

## American Immigration Lawyers Association

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Director, Regulations and Forms Services Division  
Department of Homeland Security  
425 I St. N.W., Room 4034  
Washington, D.C. 20536

Via email: [rfsregs@dhs.gov](mailto:rfsregs@dhs.gov)

**Re: Docket No. DHS-2004-0020: Comments to Proposed Regulation, "Removal of the Standardized Request for Evidence Processing Time," published in 69 Fed. Reg. 69,549-554 (Nov. 30, 2004)**

Dear Sir or Madam:

The American Immigration Lawyers Association (AILA) submits the following comments on the proposed rule to remove the absolute requirement for, and the fixed regulatory time limitations on responses to, a U.S. Citizenship and Immigration Services (CIS)-issued Request for Evidence (RFE) and Notice of Intent to Deny (NOID).

AILA is a voluntary bar association of more than 9,200 attorneys and law professors practicing and teaching in the field of immigration and nationality law. AILA's mission includes the advancement of the law pertaining to immigration and naturalization and the facilitation of justice in the field. AILA's members are well acquainted with the process of submitting petitions and applications to service centers and district offices, and with the process of responding to RFEs and NOIDs. AILA members have significant experience representing and educating business and family clients who must respond to RFEs and NOIDs, and because the members of our association represent large and small businesses, academic institutions, research facilities, and governmental entities that employ foreign nationals, as well as U.S. workers and family members, AILA is uniquely qualified to comment on this proposed rule.

AILA shares the CIS concern that it has been taking the agency far too long to process applications and petitions seeking immigration benefits. However, the backlog problem does not result from the time it takes to respond to RFEs, and the already-implemented policy of issuing denials instead of RFEs has resulted in a significant growth of arbitrary and capricious decisions. AILA believes that the CIS proposal to

reduce the amount of time to respond to an RFE is unnecessary and unjust, and that the “deny, don’t RFE” policy should be immediately revisited and certainly not codified.

Right at the outset, we would like to voice our objection to the following claim, made at the start of the supplementary information to the proposed rule:

This proposed rule would affect those petitioners and applicants who submit applications/petitions for immigrant benefits and receive requests for evidence (RFEs) or notices of intent to deny (NOIDs) from the Department.<sup>1</sup>

With all due respect, while the rule will affect those who receive an RFE, its greater impact will be felt on those petitioners and applicants who do *not* get an RFE or NOID, but rather get flat-out denials. This proposed rule, if implemented, provides no safeguard that cases will be fairly adjudicated, states up front that its purpose is to “streamline” processes, not to protect due process, and even claims that by eliminating RFEs and shortening the time to reply, the public will “benefit.”

The public will receive fewer and more specific RFE or NOID notices and benefit from faster approval of applications and petitions.<sup>2</sup>

The public can never benefit from a system that places efficiency above fair adjudication, and AILA does not agree that the proposed rule will lead to a streamlined and efficient process. Our concerns are set forth below.

### **1. The Legacy INS Knew Better Than to Eliminate RFEs Prior to Denial**

Without adequate explanation for its reasons, the proposed rule summarily declares “This rule amends 8 CFR 103.2(b)(8) by removing the mandatory requirement that USCIS issue an RFE for initial evidence. Instead, USCIS, in its discretion, may deny a petition or application when required initial evidence is missing.”<sup>3</sup>

This is not the first time that the immigration agency has proposed removing the requirement for the issuance of an RFE before a case is denied, and not the first time that it has sought to cut back on the time allotted to respond to an RFE. Back in 1991, the Immigration and Naturalization Service (INS) considered doing what the CIS is now proposing, but upon consideration abandoned the approach. The INS published a proposed regulation<sup>4</sup> that would have allowed it to deny petitions and applications outright, without issuing RFEs. At that time, the INS said:

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<sup>1</sup> 69 Fed. Reg. 69549, 69,550 (Nov. 30, 2004) (supplementary information).

<sup>2</sup> *Id.* at 69,552 (supplementary information).

