	0235	TX	PLANO	75024	69	80	5,897	2,042	8,088	74%
4	2018	DELOITTE CONSULTING LLP	4513	PA	PHILADELPHIA	19103	593	295	4,193	1,281	6,362	75%
5	2018	CAPGEMINI AMERICA INC	5929	IL	CHICAGO	60606	273	1,061	2,664	914	4,912	60%
6	2018	MICROSOFT CORPORATION	4442	WA	REDMOND	98052	1,252	13	3,200	54	4,519	99%
7	2018	AMAZON COM SERVICES INC	4687	WA	SEATTLE	98121	2,399	23	1,993	45	4,460	98%
8	2018	WIPRO LIMITED	4401	NJ	EAST BRUNSWICK	08816	273	82	2,877	599	3,831	82%
9	2018	ACCENTURE LLP	2904	IL	CHICAGO	60601	363	160	2,656	451	3,630	83%
10	2018	APPLE INC	4110	CA	CUPERTINO	95014	698	13	2,387	25	3,123	99%
11	2018	HCL AMERICA INC	5035	CA	SUNNYVALE	94085	196	100	2,105	509	2,910	79%
12	2018	TECH MAHINDRA AMERICAS INC	2696	NJ	SOUTH PLAINFIELD	07080	579	201	1,781	300	2,861	82%
13	2018	ERNST & YOUNG US LLP	5596	NJ	SECAUCUS	07094	716	93	1,760	150	2,719	91%
14	2018	GOOGLE INC	3581	CA	MOUNTAIN VIEW	94043	724	6	1,928	17	2,675	99%
15	2018	JPMORGAN CHASE & CO	4428	IL	CHICAGO	60603	321	8	1,877	54	2,260	97%
16	2018	INTEL CORPORATION	2743	AZ	CHANDLER	85248	873	9	1,263	19	2,164	99%
17	2018	FACEBOOK INC	5019	CA	MENLO PARK	94025	651	5	1,421	12	2,089	99%
18	2018	IBM INDIA PRIVATE LIMITED	1430	NC	DURHAM	27709	62	60	1,552	288	1,962	82%
19	2018	CISCO SYSTEMS INC	9951	CA	SAN JOSE	95134	328	13	1,322	28	1,691	98%
20	2018	LARSEN & TOUBRO INFOTECH LIMITED	4303	NJ	EDISON	08817	154	43	1,285	171	1,653	87%
21	2018	L&T TECHNOLOGY SERVICES LTD	1591	NJ	EDISON	08817	253	50	906	102	1,311	88%
22	2018	MPHASIS CORPORATION	9720	NY	NEW YORK	10016	174	60	914	138	1,286	85%
23	2018	SYNTEL INC	2018	MI	TROY	48083	64	57	974	162	1,257	83%
24	2018	WAL-MART ASSOCIATES INC	4409	AR	BENTONVILLE	72716	341	35	706	35	1,117	94%
25	2018	PRICEWATERHOUSECOOPERS ADVISORY SE	8214	FL	TAMPA	33607	112	20	751	222	1,105	78%
26	2018	IBM CORPORATION	1985	NC	DURHAM	27709	268	3	746	83	1,100	92%
27	2018	MINDTREE LIMITED	5091	NJ	WARREN	07059	148	98	762	89	1,097	83%
28	2018	AMAZON CORPORATE LLC	6545	WA	SEATTLE	98121	153	14	823	30	1,020	96%
29	2018	CUMMINS INC	7090	TN	NASHVILLE	37214	314	11	613	26	964	96%
30	2018	RANDSTAD TECHNOLOGIES LP	5132	MA	WOBURN	01801	42	4	860	39	945	95%

Source: USCIS H-1B Employer Data Hub (forthcoming)

Note: Top 30 employer based on initial and continuing approvals; sorted by total completions.

U.S. Citizenship and Immigration Services

Israeli Nationals Eligible for Treaty Investor Visas

Certain Israeli nationals who are lawfully present in the United States will soon be able to request a change of status to the E-2 treaty investor classification. Beginning May 1, eligible Israeli nationals already in the United States in a lawful nonimmigrant status can file Form I-129, Petition for a Nonimmigrant Worker, to request a change of status to E-2 classification, or a qualifying employer can file the petition on their behalf. Spouses and unmarried children under 21 years of age of treaty investors and employees who are already in the United States may also seek to change status to E-2 classification as dependents by filing Form I-539, Application to Extend/Change Nonimmigrant Status.

The E-2 nonimmigrant classification allows citizens of countries with which the United States has a treaty of commerce and navigation to be admitted to the United States when they are investing substantial capital in a U.S. business. E-2 status is also available to certain employees of such investors or qualifying organizations.

