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Responding to a USCIS  
Request for Evidence (“RFE”) or Notice of Intent to Deny  
(NOID)

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## Legal Disclaimer


*Presenter is not an attorney and therefore cannot give legal advice*

*The information in this presentation is not, nor should it be construed as, legal advice. Should you need legal advice, you should contact a licensed attorney for such.*



# Public Charge - ▶ Update

AS OF 10/15/19



## New Public Charge Rule on Hold

- ▶ On Oct. 11, 2019, judges in three separate cases before U.S. District Courts for the Southern District of New York (PDF), Northern District of California (PDF), and Eastern District of Washington (PDF) enjoined DHS from implementing and enforcing the final rule related to the public charge ground of inadmissibility under section 212(a)(4) of the Immigration and Nationality Act and
- ▶ Issued injunctions that postponed the effective date of the final rule until there is final resolution in the cases.
- ▶ Two of the injunctions are nationwide and prevent USCIS from implementing the rule anywhere in the United States.

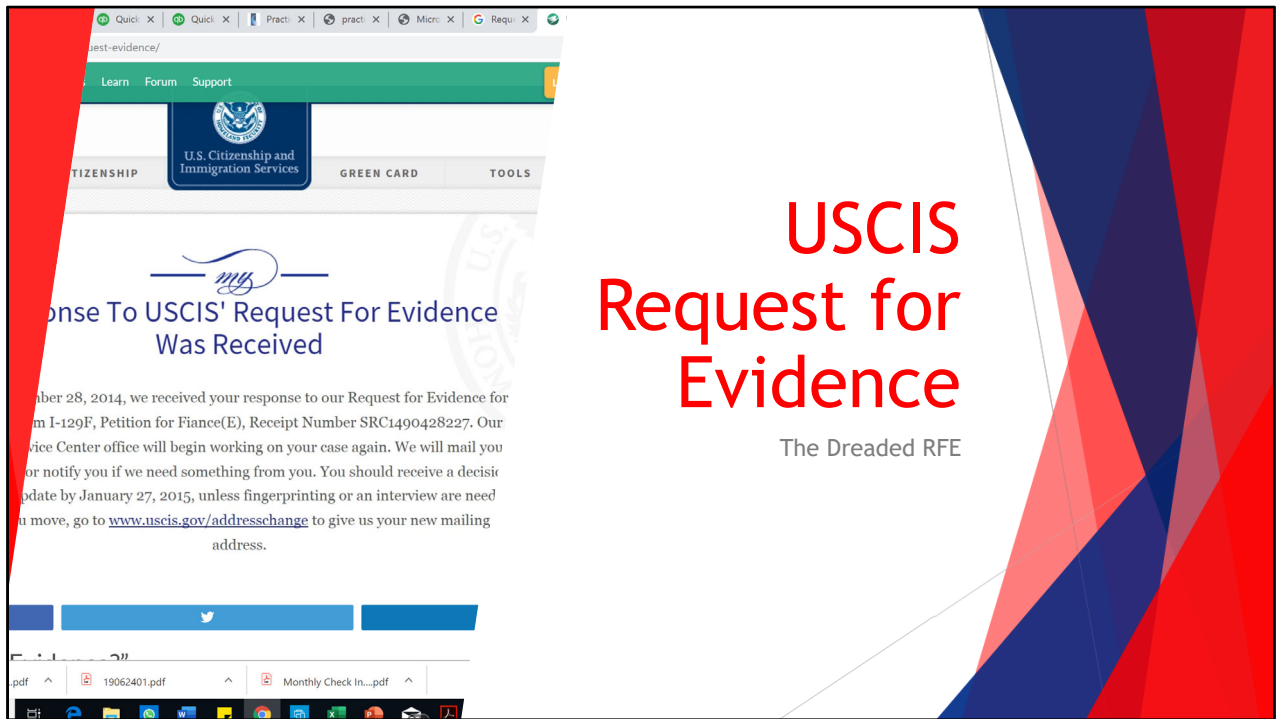
Most of the forms are changing on 10/15/19