<sup>3</sup> *Id.* at 69,551 (supplementary information)

<sup>4</sup> The proposed rule of the Immigration and Naturalization Service was published in 56 Fed. Reg. 61,201 (Dec. 2, 1991).

The rule would allow the Service to deny an application or petition filed without the eligibility information required by the form or without initial evidence of eligibility required by the form. Such a denial would not preclude the filing of a new application or petition with the required information and evidence.<sup>5</sup>

In its proposed regulation issued in November 2004, the CIS says more or less the same thing:

This rule amends 8 CFR 103.2(b)(8) by removing the mandatory requirement that USCIS issue an RFE for initial evidence. Instead, USCIS in its discretion, may deny a petition or application when required initial evidence is missing. If an applicant or petitioner fails to submit the required initial evidence, and USCIS decides to deny the application or petition rather than issue an RFE, the applicant or petitioner may file a motion to reopen...or file a new application or petition.<sup>6</sup>

Today, the CIS talks about ways to “improve the process of adjudication,”<sup>7</sup> by “reducing the time”<sup>8</sup> a case is held awaiting evidence. It seeks to “improve[] efficiency”<sup>9</sup> through a more “flexible approach.”<sup>10</sup> Thirteen years ago, the INS also thought that if it did away with RFEs, it would mean that a final decision could be reached after a single review of a case, and thus “significantly improve the processing” of applications and petitions.<sup>11</sup>

CIS would do well to take heed of the lessons learned by the INS, and understand why the INS abandoned its attempt to “streamline” the process by stomping on the due process rights of many of its stakeholders.

#### Why the INS Changed Its Mind in the Final Rule of 1994

#### ***“Most applicants and petitioners are eventually found eligible for the immigration benefits for which they apply”***

The comments the INS received in response to its proposed 1991 regulation gave it pause. One commenter, the INS pointed out, vigorously opposed any rule that would give the Service “unbridled” discretion to deny a petition or application for lack of initial evidence, a comment the Service took under advisement.<sup>12</sup> Just as important, the Service took cognizance of the fact that a “significant number” of applicants and petitioners were

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<sup>5</sup> *Id.*

<sup>6</sup> 69 Fed. Reg. at 69,551.

<sup>7</sup> *Id.* at 69,549.

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> *Id.* at 69,550.

<sup>11</sup> 56 Fed. Reg. at 61,203.

<sup>12</sup> 59 Fed. Reg. at 1456.

unfamiliar with the English language and government requirements,<sup>13</sup> and needed a second chance to prove their cases.

Rather than implement the proposed rule of 1991, the INS decided to wait and see. The agency held the rule in abeyance for more than two years to assess what its course should be, analyzing filings submitted under the direct filing program, introduced by the Immigration Act of 1990.<sup>14</sup> Certainly, the Service was guided by its recognition of an important fact. By its own reckoning, it reported:

Most applicants and petitioners are eventually found eligible for the immigration benefits for which they apply, and want to file their applications and petitions with the evidence necessary to establish eligibility so their requests are processed promptly and correctly.<sup>15</sup>

That being the case, the Service decided to design a rule that would help applicants and petitioners establish eligibility, not a rule, like the one now proposed, that would extinguish rights of applicants and petitioners, with particularly harsh results for unrepresented parties. When the final rule for processing procedures was published in 1994,<sup>16</sup> the INS announced its goal in implementing the new regulation:

The Service's goal is to recognize the needs of the population we serve while setting processing parameters that allow the agency to process applications quickly, correctly and fairly.<sup>17</sup>

That was an admirable goal, placing the emphasis where it belonged: on fair adjudications. Thus, in the final rule, the INS reached a commendable compromise. There didn't seem much point in denying cases outright if most applicants and petitioners were eventually found eligible for the benefits they sought. So, to give applicants and petitioners a chance to prove their eligibility, the Service imposed a reasonable rule: Only in cases of *clear ineligibility* could the INS deny a case without an RFE.<sup>18</sup> But in all other cases, where sufficient evidence to reach a decision was lacking, the Service would issue an RFE.