For more on the E-2 classification, see our E-2 Treaty Investors page.

Last Reviewed/Updated: 04/22/2019

L-1 Processing at the U.S./Canadian Border – An Update

U.S. Customs & Border Protection (CBP) recently ceased accepting applications for L-1 "extension" at U.S. Ports of Entry (POE) at the U.S./Canadian border. This sudden and unannounced change in long-standing border processing procedure has been met with much confusion among L-1 applicants, their employers, and immigration practitioners. Arguably, any time an individual applies for admission to the U.S. in L-1 status at a Port of Entry, s/he is not requesting an "extension of stay", as available under 8 CFR 214.2(l)(15)(i), since s/he is not within the U.S. (and therefore not in L-1 status) at the time the request is made. When filing at the POE for someone who previously held L-1 status, foreign nationals are seeking a petition extension only, together with readmission in L-1 status. Nonetheless, it would seem that CBP is interpreting any request for renewed L-1 status to someone who has already been granted that status in the past as an "extension" which must now be processed through a U.S. Citizenship & Immigration Services (USCIS) Service Center rather than CBP at the border.

The American Immigration Lawyers Association (AILA) is currently in contact with CBP Headquarters in an effort to verify the rationale and basis for this dramatic policy change and, hopefully, to persuade the agency to reverse it. In the meantime, CBP Headquarters has apparently already announced an exception to the new policy for commuters and intermittent L-1 status holders. CBP will continue to accept L-1 extension/ readmission applications for Canadians who reside in Canada and spend less than 50% of their time in the U.S. The "intermittent" or "commuter" L-1 designation arises from 8 CFR 214.2(l)(12)(ii), which provides an exception to the normal 5 or 7 year maximum period of stay in L-1 status, and which reads as follows:

> The limitations of paragraph (l)(12)(i) of this section shall not apply to aliens who do not reside continually in the United States and whose employment in the United States is seasonal, intermittent, or consists of an aggregate of six months or less per year. In addition, the limitations will not apply to aliens who reside abroad and regularly commute to the United States to engage in part-time employment. The petitioner and the alien must provide clear and convincing proof that the alien qualifies for an exception. Clear and convincing proof shall consist of evidence such as arrival and departure records, copies of tax returns, and records of employment abroad.

Presumably, in order to qualify for this exception, proof that the applicant resides in Canada and spends less than 50% of his/her time in the U.S. would need to be provided at the time the "extension" is sought, regardless of the individual is seeking an extension beyond what would otherwise be the normal 5-year (L-1B) or 7-year (L-1A) maximum period of admission.

Particularly given the hostile adjudicatory climate for L-1 petitions at USCIS at the present time, Canadian L-1 workers may wish to consider alternatives to avoid having to process L-1 extensions, such as initiating the green card process earlier in the course of L-1 employment before an extension of stay in L-1 status becomes necessary, or alternative visa categories such as E-2 or O-1.

EXECUTIVE ORDERS

Presidential Executive Order on Buy American and Hire American

ECONOMY & JOBS

Issued on: **April 18, 2017**

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By the authority vested in me as President by the Constitution and the laws of the United States of America, and to ensure the faithful execution of the laws, it is hereby ordered as follows:

Section 1. Definitions. As used in this order:

(a) "Buy American Laws" means all statutes, regulations, rules, and Executive Orders relating to Federal procurement or Federal grants including those that refer to "Buy America" or "Buy American" that require, or provide a preference for, the purchase or acquisition of goods, products, or materials produced in the United States, including iron, steel, and manufactured goods.

(b) "Produced in the United States" means, for iron and steel products, that all manufacturing processes, from the initial melting stage through the application of coatings, occurred in the United States.

(c) "Petition beneficiaries" means aliens petitioned for by employers to become nonimmigrant visa holders with temporary work authorization under the H-1B visa program.

(d) "Waivers" means exemptions from or waivers of Buy American Laws, or the procedures and conditions used by an executive department or agency (agency) in granting exemptions from or waivers of Buy American Laws.

(e) "Workers in the United States" and "United States workers" shall both be defined as provided at section 212(n)(4)(E) of the Immigration and Nationality Act (8 U.S.C. 1182(n)(4)(E)).

Sec. 2. Policy. It shall be the policy of the executive branch to buy American and hire American.

(a) Buy American Laws. In order to promote economic and national security and to help stimulate economic growth, create good jobs at decent wages, strengthen our middle class, and support the American manufacturing and defense industrial bases, it shall be the policy of the executive branch to maximize, consistent with law, through terms and

conditions of Federal financial assistance awards and Federal procurements, the use of goods, products, and materials produced in the United States.