As a result of the injunctions, USCIS will accept the previous editions

Keep informed on the USCIS website

Members will be updated as developments arise

New forms for Adjustment of Status  
10/15/2019



## What is an RFE?

- ▶ USCIS will send a Request for Evidence (“RFE”) when:
  - ▶ Required documentation is not submitted with a petition/application
  - ▶ The evidence submitted is NOT sufficient for one reason or the other
  - ▶ A “Red Flag” is raised either by the evidence submitted (not submitted) or Results of a Biometrics Appointment

## General Principles of RFEs and NOIDs



In each case, officers must:



Understand the specific elements required to demonstrate eligibility for the particular application, petition, or request.



Understand the standard of proof that applies to the particular application, petition, or request.



In most instances, the individual has the standard of proving eligibility by a preponderance of the evidence.

Under that standard, the individual must prove it is more likely than not that each of the required elements has been met.



Review all the evidence to determine whether each of the essential elements has been satisfied by the applicable standard of proof.

## General Principles of RFEs and NOIDs



If all the essential elements have been satisfied by the applicable standard of proof, including any additional requirement to establish that the individual warrants a favorable exercise of discretion, *the officer shall approve the application, petition, or request without issuance of an RFE. 8 CFR 103.2(b)(8)(i).*



If the totality of the evidence submitted does not meet the applicable standard of proof, and the adjudicator determines that there is no possibility that additional information or explanation will cure the deficiency, then the adjudicator shall issue a denial.

## Requests for Evidence (RFE)



If not all of the required initial evidence has been submitted; or



The officer determines that the totality of the evidence submitted does not meet the applicable standard of proof.



The officer should issue an RFE *unless* he or she determines there is no possibility that additional evidence available to the individual might cure the deficiency

## Notice of Intent to Deny (“NOID”)

- ▶ A NOID is required before denying any immigration benefit requests submitted on the following forms:
  - ▶ Form I-800A (relating to adoptions) based on a mandatory denial ground in 8 CFR 204.309(a);
  - ▶ Form I-800 based on a mandatory denial ground in 8 CFR 204.309(b); or
  - ▶ Form I-485 filed by a physician under 8 CFR 245.18(i) because the physician failed to comply with the conditions attached to his or her National Interest Waiver. A

## Notice of Intent to Deny ("NOID")

- ▶ NOID is also required when derogatory information is uncovered during the course of the adjudication that is not known to the individual, according to 8 CFR 103.2(b)(16).
- ▶ The issuance of a NOID is also appropriate in the following circumstances:
  - ▶ There is little or no evidence submitted (e.g., a "skeletal filing"); or
  - ▶ The individual has met the threshold eligibility requirements for the requested benefit or action, *but* has not established that he or she warrants a favorable exercise of discretion (where there is also a discretionary component to the adjudication).

## RFEs and NOIDs



Officers **must** 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 need for multiple RFEs.



In response to an RFE or a NOID, individuals 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 treat such submission as a request for a decision on the record. 8 CFR 103.2(b)(11).

## Opportunity to Rebut Derogatory Information

Under 8 CFR 103.2(b)(16)(i), if a decision adverse to the individual is based on derogatory information, and the individual is unaware that the information is being considered, the officer PM-602-0085:

Requests for Evidence and Notices of Intent to Deny must advise the individual of this information and offer him or her an opportunity to rebut it before the decision is rendered.

Any explanation, rebuttal, or information presented by or on behalf of the individual must be included in the record of proceeding.



U.S. Citizenship  
and Immigration  
Services

## USCIS Independent Verifications

- ▶ 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. 8 USC 1357(b); 8 CFR 103.2(b)(16)(i).
- ▶ 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.
  - ▶ an officer may, in the exercise of discretion, corroborate evidence relating to an individual's history of nonimmigrant stays in the United States by searching a nonpublic, U.S. government database.
    - ▶ Any such additional evidence must be placed in the Record of Proceeding, unless specifically exempted from inclusion, as is the case for classified materials.

