



## USCIS Policy Update on Issuing RFEs and NOIDs

Sept. 6, 2018

On Sept. 6, 2018, the [CIS Ombudsman](#) (CISOMB)<sup>1</sup> held a stakeholder teleconference to discuss the USCIS [“Issuance of Certain RFEs and NOIDs”](#) policy memorandum (PM) that was issued on July 13, 2018. USCIS representatives provided an overview of the memorandum and addressed many questions submitted in advance by the CISOMB. The updated policy went into effect on September 11, 2018. Below are a summary of the PM and the advance questions and answers from the teleconference.

### Overview

USCIS’ 2013 policy memorandum, “Requests for Evidence and Notices of Intent to Deny” ([2013 PM](#)), addressed policies for the issuance of requests for evidence (RFEs) and notices of intent to deny (NOIDs) when the evidence submitted at the time of filing did 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 when a nonexistent benefit is requested) would be issued without an RFE or a NOID. This PM clarifies how those filings, as well as filings lacking required initial evidence, should be treated.

When the case 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) states that an adjudicator, under the circumstances described in the regulation, may either deny the application, petition, or request, or issue an RFE or NOID when the record does not establish eligibility. The burden of proof, however, is on the applicant, petitioner, or requestor to establish eligibility.

The policy implemented in the 2018 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 NOID, when appropriate. This policy is intended to discourage frivolous or substantially incomplete filings used as placeholder filings and to encourage applicants, petitioners, and requestors to be diligent in collecting and submitting required

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<sup>1</sup> Created by [section 452 of the Homeland Security Act of 2002](#), the Ombudsman is an impartial and confidential resource that is within DHS but independent of USCIS.

evidence. The purpose of this policy memo is NOT to penalize filers for innocent mistakes or misunderstandings of the evidence required to establish eligibility.

The policy goes into effect on September 11, 2018. Except for the adjudications mentioned below, all applications, petitions, and requests received after this date will be subject to the new policy. Anything USCIS received on or before September 11, 2018, will not be subject to the new policy.

Examples of forms that USCIS may deny without sending an RFE or NOID:

- A family-based [Form I-485, Application to Register Permanent Residence or Adjust Status](#) submitted without a [Form I-864, Affidavit of Support Under Section 213A of the INA](#).
- A [Form I-129, Petition for a Nonimmigrant Worker](#) for H-1B nonimmigrant worker submitted without any evidence of the beneficiary's education or experience (the petition is required by regulation to establish that the beneficiary qualifies for the specialty occupation).

## Cases That Are Not Affected by the 2018 PM

Due to preliminary injunctions issued by district courts in California and New York that require USCIS to operate the Deferred Action for Childhood Arrivals (DACA) policy on the same terms and conditions in place prior to Sept. 5, 2017, this PM does not change the RFE and NOID policies and practices that apply to the adjudication of DACA and DACA-related requests.

This PM also will not impact asylum, refugee, and NACARA cases because of existing regulatory and policy guidance specific to those requests

## Questions

### Q1. What issue is the PM addressing?

**A1.** This PM provides updated guidance to USCIS adjudicators regarding their discretion to deny an application, petition, or request without first issuing an RFE or NOID if required initial evidence is not submitted or if the evidence in the record does not establish eligibility.

The previous policy stated that petitions and applications should receive an RFE unless there was “no possibility” that additional evidence might cure a deficiency. The effect of the “no possibility” policy was that it limited the application of an adjudicator’s discretion and only statutory denials (such as a denial when a nonexistent benefit is requested) would be issued without an RFE or NOID.

The previous policy was also inconsistent with the fact that the petitioner, applicant, or requestor bears the burden of proof when requesting an immigration benefit. Some applications, petitions, and requests are filed with only minimal documentation. On occasion, this may be done to secure ancillary benefits associated with the filing or for other reasons not directly related to the filing itself.

This updated policy guidance is intended to discourage frivolous or substantially incomplete filings used as placeholder filings and to encourage applicants, petitioners, and requestors to be diligent in collecting and submitting required initial evidence. It restores to the adjudicator full discretion to deny applications, petitions, and requests without first issuing an RFE or a NOID when appropriate. The purpose of this policy memo is not to penalize filers for innocent mistakes or misunderstandings of the evidence required to establish eligibility.

This guidance does not supplant court orders or injunctions governing the handling of cases involved in litigation, nor does it apply in cases where form instructions or regulations permit applicants, petitioners, or requestors to file before all required initial evidence is available.

Specifically, this PM does not change the RFE and NOID policies and practices that apply to the adjudication of DACA or DACA related requests.

## **Operational Questions**

### **Q2. In layman's terms, what is the difference between a statutory denial and a lack of initial evidence denial?**

**A2.** A *statutory denial* includes any filing situation where 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 issuing a denial may be a statutory denial are:

- Waiver applications that require the applicant to show 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; or
- Family-based visa petitions filed for family members that are not authorized by statute (such as a grandparent, cousin, etc.).

A *lack of initial evidence denial* is one in which all required initial evidence is not submitted with the benefit request. In such a case, USCIS 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 NOID include but are not limited to:

- Waiver applications submitted with no supporting evidence; or

- Cases where the regulations, statute, or form instructions require the applicant to submit an official document or other form or evidence establishing eligibility at the time of filing and there is no such submission. For example, a family-based Application to Register Permanent Residence or Adjust Status (Form I-485) is filed without an Affidavit of Support (Form I-864)

**Q3. Can you summarize the impact of the new policy at the adjudicator level? How will this improve adjudications?**

**A3.** This new policy restores to the adjudicator full discretion to deny applications, petitions, and requests without first issuing an RFE or a NOID, when appropriate under 8 CFR 103.2. This will allow USCIS to focus resources on evaluating cases rather than on tracking down missing evidence. USCIS reminds its stakeholders that the burden of proof is on the applicant or petitioner to establish eligibility for the benefit sought.

