RFEs

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Request for Further Evidence (RFE)

- An RFE is the tool that USCIS uses to seek additional information when an adjudicator deems that an application or petition lacks the required evidence to adjudicate the case
- Evidence shows that most RFEs are a result of missing initial evidence
- Upticks in number of unnecessary RFEs is also common, perhaps due to lack of adequate training and high turnover at Service Centers

Session Topics

Session will discuss RFEs for F-1, H-1B, and permanent resident applications

- Authority for Issuing RFEs
  - Regulation
  - Memos
  - Guidance
  - Adjudicators Field Manual
  - Templates
- Standard of proof in immigration petitions
- Problems and issues
- Effect of unnecessary RFEs on employers, employees, USCIS
- Examples of "bad" RFEs
- USCIS' efforts to correct the problems
- What you can do

LEGAL AUTHORITY

8 CFR Section 103.2

- Use of RFE is discretionary
- If required **initial evidence** is not submitted, USCIS may deny petition or issue RFE
- If required initial evidence has been submitted but the evidence submitted does not establish eligibility, USCIS may issue RFE
- RFE should specify the type of evidence required… and give the applicant or petitioner sufficient notice and sufficient information to respond…..

PREPONDERANCE OF EVIDENCE

General standard to be used in the adjudication of immigration petitions and applications

- Preponderance of Evidence standard requires that the evidence demonstrate that the applicant's claim is "**probably true**"
- Case is approvable if the director believes that the petitioner's claim (based on submitted credible evidence) is probably true; or "**more likely than not**," the applicant or petitioner has satisfied the standard of proof
- Not required to prove eligibility beyond a reasonable doubt

INTEROFFICE MEMO FROM WILLIAM YATES – RFEs AND NOIDs 2/16/05

- Affirms standard of proof
- Discusses discretionary nature of RFEs
- RFE should be specific
- Use only relevant portions of templates
- Explain why previously submitted evidence is not sufficient or persuasive

INTEROFFICE MEMO FROM DONALD NEUFELD – REMOVAL OF STANDARDIZED RFE PROCESSING TIMEFRAME, 6/1/07

- Avoid RFEs if possible
- Carefully consider requesting discretionary evidence
- Do not fish for evidence
- Permit flexible, but limited times to respond, depending on application type (no more standardized 12 weeks)

Neufeld Memo Determining Employer-Employee Relationship for Adjudication of H-1B petitions, Including Third Party Site Placement 1/8/10

- USCIS may issue RFE **when it believes that petitioner has failed to establish eligibility for benefit sought,** including in cases where employer has failed to establish that employer-employee relationship exists and will continue to exist throughout duration of the beneficiary's employment term with the employer
- Such RFE must specifically state what is at issue and be tailored to request specific, illustrative types of evidence that goes directly to what USCIS deems as deficient

Neufeld Memo Determining Employer-Employee
Relationship for Adjudication of H-1B petitions, Including
Third Party Site Placement 1/8/10 Cont'

- Officer should first carefully review all evidence provided with the H-1B petition to determine which required elements have not been sufficiently established by petitioner
- RFE should not mandate that a specific type of evidence be provided, unless provided for by regs.
- Officer should provide examples of documentation that could be provided to establish H-1B eligibility
- RFE should not request info that has already been provided in the petition

ADJUDICATOR'S FIELD MANUAL (CHAPTER 10.5(a)

RFEs should, if possible be avoided- burden on USCIS resources and delay in completion of case

RFE PROBLEMS

- Inconsistent adjudication patterns across and within service centers
- RFEs that do not consider evidence already submitted
- Boilerplate language - Overly broad requests that may be immaterial or irrelevant; unnecessary or inappropriate
- RFEs seem to be delaying tactic for adjudicators to buy time in premium processed cases

EFFECT ON PETITIONERS, BENEFICIARIES, AND USCIS

- Duplication /redundancy
- Monetary Cost
- Human time to respond to an RFE (venting, getting people to submit information—alien, HR contact, etc. discussing it, and addressing each and every point so as not to risk a denial)
- Delay in granting of final benefit, which may lead to loss of income and other hardship for beneficiary
- RFE process resource intensive for USCIS and additional adjudicator time to go through the additional documents
- Rate of denial after RFE-- Most responses end in approvals

SAMPLE F-1, H-1B AND I-140 RFE

- What evidence was initially submitted?
- What did the RFE request?
- What was the final decision?

USCIS RFE PROJECT AND OTHER RESPONSES

- April 12, 2010, initiative to make RFEs consistent across service centers and make them specific and clear
- Initial focus is on O, P, Q and EB-1 Petitions
- De novo review of all the CIS policies and guidance to see what needs to be changed and what needs to be reaffirmed
- Listening Session –RFE Review and Revision 4/19/10. Director speaking with stakeholders about how to improve practice and how to revise templates
- Advance copies of draft policies posted on website
- **Standardized TRAINING;** problem may lie in helping adjudicators understand how to apply the standards
- Goal is to adjudicate fairly, effectively and consistently; and reduce the burden on the employer

TIPS AND RECOMMENDATIONS

- Remember that petitioner bears the burden of proving eligibility for the benefit sought
- Proactively avoid RFEs in the first place by including all required initial evidence upfront
- Read instruction pages of forms
- Explain and restate information clearly and without using too much jargon
- Number exhibits
- Review initial submission
- Use the information in RFEs to take offensive approach in the initial submission
- Update checklists to suit RFEs to avoid future RFEs
- File early so you have enough time to deal with potential RFE
- Report RFE trends to IssueNet – "Report an Issue"
- Report unreasonable, impossible request, to IssueNet –"Get Liaison Help"