## Increase of RFEs, NOIDs, and Denial

- ▶ Under the Trump Administration (in FY 2017 - 2018) there has been a SIGNIFICANT increase in RFEs, NOIDs and Denials
- ▶ Higher rates in Employment Based Immigration (Especially H-1B and L-1)
- ▶ Family Immigration Increases:
  - ▶ RFEs: 41.2%
  - ▶ NOIDs: 32.9%
  - ▶ Denials: 37.6%
- ▶ That is JUST 2017 & 2018





## What Has Happened - THIS Fiscal Year (2019)

In the first 2 quarters of FY 2019 (10/01/18 - 3/31/19) - in comparison to FY 2016:

RFEs Increased: 60%

NOIDs Increased: 54.5%

Denials Increased: 49.7%



# Avoiding RFEs/NOIDs

Best Practices to Avoid the Dreaded RFE or NOID

## Avoiding RFEs/NOIDs Adjustment of Status

- ▶ Proper Intake and Analysis of a Case
- ▶ Most Difficult Cases are STILL Marriage Based Adjustments and 245(i) Adjustments filed between January 15, 1998 - April 30, 2001.
- ▶ Proving Physical Presence on December 20, 2000
- ▶ As many documents with name, date and us address from Nov and Dec 2000, and Jan and Feb 2001 as possible.
  - ▶ School records (applicant or the child)
  - ▶ Medical Records / Immunization Records
  - ▶ Parking Tickets / DMV Records
  - ▶ Affidavits are not sufficient to prove physical presence for AOS under 245(i)
- ▶ Proving Legal Entry:
  - ▶ I-94 and/or Stamp in Passport
  - ▶ If I-94 is not displaying on CBP website - see if you can pull travel history
  - ▶ File Form I-102 with USCIS
  - ▶ Sworn Affidavits - PLEASE REFER THESE CASES (Quilantan Entries) to Attorneys

## Avoiding RFEs/NOIDs Adjustment of Status

- ▶ Bona Fides of Marriage
  - ▶ If the evidence is light, and the couple is having difficulty obtaining evidence - DO NOT TAKE THE CASE
    - ▶ Remember, you are not obligated to take a case
    - ▶ Explain to the client the scrutiny that marriage based green cards undergo
  - ▶ Field inspections have increased by more than 50% in the last 18 months.
  - ▶ Prepare your clients (and their families) for home/field inspections
    - ▶ They need to know if they are not home, that USCIS will visit neighbor's, family and friends (if they have written affidavits)
    - ▶ USCIS field inspections also include calling places of employment
  - ▶ Review of Social Media Accounts
    - ▶ Recent Court Rulings state that Petitioners and Beneficiaries are REQUIRED to provide social media information if it is requested.
    - ▶ May want to include screenshot of social media - but do not include them if they do NOT help your client's case.

## Avoiding RFEs/NOIDs I-751

- ▶ Bona Fides of Marriage
  - ▶ If the evidence is light, and the couple is having difficulty obtaining evidence - DO NOT TAKE THE CASE
    - ▶ Remember, you are not obligated to take a case
    - ▶ Explain to the client the scrutiny that marriage based green cards undergo
  - ▶ Field inspections have increased by more than 80% on I-751's in the past 6 months - ESPECIALLY WHEN EVIDENCE IS WEAK. .
    - ▶ RED FLAGS FOR I-751
    - ▶ No Joint Assets
    - ▶ No Joint Lease
    - ▶ No Joint Bank Account
    - ▶ No Pictures with Friends and Family
    - ▶ No Joint Bills - or Individual Bills in One or Other Spouse's Name
    - ▶ No Social Media Interactions

## Avoiding RFEs/NOIDs I-751

- ▶ Bona Fides of Marriage
- ▶ Prepare your clients when they get their conditional residency what is going to be expected of them when it comes time to file the I-751
- ▶ Provide them with a list of documents to obtain over the next 2 years
- ▶ Explain to clients that scrutiny has been heightened and that we expect it to get worse under this administration
- ▶ IF Trump is reelected (\*sigh) - We can expect for immigration to continue to become increasingly more difficult
- ▶ If ANY of the Red Flags appear in one of your cases - HAVE YOUR CLIENT CONSULT WITH AN ATTORNEY!!



