

AILA-SCOPS Q & A July 30, 2008

1. An H-1B petition was approved in Nebraska or Texas in the past. If the petitioner now wants to revoke the petition, to which service center is the withdrawal notice sent, NSC/TSC or to CSC/VSC, since CSC and VSC have jurisdiction over H-1B petitions? How is jurisdiction determined?

Answer: Requests for revocation should be sent to either the CSC (if the H was approved by NSC) or the VSC (if the H was approved by TSC).

AILA Note: AILA has requested that SCOPS remind Service Center mailrooms of this process so that they do not continue to reject revocation letters.

2. Members are reporting that despite including G-28's with applications or petitions, documents are sent only to the applicant or petitioner. Other than using blue paper for the G-28, what is the best way to ensure that the G-28 is picked up by the contractor to be entered into the system?

Answer: An original G-28 should be filed with each application. SCOPS requests examples to determine why G-28's are not being caught by the contractors. SCOPS will also speak with the Service Centers to see if G-28's should be further marked or placed on top of the filing.

3. Do e-filed applications go into the processing queue the same way as applications that are mailed? Do the same estimated processing times apply?

Answer: Yes, the e-filed applications are handled the same way as paper filings and the same processing times apply.

4. A petition is denied and an MTR/appeal is filed. Can a second petition be filed while the first one is pending on appeal? Is the second petition held in abeyance pending the appeal outcome? If so, since each petition has to stand on its own, what is the authority for holding the second petition in abeyance?

Answer: Yes, a second petition can be filed. However, under longstanding Service policy, the second petition will be held in abeyance pending the outcome of appeal. If the petitioner would like quicker resolution of the second petition, the appeal should be withdrawn. Please see the 2-8-89 Richard Norton memo, entitled Adjudication of Petitions and Applications which are in Litigation or Pending Appeal which discusses this policy.

5. For a few days in June, there was a revised version of the I-9 form on USCIS.gov (June 08). The website has since been changed. However, some members had already advised clients to start using this revised form. Is the new form invalid or just not yet required?

Answer: There was an I-9 form on the USCIS website with a revision date of 6-5-07 that had an expiration date of 6-30-08. In mid-June 2008, a new form was posted with a revision date of 6-16-08 and an expiration date of 6-30-09. However, the content of the form did not change. Therefore, USCIS determined that the revision date did not need to be changed, however the expiration date did need to be changed. As a result, the I-9 form on USCIS.gov is the latest version of the form and it bears a revision date of 6-5-07 and an expiration date of 6-30-09. If individuals used the version of the form with the 6-16-08 revision date, it is still valid per the Verification Division of USCIS.

6. AILA conference follow-up: At the conference, we discussed that members are receiving denials based on examiners use of “Wikipedia” as a source of information. We all agreed that Wikipedia was not a reliable source, as the purpose of Wikipedia is to allow anyone in the world to add to the content at any time. Please confirm that the Service Centers have been alerted to this issue and that Wikipedia will no longer be used as a source of information.

Answer: SCOPS has notified the Service Centers of this issue and there should not be additional RFEs or denials citing Wikipedia. SCOPS requests that AILA provide examples to USCIS.

7. AILA conference follow-up: At the conference, we discussed members receiving denials based on information not in the record, without first receiving an RFE or NOID. Failure to issue an RFE or NOID in these circumstances is contrary to the regulation at 8 CFR 103.2(b)(16), which states “If the decision will be adverse to the applicant or petitioner and is based on derogatory information considered by the Service and of which the applicant or petitioner is unaware, he/she shall be advised of this fact and offered an opportunity to rebut the information and present information in his/her own behalf before the decision is rendered . . .” The only exception to this rule is where the information is “classified information.” The sources we have been discussing are all in the public domain. Please remind the field that regulations require that a petitioner or applicant be provided an opportunity to rebut derogatory information prior to entry of an adverse decision.

Answer: Information has been passed onto the Service Centers about this. SCOPS requests that AILA provide examples for review.

8. AILA conference follow-up: At the conference, we discussed RFE response times, specifically those where the applicant/petitioner is provided with only 30 days to respond. In the Neufeld memo explaining the RFE response times, it appears that extensions may be available in certain circumstances, up to the maximum of 84 days. (See page 5, revising AFM Chapter 10.5, section (b)(3): “Extensions of time to submit evidence beyond the 12-week limit for RFEs or the 30-day period for NOIDs are not permitted.” Nevertheless, requests to the Service Centers for an extension are denied. We understand that USCIS does not

want each case to be a debate over response times. However, there are some instances where it is impossible to comply within the time period. In those instances, is an extension available or should the response be sent in timely with an explanation of why the applicant/petitioner cannot comply? (Examples include a request by the Service for a sealed tax transcript which takes more than 30 days according to the IRS; or a request for a revised medical exam when the applicant is currently travelling abroad)

Answer: The RFE memo provides general guidelines, but it is the Center's practice not to issue extensions. It is USCIS' position that in order to give extensions, the memo would need to be revised. USCIS believes that applicants and petitioners should be able to comply within the timeframe requested.

With regard to those cases where the Beneficiary/Petitioner believes he or she is unable to comply with the request, the RFE should be answered timely with as much information as possible and an explanation of why the Beneficiary/Petitioner cannot provide the evidence requested. However, there is no guarantee that a second RFE will be issued to provide additional information.

AILA Note: There was further discussion on time frames and initial v. additional evidence. Further information will be provided to USCIS for review of these concerns and further discussion.

9. The instructions to the I-485 on the USCIS website state that applicants *79 and older* do not have to pay the biometrics fee. There is also a current fee schedule released by USCIS that states this, as well as the 2005 version of the fee schedule. However, members are reporting billing notices for the biometrics fee when an applicant is 79. Please confirm whether or not an applicant who is 79 at the time of filing must submit the biometrics fee.

Answer: The information on the website is correct. Those applicants who are 79 at the time of filing are not required to pay the biometrics fee. Billing notices in these instances are issued in error and should be brought to the attention of USCIS.