To deal with its concerns that some might unfairly secure a priority date by deliberately submitting applications and petitions without the required evidence, and by

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<sup>13</sup> *Id.* at 1457.

<sup>14</sup> Regulations issued in the wake of the Immigration Act of 1990 (IMMACT 90), Pub. L. No. 101-649, 104 Stat. 4978, mandated that I-140 immigrant visa petitions be filed at the service center having jurisdiction over the intended place of employment, rather than at the district office. See the amended rule 8 C.F.R. § 204.5 in 56 Fed. Reg. 60,897, 60,905 (Nov. 29, 1991).

<sup>15</sup> 56 Fed. Reg. at 61,202.

<sup>16</sup> 59 Fed. Reg. 1455-66 (Jan. 11, 1994).

<sup>17</sup> *Id.* at 1457.

<sup>18</sup> *Id.* The current regulation at 8 C.F.R. § 103.2(b)(8) codifies that requirement: "If there is evidence of ineligibility in the record, an application or petition shall be denied on that basis notwithstanding any lack of required initial evidence."

way of compromise with the commenters who opposed the 1991 proposed regulation, the Service came up with a reasonable solution in 1994, summarized below:

1. If a case was filed without the evidence to establish eligibility, an RFE would issue.
2. An applicant or petitioner would be given a reasonable period of time, 12 weeks, to respond to the RFE. However, no extensions of that time were permitted.
3. To shield against people getting ancillary benefits to which they might not be entitled, the Service would stop the processing clock and not approve ancillary benefits until it received the necessary evidence to establish prima facie eligibility for the primary benefit sought.
4. If a case was filed and *clear* ineligibility for the benefit sought existed, the case could be denied without an RFE.

The 1994 rule was a reasonable and effective means of dealing with a host of competing interests. At the outside limit, a case would be held in abeyance for only 84 days, which the INS had determined to be the proper amount of time that an applicant or petitioner would need to submit all the evidence demanded. The CIS should guide itself by the lessons learned from its predecessor agency, and abandon this attempt to make the issuance of an RFE a matter of adjudicator discretion. It should also note that a rule in which the response time to an RFE would most likely be as short as 30 days, is **180 percent less** than the time that the INS calculated as a reasonable period to reply.

## **2. RFEs Provide Notice to Stakeholders**

The issuance of an RFE serves an important notice function, alerting petitioners, applicants and beneficiaries that the CIS has questions about a submission. Upon review of the RFE, a party has an opportunity to reassess its eligibility for a benefit, and to evaluate whether it may be able to overcome the Service's doubts.

The notice function is important, allowing businesses to make employment decisions that avoid or minimize any sudden disruptions in the workforce. Notice is even more important for individuals, because, if a case is denied outright, rather than returned for more information, the effects can be harsh. Although the CIS has designated the entire term that a timely filed extension or change of status petition or application is *pending* as a period of stay authorized by the Attorney General,<sup>19</sup> once a denial decision is rendered, the foreign national will begin to accrue unlawful presence under INA § 212(a)(9) if the individual's prior status has expired.<sup>20</sup> To make matters worse, the moment that the CIS issues a denial of a petition requesting extension or change of status,

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<sup>19</sup> See, e.g., Memorandum, *Period of Stay Authorized by the Attorney General After 120-Day Tolling Period for Purposes of Section 212(a)(9)(B) of the Immigration and Nationality Act*, Michael A. Pearson, File No. HQADN 70/21.1.23-P, AD 00-07 (Mar. 3, 2000).