# ► Receiving an RFE

Painful and Helpful!!

## I Received an RFE for My Client - Now What?

- ▶ Receiving an RFE can be painful.
- ▶ You may feel embarrassed, incompetent and frustrated
- ▶ Your client may be upset - angry even
- ▶ Your client may feel that you do not know what you are doing
- ▶ All of these things are common - unfortunately!





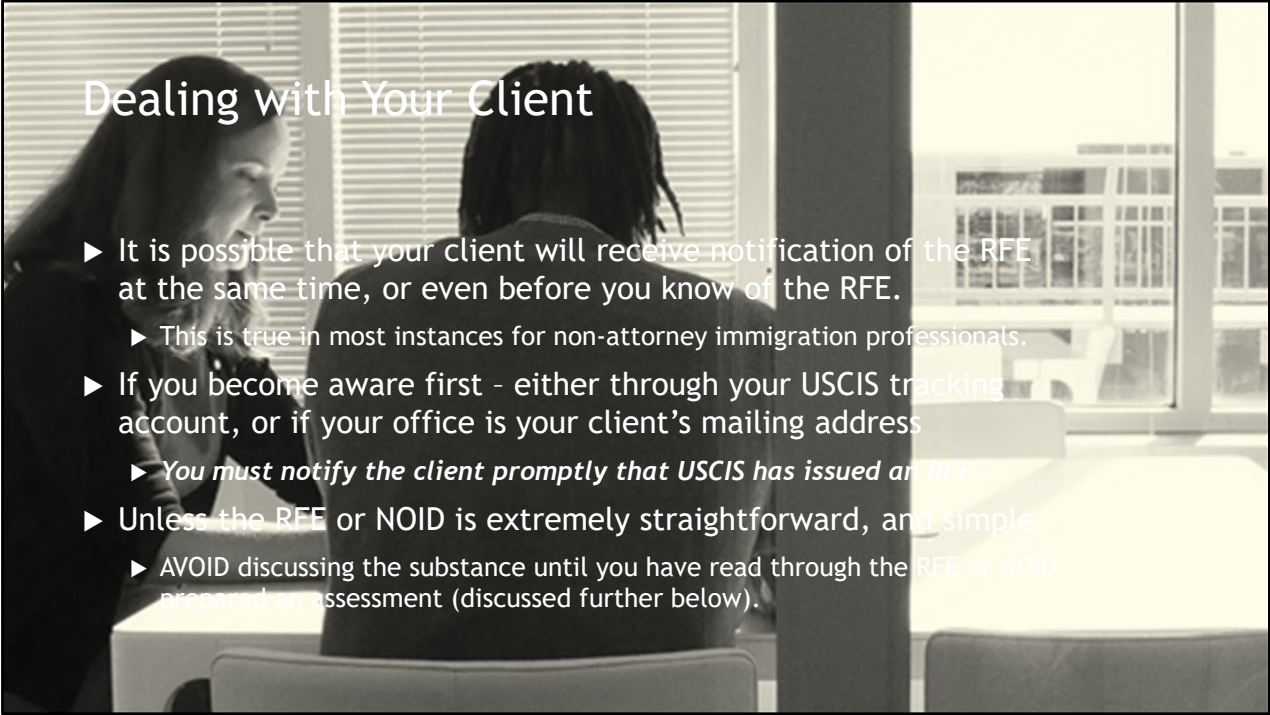
## RFEs Aren't ALL bad news!

