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USCIS Proposed Rule Would Change Its Handling of “Requests for Evidence” On All Immigration Petitions and Applications

All applications for immigration benefits from USCIS begin with the filing of an application or petition. An “application” is a request for an immigration benefit that an alien files on behalf of himself. For example, Form I-539 is used to make immigration applications for an extension of stay or change of status from one nonimmigrant status to another where a petitioning entity is not required. It is primarily used for the dependent relatives of, for example, H-1B nonimmigrants who are in H-4 status, or the dependent relatives of L-1 nonimmigrants who are in L-2 status and want to extend or change their status. Another example of an immigration “application” is the I-765 application for an Employment Authorization Document (EAD). An immigration “petition”, on the other hand, is a request by one party that an immigration benefit be granted to another (alien) party. For example, almost all employment-based immigration benefits are granted through the filing of petitions by U.S. employers for alien workers. Form I-129 is a petition that an employer can file on behalf of an alien for L-1, H-1B, O-1, P, or R-1 nonimmigrant status. I-140’s and I-360 are also petitions (in this case, immigrant rather than nonimmigrant petitions) filed by a U.S. employer on behalf of an alien seeking permanent residence based on a U.S. job offer.

When USCIS receives an application or a petition filed by or on behalf of an alien, an immigration officer performs an initial review to determine whether all of the evidence required by regulations to prove eligibility for the benefit is included in the packet. For example, if an employer submits an I-140 petition on behalf of an alien, one of the pieces of evidence required is evidence of the employer’s ability to pay the alien’s proposed wages. This evidence must be in the form of one of the following: (1) the employer’s federal income tax returns; (2) an annual report filed with the S.E.C. (if the company is publicly traded; or (3) an audited financial statement. If upon an initial review, the immigration officer determines that the employer has not submitted one of these three items, that officer will send a Request for Evidence (or RFE) to the petitioning employer requesting this missing documentation. This is considered a request for “initial evidence” since it is a piece of information required under regulation to prove eligibility for the immigration benefit, and it is missing from the petition. However, under current regulations, if the immigration officer reviews the petition or application and it contains evidence of the alien’s *ineligibility* for the immigration benefit, then the officer can deny the application or petition immediately, notwithstanding any missing initial evidence.

If the immigration officer reviews the application or petition, and all of the required information is submitted in the packet, then an RFE for “initial evidence” will not be sent

out. After this cursory review is completed, the immigration officer then weighs the substance of the evidence submitted with the application or petition, to determine whether the alien and/or the petitioner have established eligibility for the evidence sought. It is possible that an alien or his prospective employer could submit all the documentation required but that, upon closer review, USCIS could determine that the evidence still does not establish eligibility for the benefit. For example, if an employer submits an H-1B petition for a worker who does not have a degree, but submits an evaluation of the alien's work experience stating that it is equivalent to a U.S. Bachelor's degree, USCIS could disagree with the evaluation and state that it does not really believe the alien's experience is equivalent to a degree. In that instance, the immigration officer could either send out an RFE for "additional evidence," asking the petitioner to submit more conclusive proof of eligibility for the benefit. It used to be a standard practice for INS, and then USCIS, to send out an RFE whenever it doubted the approvability of an application. However, in May 2004, USCIS issued a memo stating that once all of the "initial evidence" required for an application has been submitted, immigration officers can send out a denial without RFE "where the applicant or petition has not met his or her burden to establish eligibility for the benefit."

Unfortunately, this means that some approvable cases will be denied out of hand without the applicant or petitioner having a chance to overcome an officer's doubt about the approvability of the application or petition. This will likely result in more motions to reopen denied cases, and more appeals being filed with the Administrative Appeals Office. USCIS issued the memo instructing its officers to deny cases without RFEs in order to help cut down on the backlog of cases at USCIS. However, the result will likely be the creation of a very long backlog of cases being appealed at the Administration Appeals Office.

In addition to the memo that USCIS issued regarding issuance of denial notices without RFEs, the Department of Homeland Security recently published a Proposed Rule in the Federal Register regarding RFEs. The rule deals with the amount of time a petitioner or applicant has to respond to an RFE. Under current regulations, a response to any RFE must be submitted within 12 weeks. If USCIS does not receive a response within that time frame, then it automatically denies the application or petition. However, under the Proposed Rule, immigration officers would have discretion in setting the time frame for a response. For some RFEs requesting straightforward documentation, the officer may set a short time frame of a couple of weeks for response, while more detailed RFEs could prompt the officer to allow a longer time frame for response. USCIS states in the comments in the Federal Register that it does not expect that any RFEs will give the petitioner/ applicant less than 30 days to respond. Nevertheless, when one considers the time that it takes for mailing the notice, a 30-day response period could put a very big time crunch on an applicant or petitioner forced to respond to the RFE; and if the response is not submitted on time, the case will be denied. The problem with this rule is that what an immigration officer, in his discretion considers an adequate period of time for retrieval of a document may be unrealistic for the person or company responding to the request.