The purpose of this PM is not to penalize filers for innocent mistakes or misunderstandings of the evidence required to establish eligibility. If the initial required evidence is missing, adjudicators should take into account various factors to determine whether the missing evidence is due to an innocent mistake or misunderstanding and to what extent the petitioner or applicant tried to comply with the form instructions and regulatory requirements.

**Q4. How does USCIS anticipate this policy impacting its processing times? Are there any concerns about the processing times for appeals or motions to reopen lengthening in response to more denials?**

**A4.** This memo is intended to discourage frivolous or substantially incomplete filings and to encourage applicants, petitioners, and requesters to be diligent in collecting and submitting required evidence. By discouraging frivolous and placeholder filings and encouraging more complete applications, USCIS believes this policy may improve its ability to efficiently process applications and petitions.

**Officer Training/Guidance**

**Q5. How is USCIS preparing its adjudicators to implement this policy?**

**A5.** Adjudicators will be provided a refresher course on 8 CFR 103.2(b)(8) and how to exercise their discretion under that regulation.

**Q6. What kind and level of training/supervisor review is happening at the start of the policy's implementation?**

**A6.** USCIS has prepared training materials on the new policy for its adjudicators. Denials based on this policy memo may have additional post-adjudication review.

**Q7. Is there an expectation that certain programs will continue to require an RFE/NOID before issuing a denial? If there are plans in place to continue to issue RFEs in certain categories, what is the criteria for determining when one is to be issued?**

**A7.** The new policy restores adjudicator discretion in a given case. As such, there is no category or case type for which an RFE should be routinely expected, as all filings are adjudicated on their own merits on a case by case basis. Those applying for immigration benefits with USCIS are expected to be familiar with the requirements for a particular benefit category and to properly document their submission with required initial evidence. If a filing contains the initial evidence required by the form and regulations, then the expectation is that the adjudicator will review that evidence and issue an RFE if additional questions or the need for clarification arises. If the evidence in the case is sufficient to make a determination on eligibility, then a decision should be made.

USCIS will publish checklists of required initial evidence for each form/classification, which will be an optional tool to assist the public with filing forms. We expect that these checklists will be posted online on September 11, 2018. However, these checklists do not replace or change statutory or regulatory requirements, and we recommend that the public review all applicable requirements, as well as the appropriate form instructions, before completing and submitting a form.

**Q8. How is USCIS coordinating this guidance with other policy updates, such as the new NTA policy?**

**A8.** USCIS is not implementing this memo with any other particular policy in mind but is implementing it consistent with all applicable policies. This memo was not drafted in conjunction with any other memo.

**Q9. What sort of tracking mechanisms will be used to ensure that the new policy is deterring people from filing incomplete petitions or applications?**

**A9.** Based on this PM, USCIS will begin tracking RFEs that are issued for required initial evidence and RFEs that are issued for additional evidence. Officers are being trained to check if all required initial evidence is included and to request additional evidence only if it will help them make a final decision. If they can make a final decision without issuing another RFE, they should do so.

**Q10. We occasionally see RFEs issued for documents that were submitted with the initial filing.**

- **What should petitioners and applicants do if their submission is denied instead of RFE'd for documents or evidence that was in fact submitted? And, if someone believes that a submission should have received an RFE, what action should the person take?**
- **Is filing a motion to reopen or appeal with a \$630 filing fee the only option?**

- **How is the organization anticipating handling specific requests regarding denials? For example, if a petitioner disagrees that an element was missing from a submission, as we discussed a few minutes ago, how should they follow up with the agency?**

**A10.** This PM does not change the process for available remedies for RFEs believed to have been made in error. If petitioners and applicants believe that an RFE was issued in error or is missing, they should proceed as they would have before the memo went into effect. Go to the [Contact Us](#) page for contact information.

This policy does not change or limit motion or appeal rights. The [Questions and Answers: Appeals and Motions](#) page provides information on filing motions and appeals.

## **Applicant/Petitioner Filings**

**Q11. What guidelines should applicants use to ensure they are filing a complete initial application or petition with USCIS?**

**A11.** Required initial evidence is listed in the regulations, statute, and instructions for each form/classification. USCIS will publish checklists of required initial evidence for each form/classification. We expect that the checklists will be posted online on September 11, 2018. However, the new checklists are not meant to substitute for the instructions, regulations, or statute.

**Q12. For certain filings, an RFE is necessary (updated taxes for a Form I-864; medical exam for a long pending adjustment of status case). Can people still expect to receive an RFE or NOID for this type of case?**

**A12.** Officers will follow 8 CFR 103.2(b)(8). These types of cases will be handled appropriately by USCIS. We note that these scenarios are different from missing initial required evidence. If updated information is necessary to determine eligibility then an RFE should be expected.

**Q13. What if the case does not qualify for administrative relief, is refiling with a new fee the only option?**

**A13.** Generally, a denial by itself does not bar someone from resubmitting their immigration petition or application.

## **Public Engagement**

**Q14. How does USCIS intend to inform applicants and petitioners about this policy?**

**A14.** As we do with all policy memos, we provided a [news release](#) when we issued the memo. Additionally, we are participating in this engagement and we hope that this engagement session is helpful. We also note that applicants and petitioners should be well aware of this

memo because we issued it nearly 60 days ago with a delayed effective date. Furthermore, as noted previously, the need to submit all required initial evidence is not a new requirement.

**Q15. Are there any additional planned public engagements?**

**A15.** Not at this time, but USCIS will evaluate and consider additional engagements as necessary.