



GMS Flash Alert

Immigration Edition

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United States - Updated Policy on Requests for Evidence, Notices of Intent to Deny

On July 13, 2018, U.S. Citizenship and Immigration Services (USCIS) released a [new policy memorandum](#) granting immigration adjudicators discretion to deny visa applications or petitions without first issuing a Request for Evidence (RFE) or Notice of Intent to Deny (NOID) in cases where initial evidence is missing or does not establish eligibility.

The guidance will apply to all petitions and applications received **after September 11, 2018**.

WHY THIS MATTERS

As noted, under the new policy, USCIS officers do not need to first issue an RFE or NOID when they deny applications and petitions when it has been determined that the filing failed to include sufficient initial evidence.

This could result in an immediate uptick of visa application denials as the new policy grants USCIS adjudicators increased authority to by-pass the RFE or NOID step; a crucial process that provides the petitioning employer or applicant an opportunity to respond with supplemental information when there is a lack of sufficient evidence in the original filing.

Background

Prior to the publication of this memo, USCIS adjudicating officers who were not convinced a case was approvable were instructed to issue an RFE or a NOID to address deficiencies in the petition filing, unless there was "no possibility" that additional evidence could be submitted to fix the deficiency.¹ This instruction is now set to change effective September 11, 2018.

An RFE is a notice issued by a USCIS adjudicator formally requesting additional information or supplemental documentation before he or she can make a final determination on the visa application. Similarly, a NOID is a preliminary decision by the USCIS adjudicator to deny an application based on an initial determination that the petitioning employer or applicant failed to meet the minimum eligibility requirements. In either scenario, the issuance of an RFE or NOID provides the petitioner or applicant an opportunity to respond to the adjudicator's initial findings.

What the New Policy Does

As noted above, the new policy grants USCIS officers full discretion to deny applications and petitions without first issuing an RFE or NOID where USCIS determines the filing failed to include sufficient initial evidence. USCIS cites² two examples of filings that may be denied without first issuing an RFE or NOID based on a lack of sufficient initial evidence:

- "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)."

KPMG NOTE

What Is Clear under the Policy and What Is Unclear

Although the new policy memorandum instructs adjudicators to deny petitions without first issuing an RFE if the case lacks sufficient "initial" evidence, it is not yet clear how USCIS will interpret this standard and implement the new guidance. The new policy is not a complete elimination of the RFE or NOID. The new policy outlines it is still appropriate for USCIS adjudicators to issue RFEs and NOIDs where eligibility for the immigration benefit sought cannot be established by the evidence submitted in the filing. Further, the memo instructs USCIS adjudications to identify any missing evidence specifically required by the applicable statute, regulation, or form instruction, and provide examples of evidence that may be submitted to establish such eligibility. Thus, the new policy is not an absolute departure from the practice of providing the petitioner or applicant an opportunity to provide additional corroborating evidence supporting eligibility.

Taking Precautionary and Other Important Steps

We at KPMG Law LLP in Canada encourage all petitioners and applicants to continue working with their immigration counsel to take necessary precautions and to make sure all visa petitions and applications are filed with the requisite documentation and evidence before an application for immigration benefit is submitted to USCIS.

What the New Policy Reveals: Expanding Enforcement

This memo, in connection with an earlier memo published by the USCIS on June 28, 2018, instructing USCIS officers to issue a Notice to Appear (NTA) initiating removal proceedings for individuals no longer maintaining lawful presence following a denied application for immigration benefit, shows the USCIS is focused on expanding its enforcement abilities. For an analysis of the June 28, 2018 USCIS policy memo directing USCIS to issue NTAs, see GMS [Flash Alert 2018-103](#) (August 2, 2018).

KPMG NOTE

Preparing for the Policy Change

We can expect to see increased denial rates from the USCIS with the implementation of the new policy memo. As a recourse, applications to extend nonimmigrant visa status (including common temporary employment-based visas: H-1B, L-1, O-1, and others) should be filed as early as possible (up to six (6) months prior to expiration) to allow an opportunity to re-file should the initial application be denied. Additionally, employers and applicants should consider utilizing USCIS's "premium processing" service on all eligible applications to mitigate potential lapses in nonimmigrant status and the accrual of unlawful presence should the initial application be denied.

Future Updates

Our office is closely monitoring the implementation of this new guidance by USCIS and its potential impact on petitioners and applicants. We will continue to provide you with any updates.

FOOTNOTES:

1 To see Policy Memo: "Requests for Evidence and Notices of Intent to Deny" (June 3, 2013), click [here](#).

2 To see the announcement on the USCIS Web site, click [here](#). Also see [Policy Memo: "Issuance of Certain RFEs and NOIDs; Revisions to Adjudicator's Field Manual \(AFM\) Chapter 10.5\(a\), Chapter 10.5\(b\)"](#) (July 13, 2018).

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Contact us

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