<sup>20</sup> *Id.*

the visa overstay provisions of INA § 222(g) are also triggered if the individual's prior status has expired, voiding the foreign national's visa and requiring that he apply for any future visas only in his home country.<sup>21</sup>

Moreover, under a July 2004 regulation governing employment authorization documents (EADs), implemented without the opportunity for notice and comment, the CIS may have made matters worse for those who appeal the denial of petitions or applications.<sup>22</sup> Prior to the change, CIS regulations provided that an applicant for adjustment of status whose immigrant petition had been denied was entitled to an EAD during the pendency of an appeal. The prior regulation provided, in pertinent part,

[E]mployment authorization *shall* be granted in increments not exceeding one year during the period the [adjustment of status] application is pending (including any period when an administrative appeal or judicial review is pending) and shall expire on a specified date.<sup>23</sup>

That portion of the regulation was *deleted* by the July 30, 2004, interim regulation and, in its place, the rule was amended to read:

BCIS, in its discretion, may establish a specific validity period for an employment authorization document, which *may* include any period when an administrative appeal or judicial review of an application or petition is pending.<sup>24</sup>

Although the rule is not clearly drafted, it does seem that the CIS now has discretion not to issue an EAD to those whose appeals are pending. Without the ability to support oneself while pursuing an appeal, how many would be able to afford to take a denial to a higher authority? This is particularly so given that the processing times for appeals at the AAO are currently 16 months for an L-1 case, 12 months for an H-1B, 14 months for an employment-based third preference immigrant petition, eight months for an extraordinary ability, outstanding researcher, or national interest waiver case, and ten months for a multinational manager immigrant petition.<sup>25</sup> It would appear to be a matter of common sense that those processing times will grow substantially longer as more

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<sup>21</sup> See, e.g., Memorandum, *Section 222(g) of the Immigration and Nationality Act*, Michael A. Pearson, File No. HQ 70/12-P, IN 00-14 (Mar. 3, 2000) (amending INS Inspector's Field Manual §15.15(g)(1)) (period of stay authorized by the Attorney General continues until date Service issues a decision).

<sup>22</sup> 69 Fed. Reg. 45,555 (July 30, 2004).

<sup>23</sup> 8 C.F.R. § 274a.12(c)(9) (emphasis added). Despite the regulatory mandate, the rule was ignored by the CIS in its memorandum directing that if an I-140 immigrant petition, filed concurrently with an application for adjustment of status and interim benefits, was denied, applications for interim benefits, including an EAD, should also be denied. Memorandum, *Procedures for Concurrently Filed Family-based or Employment-based Form I-485 When the Underlying Visa Petition Is Denied*, William R. Yates, File No. HQADN 70/23.1 (Feb. 28, 2003).

<sup>24</sup> 8 C.F.R. § 274a.12(c) (emphasis added) (2004).

<sup>25</sup> These processing times are calculated from the date of receipt of the alien file at the AAO, and do not include Service Center processing time for the appeal. Although the CSC stated in liaison on October 27, 2004 that appeals are generally forwarded to the AAO within 30-45 days, in AILA's experience, it can take much longer. See CSC Liaison Meeting Q&A (October 27, 2004).

appeals are brought to redress RFE-less denials, pursued by those fortunate enough not to depend on EADs for their livelihood.

### **3. The CIS Should Be As Committed to Fundamental Fairness As Its Sister Agencies and the Courts**

This proposed regulation strikes a crippling blow to fairness and due process in the adjudication of immigration petitions. Our immigration laws have been and should continue to be designed to provide applicants with a fair opportunity to establish eligibility for immigration benefits. This regulation takes away that opportunity in the guise of crafting a “streamlined” and “flexible” approach.