- ▶ While it's not a happy experience to receive a Request for Evidence (RFE), your response provides an opportunity to build a strong administrative record in the event of an appeal or for an attorney to litigate.
- ▶ An RFE will provide you and your client the opportunity to strengthen the case.
- ▶ Hopefully the tips in this webinar will reduce the risk of a denial for failure to address the issues raised by the officer and improve the likelihood that the next notice will be an approval.
- ▶ Although there will be occasions when a thorough response still results in a denial, your efforts to improve the record could lay a foundation to appeal the case, refile or for an attorney to effectively litigate the case if necessary.



## What to do first - Calendar the Deadline.

- ▶ Before you focus on the substance of the RFE, locate and calendar the due date.
- ▶ Protect yourself (in the event something goes wrong) by documenting the deadlines in two separate locations.
- ▶ Check the regulations to determine if your client is entitled to any additional time
  - ▶ For example: the USCIS regulation providing for an additional three days if the RFE notice is served by mail.
- ▶ But also remember that if your client used premium processing and you receive the RFE by fax, the three-day rule does not apply.



## Dealing with Your Client

- ▶ It is possible that your client will receive notification of the RFE at the same time, or even before you know of the RFE.
  - ▶ This is true in most instances for non-attorney immigration professionals.
- ▶ If you become aware first - either through your USCIS tracking account, or if your office is your client's mailing address
  - ▶ *You must notify the client promptly that USCIS has issued an RFE.*
- ▶ Unless the RFE or NOID is extremely straightforward, and simple
  - ▶ AVOID discussing the substance until you have read through the RFE or NOID prepared an assessment (discussed further below).



practice

## Practice Tip

- ▶ When you file the application or petition, inform your client that a RFE is possible - NO MATTER HOW WELL THE PACKAGE IS PUT TOGETHER.
- ▶ Let them know that there has been a SIGNIFICANT increase in RFEs and NOIDs.
- ▶ If there is additional evidence that could possibly be needed - ask them to start gathering it --- even if there is no RFE, they will have additional evidence to present at the interview.

Read with  
purpose, but  
don't get bogged  
down.

Start by  
determining  
what issues  
USCIS has raised.

Analyzing the RFE/NOID  
Two Reading Process

## What to Look for in the 2<sup>nd</sup> Reading



### **Has USCIS accurately stated the applicable law and implementing regulations?**

Be alert for overstatements of purported requirements that do not exist.



### **Did USCIS apply the correct legal standard for the classification requested?**

Did the RFE request information in a category that is not applicable to your client's application.

For EB Based Immigration, did the RFE claim that the petitioner must submit evidence about the qualifications of subordinates to be supervised by the beneficiary while ignoring or rejecting evidence that the beneficiary qualifies by managing a function?

## What about the evidence already submitted? Is additional evidence needed?

Did the petitioner submit evidence responsive to each requirement for the visa classification?

A USCIS RFE Template (if available for the classification) can be helpful in determining what evidence USCIS considers responsive to a particular criterion.