(b) Hire American. In order to create higher wages and employment rates for workers in the United States, and to protect their economic interests, it shall be the policy of the executive branch to rigorously enforce and administer the laws governing entry into the United States of workers from abroad, including section 212(a)(5) of the Immigration and Nationality Act (8 U.S.C. 1182(a)(5)).

Sec. 3. Immediate Enforcement and Assessment of Domestic Preferences According to Buy American Laws. (a) Every agency shall scrupulously monitor, enforce, and comply with Buy American Laws, to the extent they apply, and minimize the use of waivers, consistent with applicable law.

(b) Within 150 days of the date of this order, the heads of all agencies shall:

(i) assess the monitoring of, enforcement of, implementation of, and compliance with Buy American Laws within their agencies;

(ii) assess the use of waivers within their agencies by type and impact on domestic jobs and manufacturing; and

(iii) develop and propose policies for their agencies to ensure that, to the extent permitted by law, Federal financial assistance awards and Federal procurements maximize the use of materials produced in the United States, including manufactured products; components of manufactured products; and materials such as steel, iron, aluminum, and cement.

(c) Within 60 days of the date of this order, the Secretary of Commerce and the Director of the Office of Management and Budget, in consultation with the Secretary of State, the Secretary of Labor, the United States Trade Representative, and the Federal Acquisition Regulatory Council, shall issue guidance to agencies about how to make the assessments and to develop the policies required by subsection (b) of this section.

(d) Within 150 days of the date of this order, the heads of all agencies shall submit findings made pursuant to the assessments required by subsection (b) of this section to the Secretary of Commerce and the Director of the Office of Management and Budget.

(e) Within 150 days of the date of this order, the Secretary of Commerce and the United States Trade Representative shall assess the impacts of all United States free trade agreements and the World Trade Organization Agreement on Government Procurement on the operation of Buy American Laws, including their impacts on the implementation of domestic procurement preferences.

(f) The Secretary of Commerce, in consultation with the Secretary of State, the Director of the Office of Management and Budget, and the United States Trade Representative, shall submit to the President a report on Buy American that includes findings from subsections (b), (d), and (e) of this section. This report shall be submitted within 220 days of the

date of this order and shall include specific recommendations to strengthen implementation of Buy American Laws, including domestic procurement preference policies and programs. Subsequent reports on implementation of Buy American Laws shall be submitted by each agency head annually to the Secretary of Commerce and the Director of the Office of Management and Budget, on November 15, 2018, 2019, and 2020, and in subsequent years as directed by the Secretary of Commerce and the Director of the Office of Management and Budget. The Secretary of Commerce shall submit to the President an annual report based on these submissions beginning January 15, 2019.

Sec. 4. Judicious Use of Waivers. (a) To the extent permitted by law, public interest waivers from Buy American Laws should be construed to ensure the maximum utilization of goods, products, and materials produced in the United States.

(b) To the extent permitted by law, determination of public interest waivers shall be made by the head of the agency with the authority over the Federal financial assistance award or Federal procurement under consideration.

(c) To the extent permitted by law, before granting a public interest waiver, the relevant agency shall take appropriate account of whether a significant portion of the cost advantage of a foreign-sourced product is the result of the use of dumped steel, iron, or manufactured goods or the use of injuriously subsidized steel, iron, or manufactured goods, and it shall integrate any findings into its waiver determination as appropriate.

Sec. 5. Ensuring the Integrity of the Immigration System in Order to "Hire American." (a) In order to advance the policy outlined in section 2(b) of this order, the Secretary of State, the Attorney General, the Secretary of Labor, and the Secretary of Homeland Security shall, as soon as practicable, and consistent with applicable law, propose new rules and issue new guidance, to supersede or revise previous rules and guidance if appropriate, to protect the interests of United States workers in the administration of our immigration system, including through the prevention of fraud or abuse.

(b) In order to promote the proper functioning of the H-1B visa program, the Secretary of State, the Attorney General, the Secretary of Labor, and the Secretary of Homeland Security shall, as soon as practicable, suggest reforms to help ensure that H-1B visas are awarded to the most-skilled or highest-paid petition beneficiaries.

Sec. 6. General Provisions. (a) Nothing in this order shall be construed to impair or otherwise affect:

(i) the authority granted by law to an executive department or agency, or the head thereof;

(ii) the functions of the Director of the Office of Management and Budget relating to budgetary, administrative, or legislative proposals; or

(iii) existing rights or obligations under international agreements.

(b) This order shall be implemented consistent with applicable law and subject to the availability of appropriations.

(c) This order is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person.

DONALD J. TRUMP

THE WHITE HOUSE,
April 18, 2017.