As the State Department’s Foreign Affairs Manual states, “keeping with the spirit of American justice and fairness...it is the policy of the U.S. government to give the applicant *every reasonable opportunity* to establish eligibility to receive a visa.”<sup>26</sup>

The Department of State underscores this important policy in many different contexts. The rationale behind the policy is always the same: Applicants must be given an opportunity to rebut findings and present evidence on their behalf.<sup>27</sup> Several State Department cables reiterate that consular officers should give applicants an opportunity to present evidence to receive a visa.<sup>28</sup> One cable explains:

This procedure is not only a matter of fairness; it also helps ensure that our visa decisions are based on a correct understanding of the facts.<sup>29</sup>

Another cable announces that there shall be “no refusals without an opportunity to be interviewed,” and explains that “this policy is in keeping with the spirit of American justice and fairness.”<sup>30</sup> The policy of interviewing an applicant before a visa may be denied is “based on the fundamental principle of fairness that the alien should be given an opportunity to be heard and to personally make his/her case to a consular officer.”<sup>31</sup> The State Department clearly understands that having the opportunity to prove one’s case is rooted in notions of fundamental fairness, and also serves to ensure that visa decisions are based on a thorough and accurate understanding of the facts.

The Department of Labor (DOL), too, does not deny an application for alien employment certification without providing the employer an opportunity to overcome the Department’s doubts. For years, the DOL’s regulations specified that if a labor certification is not granted, the Certifying Officer “shall issue to the employer, with a

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<sup>26</sup> U.S. Dep’t of State, 9 Foreign Affairs Manual (FAM) § 41.121 n.2 (emphasis added).

<sup>27</sup> *Id.* at §§ 41.122(b), 41.122(g), 42.82(b).

<sup>28</sup> See 97 State 114760, *reprinted in* 74 Interpreter Releases 1029, 1037-38 (July 7, 1997); 2001 State 102813.

<sup>29</sup> 97 State 114760.

<sup>30</sup> 2001-State-102813.

<sup>31</sup> *Id.* at ¶ 4.

copy to the alien, a *Notice of Findings*,” which states the specific bases on which it was made, and permits the employer 35 days to submit evidence that may “cure the defects,” or “rebut the bases of the determination.”<sup>32</sup>

The DOL has been no less eager than the CIS to “streamline” its processes, but it has chosen to do so in a manner that preserves fairness and due process. With the implementation of its PERM regulations,<sup>33</sup> and with it the creation of a revamped labor certification process, the DOL will still issue notice to employers whose applications may be questionable. The DOL has given those employers a 30-day window to correct defects, and permits Certifying Officers to extend that time by an additional 30 days.<sup>34</sup> If questions still remain, the Certifying Officer may request additional information, or require the employer to conduct supervised recruitment.<sup>35</sup> But, what the DOL absolutely may not do is deny a case outright,<sup>36</sup> the very authority the CIS is trying to assert for itself in this proposed regulation.

The concept of fairness and ensuring that an immigration decision is based on a correct understanding of the facts also runs through numerous Court of Appeals decisions.<sup>37</sup> An immigration judge’s adverse credibility determination of an applicant may not be based on speculation or conjecture.<sup>38</sup> Fairness and the objective of having a decision based on the correct facts mandates that an applicant be permitted an opportunity to explain any perceived inconsistencies and be afforded notice to provide additional evidence sought by the immigration judge.<sup>39</sup> By eliminating the requirement of an RFE before denial, an immigration applicant’s opportunity to explain, clarify and supplement an application in response to CIS perceived issues is denied. This violates fundamental fairness.

Although streamlining the process and reducing the long adjudicatory delays are certainly goals which we share, the “flexibility” sought by the CIS in this regulation goes too far and violates fundamental fairness. This regulation asks applicants to trust the CIS to act fairly in deciding whether it will issue an RFE, and in setting appropriate timelines

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<sup>32</sup> 20 C.F.R. § 656.25(c) (emphasis in original).

<sup>33</sup> 69 Fed. Reg. 77,326-77,421 (Dec. 27, 2004).

<sup>34</sup> 20 C.F.R. § 656.20(a)(2) and 656.20(c).

<sup>35</sup> 20 C.F.R. § 656.20(d)(1) and (d)(2).

<sup>36</sup> Applications can only be denied outright if they are “incomplete applications,” meaning that fields of information have been omitted. 20 C.F. R. § 656.17(a).