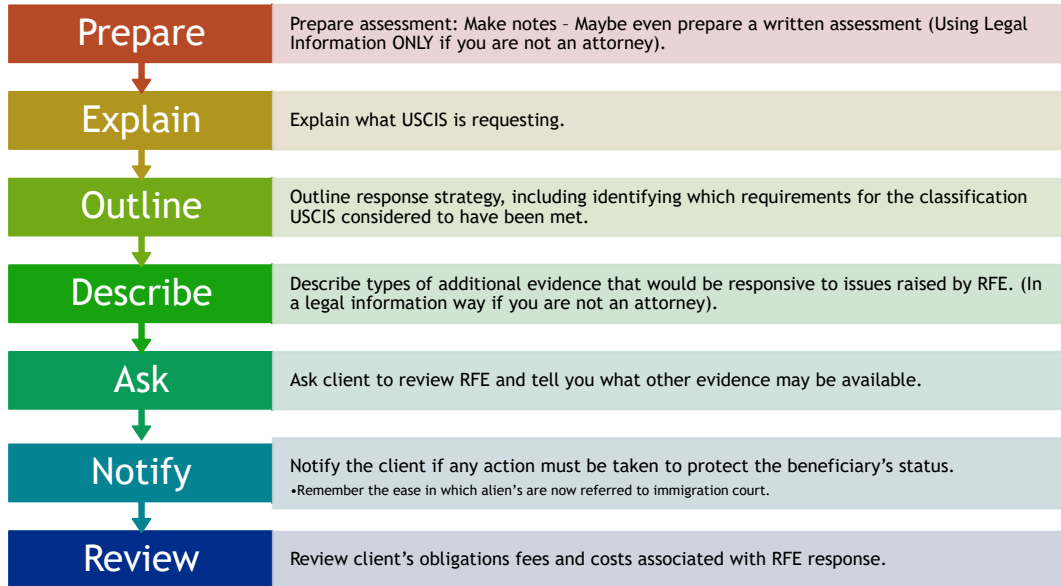
If so, why didn't USCIS find the evidence to be sufficient?

Did USCIS overlook evidence offered by the petitioner to meet a particular requirement or consider it only for a different purpose?

If so, does the evidence need to be "repackaged" (i.e., organized or highlighted in a different way)?

Did USCIS give insufficient weight to any evidence?

## Preparing the Client and the Assessment



## Other Considerations

Review whether the petitioner has the option of withdrawing and filing again instead of responding.

- DO NOT SUGGEST WITHDRAWING AN APPLICATION WITHOUT AN ATTORNEY CONSULT.
- REMEMBER - A WITHDRAWAL CAN RESULT IN A NOTICE TO APPEAR IN IMMIGRATION COURT - ESPECIALLY FOR AN UNDOCUMENTED ALIEN.

Some factors to consider:

- What would happen to beneficiary's status?
- Is adjudicator "fixated" on a type of documentation petitioner cannot provide?
  - Is petitioner unable to provide additional evidence by the response deadline?
- Could petition package be better organized/prepared?
  - A lot of the time, reorganizing the existing evidence is enough.



# Preparing the Response

## Preparing the Response

Prepare	Prepare the response at the request of and with the petitioner.
State	Factual statements and documentation must come from/through the petitioner. •Attorney statements are not evidence.
Provide	Attorney can provide “road map,” including how law applies to facts.
Follow	Follow USCIS' Instructions.
Be	Be clear and concise.

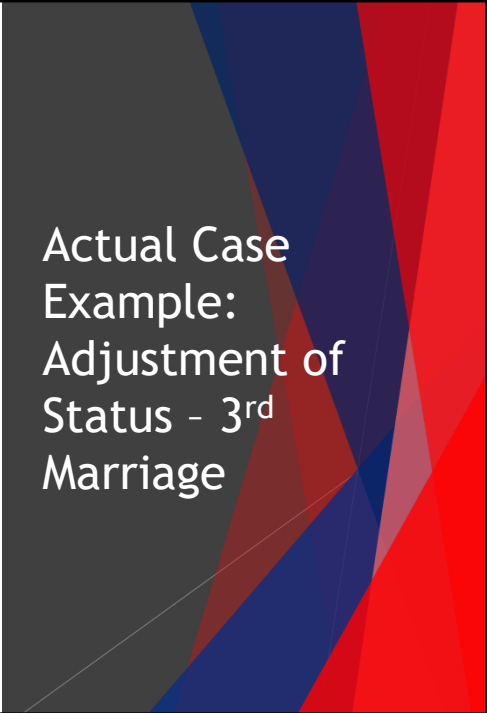
## Preparing the Response

Correct	Correct misstatements of law or regulation or standard of review. If this is the case, the petitioner/applicant may need to at least consult an attorney - or hire - an attorney for the RFE.
Respond	Respond to each issue raised by USCIS (generally should follow RFE's order in headings). •This may include explaining why an issue is not applicable.
Review	Review any additional evidence from petitioner for direct relevance to issues raised in RFE before including. Leave out any irrelevant information - do NOT Open another can of worms.
Discuss	Discuss relevance of evidence previously submitted and any additional evidence. §
Provide	Provide document index. •Use index as another opportunity to explain relevance