Understanding Requests for Evidence (RFEs): A Breakdown of Why RFEs Were Issued for H-1B Petitions in Fiscal Year 2018

Introduction

Under 8 CFR 103.2, if all required initial evidence is not submitted with the benefit request or does not demonstrate eligibility, USCIS in its discretion may deny the benefit request for lack of initial evidence or for ineligibility or request that the missing initial evidence be submitted within a specified period of time as determined by USCIS. A request for evidence or notice of intent to deny will be communicated by regular or electronic mail and will specify the type of evidence required, and whether initial evidence or additional evidence is required, or the basis for the proposed denial sufficient to give the applicant or petitioner adequate notice and sufficient information to respond. A request for evidence will indicate the deadline for response, but will not exceed twelve weeks.

Top Reasons for an RFE

There are a number of reasons why USCIS may issue an RFE. Below is a list of the top reasons, in order from most to least common, that RFEs were issued in fiscal year (FY) 2018 for H-1B petitions.

#	Reason	Description of Reason
1.	**Specialty Occupation**	The petitioner did not establish that the position qualifies as a specialty occupation as defined in section 214(i)(1) of the Act and 8 CFR 214.2(h)(4)(ii) and/or that it meets at least one of the four criteria in 8 CFR 214.2(h)(4)(iii).
2.	**Employer-Employee Relationship**	The petitioner did not establish that they had a valid employer-employee relationship with the beneficiary, by having the right to control the beneficiary's work, which may include the ability to hire, fire, or supervise the beneficiary, for the duration of the requested validity period.
3.	**Availability of Work (Off-site)**	The petitioner did not establish that they have specific and non-speculative qualifying assignments in a specialty occupation for the beneficiary for the

		entire time requested in the petition.
4.	**Beneficiary Qualifications**	The petitioner did not establish that the beneficiary was qualified to perform services in a specialty occupation per 8 CFR 214.2(h)(4)(iii)(C).
5.	**Maintenance of Status**	The petitioner did not establish that the beneficiary properly maintained their current status. This category is reflective of many different reasons that status may not have been maintained.
6.	**Availability of Work (In-house)**	The petitioner did not establish that they have specific and non-speculative qualifying assignments in a specialty occupation for the beneficiary for the entire time requested in the petition.
7.	**LCA Corresponds to Petition**	The petitioner did not establish that they obtained a properly certified Labor Condition Application (LCA) and that this LCA properly corresponds to the proffered position and terms of the petition.
8.	**AC21 and Six Year Limit**	The petitioner did not establish that the beneficiary was eligible for AC21 benefits or was otherwise eligible for an H-1B extension as it appeared that H-1B had hit the six-year limit.
9.	**Itinerary**	The petitioner did not meet the itinerary requirement at 8 CFR 214.2(h)(2)(i)(B), which requires petitioners to submit an itinerary with a petition that requires services to be performed in more than one location. The itinerary must include the dates and locations of services to be provided.
10.	**Fees**	The petitioner did not establish that they paid all required H-1B filing fees.

U.S. Citizenship and Immigration Services

USCIS Resumes Premium Processing for All H-1B Petitions

USCIS will resume premium processing on Tuesday, March 12, for all H-1B petitions. If you received a request for evidence (RFE) for a pending petition, you should include the RFE response with the premium processing request.

When an H-1B petitioner properly requests the agency's premium processing service, USCIS guarantees a 15-day processing time. If we do not take certain adjudicative action within the 15-calendar day processing time, USCIS refunds the petitioner's premium processing service fee and continues with expedited processing of the petition.

If Your H-1B Petition Was Transferred

If you received a transfer notice for a pending H-1B petition, and you are requesting premium processing service, you must submit the premium processing request to the service center now handling the petition. You should also include a copy of the transfer notice with your premium processing request to avoid possible delays associated with the receipt of your premium processing request. If your petition was transferred and you send your premium processing request to the wrong center, USCIS will forward it to the petition's current location. However, the premium processing clock will not start until the premium processing request has been received at the correct center.

Please use the below table to determine where you should send your premium processing request if USCIS transferred your petition:

If your petition was transferred to the…	Send your premium processing request to…
Nebraska Service Center	**USPS:** USCIS Nebraska Service Center P.O. Box 87129 Lincoln, NE 68501-7129 **FedEx, UPS, and DHL deliveries:** USCIS Nebraska Service Center 850 S Street Lincoln, NE 68508
Vermont Service Center	**USPS, FedEx, UPS, and DHL deliveries:** USCIS Vermont Service Center Attn: I-129 H-1B 30 Houghton Street St. Albans, VT 05478-2399

Last Reviewed/Updated: 03/11/2019