Department of State Advises on Name “Hits” in the FBI’s NCIC Database

After September 11, 2001, the Department of Justice passed the USA PATRIOT Act, which mandated that immigration and consular officers obtain access to the FBI’s criminal database, National Crime Information Center (NCIC). USCIS now runs each adjustment of status applicant’s name through NCIC before adjudicating the application. If there is a “hit” on an individual’s name, i.e. if the name of the applicant, or of someone with a similar name and birth date is found, then USCIS must clear the name with FBI before approving the application. The Department of State also runs an NCIC check on individuals before granting them nonimmigrant and immigrant visas.

Because USCIS and the Department of State are not law enforcement agencies, they are not permitted to know *why* an individual’s name is in the NCIC database. They can simply tell that it’s there. Therefore, when USCIS or DOS gets a “hit” on a name from NCIC, they have to notify the FBI so that FBI can clear the person.

Several of our clients, particularly those with common Latino or Arabic names, have applications for permanent residence that are being held up because of an NCIC “hit.” Currently, there is no way to get any information from USCIS or the Department of State regarding why an individual’s case is being held up, or what kind of information they have on the person. In most cases, we have found that our clients are not the actual people that FBI is looking for; they just share a last name of someone who is wanted by the FBI.

If there is an NCIC “hit” on a name, it could be cleared in 30 days, or it could take over a year. There is no way for the applicant to expedite the name clearance with USCIS, since it is not actually USCIS or DOS who is responsible for clearing their name. USCIS’s and DOS’s hands are tied because they are required to wait for a response from FBI before they can approve the application.

The Department of State has launched a pilot program at the U.S. Consulate in Mexico City to capture digital fingerprints of aliens for whom there is an NCIC hit. The ten prints are sent electronically to the FBI on all NIV and IV cases to compare with possible NCIC records. The program has since expanded to include Ciudad Juarez, Guadalajara, and Monterrey. Initial reports confirm that these pilot program posts have been able to complete the NCIC check within the same day for false hits (usually 1-2 hours), while clearance for positive hits are received within two days, versus the 4-8 week delay when prints are taken manually. The Department of State is currently researching the possible use of equipment at all U.S. Consular posts. If it does so, it will greatly speed the delivery of visas at U.S. Consulates abroad, particularly for aliens who have common names.

USCIS Makes Medical Waivers Available to HIV Positive Applicants for K and V Nonimmigrant Status

USCIS has a policy of granting discretionary waivers of inadmissibility for immigrant visa applicants, but no such waiver procedure is in place for nonimmigrants. K and V nonimmigrant classes, however, were created by the LIFE Act to grant temporary nonimmigrant status to intending immigrants. K status is for fiancées and spouses of U.S. Citizens, and their dependent children; while V status is for spouses of permanent resident aliens. Since V and K nonimmigrants are somewhere between being immigrants and nonimmigrants, they are required to submit much of the evidence that would be required for an immigrant visa applicant at the time of their consular interview, including medical examination results. Because V and K nonimmigrants are treated, for many purposes, as “immigrants,” USCIS has announced a policy of granting discretionary medical waivers to HIV positive V and K nonimmigrants. These waivers will be adjudicated under the same criteria applicable to immigrant visa and adjustment of status applications.

Employers May Store I-9 Forms Electronically

In Volume 3, Issue 13 of Immigration Newswire, we reported that pending legislation would allow employers to store I-9 forms electronically. This bill was signed into law on October 30, 2004, and goes into effect either upon the date when final regulations implementing the amendments take effect; or 180 days after enactment of the act. Text of the law is available on our website, www.usvisahelp.com.

President Bush Signs 2005 Omnibus Appropriations Act Into Law: Some Fee Changes Are In Effect Immediately

H.R. 4818, the 2005 Omnibus Appropriations Act, went to the President for signature on December 7, 2004, and it was signed into law today, December 8, 2004. As reported in Volume 3, Issue 14 of Immigration Newswire, this bill will impact H-1B and L-1 processing. Our previous article on this topic is available at <http://www.usvisahelp.com/nw/Volume%203,%20Issue%2014.pdf>.

The increased H-1B training fee of \$1500 for petitioners with 25 or more full time employees, or \$750 for petitioners with less than 25 full time employees, is in effect immediately. Any H-1B petitions filed after today will require the new fee. USCIS’s webpage has been updated to notate the new fee, at <http://uscis.gov/graphics/formsfee/forms/i-129w.htm>.

The \$500 fraud fee for all first time H-1B and L-1 petitions goes into effect March 8, 2005. There are no exemptions from the \$500 fraud fee for universities or other educational/ research institutions.

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