## What if a Piece of Evidence Does Not Exist or is Unavailable?

- ▶ There are some instances where evidence may not exist, or is otherwise unavailable
  - ▶ For Example: Documents from a first marriage.
- ▶ Affidavits or Declarations - Under Penalty of Perjury - can be a means to overcoming a particular evidence category.
  - ▶ Some applications and petitions explicitly state that affidavits are not acceptable. (DACA, TPS and AOS under 245(i) to prove physical presence)
- ▶ There are more and more instances where USCIS attempts to pull the “wool over an applicant’s eye.”

- ▶ Applicant was a national of St. Lucia.
- ▶ Married a woman in 2003.
  - ▶ Marriage fell apart due to the wife returning to Oklahoma to care for her mother.
  - ▶ They attempted to maintain a long distance relationship in hopes of reuniting.
  - ▶ I-130 was denied due to failure to appear at the interview.
  - ▶ They prepared their own paperwork, and did not submit a lot of evidence.
- ▶ In 2013 - Applicant married a man - very short marriage.
- ▶ In 2017 - Applicant married a USC man - Very Happily Married Now!!



## Actual Case Example: Adjustment of Status - 3<sup>rd</sup> Marriage

## Actual Case Example: Adjustment of Status - 3<sup>rd</sup> Marriage

Applicant and Husband attended their AOS interview on March 19, 2019.

The total interview was less than 20 minutes.

Not a single questions about the bona fides of any of his 3 marriages were asked.

The officer asked for a copy of Applicant's Certified Criminal Disposition (which was submitted with the application)

The Disposition was personally walked in two days later.

About 30 days after that, they received an approval notice of the I-130.

## Actual Case Example: Adjustment of Status - 3<sup>rd</sup> Marriage



Approximately 35 days later they received a Notice of Intent to REVOKE the I-130.



USCIS stated that the beneficiary had failed to prove the bona fides of his first marriage and ALLEGED marriage fraud.



The key here was there was NOT an actual determination of Marriage Fraud - so USCIS could not revoke.



Through Briefing and 15 Sworn Affidavits - we were able to establish the bona fides of the first marriage (even though we technically should not have had to) and over come the NOIR.



Applicant received his Green Card in July!

## Even when USCIS is Wrong - It May be Prudent to Respond with the Information Requested as Opposed to Fighting It!



USCIS frequently makes mistakes.



USCIS frequently fails to look at all the evidence in a package.



USCIS frequently does not properly consider evidence.



USCIS frequently attempts to request evidence of something that is NOT required for the visa or LPR classification.



USCIS - more frequently than ever before - attempts to "hoodwink" applicants into providing evidence that is not necessary.



USCIS - more frequently than ever before - misapplies the law to case (such as the case we just examined).

## Respond When the Evidence Exists



Even if USCIS has misapplied the law, or erroneously requested evidence - if you can provide what they are requesting - DO SO.



There are exceptions



It is OK to point out that they evidence requested was not applicable, or that a statute, regulation or law does not apply - but that you have responded to their request.



BE CAREFUL of misguided (misleading) RFE's



## Be Sure to Read Between the Lines in an RFE

- ▶ Some RFEs are not direct in what USCIS is actually looking for.
- ▶ Be sure to consider all possible conclusions that could POSSIBLY be reached if a document is submitted to USCIS.
- ▶ USCIS is becoming particularly sneaky in making requests for documents to “catch” someone making a false claim to US Citizenship.
- ▶ For Example, we have seen USCIS request the following:
  - ▶ I-9’s from employers
  - ▶ Old W2’s
  - ▶ DMV Records from ALL states and under all names that a DL was issued to an applicant.
  - ▶ FBI Records for I-130s (remember, there is no biometrics for an I-130)

# Time Constraints Associated with Responses to RFEs and NOIDs

87 / 30 / 33 Days???

## Normal Time to Respond to RFEs

- ▶ USCIS provides 87 calendar days to respond to an RFE for MOST applications/petitions.
  - ▶ Some employment-based petitions are 45 calendar days
  - ▶ I-601A Waivers are only afforded 33 calendar days - these are often very challenging
    - ▶ The majority of I601A denial are not associated with lack of hardship - they are the result of failing to respond timely - or completely to an RFE.
  - ▶ Late Responses used to be considered - but, we are seeing more and more frequently that even 1-day late results in a denial
- ▶ Depending on what they are asking for, these deadlines can be impossible to meet.
- ▶ It is ALWAYS a best practice to encourage clients to keep gathering and building evidence for their case until it approved - just in case.
  - ▶ Also, when someone does not have originals of civil documents, they should use the adjudication time to obtain the originals.
  - ▶ This will prevent not being able to respond to a RFE, as well as provide the document for inspection at the interview.

## Normal Time to Respond to a NOID or NOIR

- ▶ 33 Calendar Days - PERIOD!!
- ▶ These responses can be of particular concern
  - ▶ Especially for inexperienced immigration professionals (including new attorneys)
- ▶ A NOID or NOIR is usually alleging something very serious
  - ▶ Rebutting serious allegations - especially on such short time constraints - is difficult, even for the most experienced professionals.

## BEST PRACTICE TO AVOID RFES/NOIDS/NOIRS

- ▶ Thorough Intake Form and Intake Process
- ▶ COMPLETE FOIA and Criminal History Background Checks on ALL clients PRIOR to filing
- ▶ Don't Get Emotionally Involved and be Persuaded to Waiver on Background Checks
- ▶ If Something Doesn't Feel Right in Your Gut - It's Probably NOT
- ▶ When in Doubt - Use Your NAIP Membership Group / Attorney Network
- ▶ DON'T Take Chances





# The Heartbreak of Denial

PLUS THE RISK TO AN UNDOCUMENTED  
APPLICANT

## Dealing with USCIS Denials

If, despite all your hard work, your client's petition is still denied:

If they are in the United States, and they are undocumented:

**THEY NEED AN IMMIGRATION ATTORNEY RIGHT AWAY**

THE NEXT DOCUMENT TO COME IN THE MAIL WILL BE A NOTICE TO APPEAR IN IMMIGRATION COURT.

An attorney may want to consider litigating the case in federal court.

## Denials of Applications/Petitions for Undocumented Applicants



Pursuant to the July 2018 Memo when USCIS denies an application/petition for an UNDOUMENTED alien, they will immediately be placed into removal proceedings.



The mere filing of benefits is becoming more and more dangerous under this administration.

Be cautious in your assessment of the case before filing anything for an undocumented person. ESPECIALLY if they do not have a substantial amount of evidence to support their case.



When in doubt - Utilize your attorney network for your clients to receive proper legal advice.

## Denials for Persons Consular Processing

Many denials will give you the opportunity to appeal with the Administrative Appeals Office ("AAO").

However, it may be easier to refile the application with evidence to overcome what is in the denial.

There is no time frame in which the AAO must adjudicate the appeal.

You cannot file a new application with an appeal pending.

In most instances --- the appeal is a futile effort that wastes time and money for your client.

Filing an appeal is usually appropriate to preserve a priority date - or a child's age under CSPA to keep them classified as an IR or Child for Immigration Purposes.

**FINAL  
THOUGHTS**





Thank you for attending  
this webinar!!

We hope to see you  
again soon in a live  
class or live webinar