<sup>37</sup> See, e.g., *Dia v. Ashcroft*, 353 F. 3d 228, 247-60 (3d Cir. 2003) (IJ credibility determination impermissibly rested on conjecture); *Unase v. Ashcroft*, 349 F. 3d 1039 (7<sup>th</sup> Cir. 2003) (IJ credibility finding based upon speculation regarding significance of certain evidence, or conjecture regarding failure of family members to testify is reversed as lacking substantial evidence).

<sup>38</sup> *Dia v. Ashcroft*, 353 F. 3d 228, *supra* note 37; *Guo v. Ashcroft*, 361 F. 3d 1194, 1200-02(9<sup>th</sup> Cir. 2004) (adverse credibility determination based on speculation and conjecture was not supported by substantial evidence).

<sup>39</sup> See *Paramaswamy v. Ashcroft*, 295 F. 3d 1047, 1054 (9<sup>th</sup> Cir. 2002) (asylum case remanded for new hearing where IJ made boilerplate demeanor findings, relied on boilerplate hypotheses to reject evidence, perceived inconsistencies not based on the evidence, and created hypothetical reasons in requesting corroborative evidence.)

for responses. Thus, we are asked to substitute the rule of law—a required RFE for initial evidence except in cases of *clear* ineligibility and a reasonable 12-week response time—for what we are certain will be a rule of chaos. Perhaps the case histories that follow will highlight our concerns.

#### 4. Cases Denied Without the Issuance of an RFE

A May 4, 2004, memorandum, “Requests for Evidence,”<sup>40</sup> gave the green light to issuing flat-out denials of petitions and applications rather than RFEs. The memorandum, which, as it turns out, was a prologue to the proposed rule, sent a strong message to adjudicators that in many cases an RFE is *not* required and should *not* be issued prior to denying a case. The memorandum indicated that it was promulgated “[a]s part of [the CIS] backlog reduction initiatives,”<sup>41</sup> and came about after a review of CIS practices that revealed that adjudicators “unnecessarily issue an RFE prior to making a final decision on a petition or application.”<sup>42</sup>

AILA members have now experienced more than eight months of operating under the policy enunciated in the May 4, 2004, memorandum, and we can tell the CIS that as a result of that policy, cases that should have approved, were denied, without affording interested parties any opportunity to respond to *perceived* deficiencies in the submissions. Among the wrongful denials were:

- An L-1A filed by a major, well-known international hotel chain for a senior manager with 20 years’ experience for the U.S. position of Manager of Japanese Guest Services (the petitioner’s guests are 75 percent Japanese) was denied without RFE for the stated reason that the position offered was not a “Manager” as defined by CIS. The position answered directly to the General Manager and supervised a staff of fifteen including three Guest Service Managers.
- An H-1B petition for an Accountant/Financial Analyst with a manufacturing company was denied without RFE for the stated (and inaccurate) reason that a Financial Analyst only works for banks or large investment firms. The denial ignored the job title and job duties clearly stated in the petition.
- On a ten-year B-2 visa issued on November 27, 1998, under which the applicant had been admitted to the U.S. three or four times before his last entry on February 2, 2004, the I-539 requesting change of status to F-1 was denied without RFE because the applicant “had failed to reveal to Consular Officer the true purpose of her visit to

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<sup>40</sup> Memorandum from William R. Yates, Associate Director, Operations, U.S. Citizenship and Immigration Services, to all USCIS offices, *Requests for Evidence (RFE)*, (May 4, 2004) [hereinafter May 4, 2004, memorandum].

<sup>41</sup> *Id.*, at 1.

<sup>42</sup> *Id.*

the U.S.” The visa had been issued more than five and a-half years before, and the I-20 had been issued some 139 days after entry.

- An H-3 petition was denied on the basis that the training is “likely” available in the home country. Information in the file was overlooked that the petitioner is seeking to train the employee in company-specific procedures, an approach that has long been recognized as acceptable for H-3 purposes by AAO.
- A reentry permit for a Dutch national permanent resident, married to a U.S. citizen who had been transferred by his U.S. employer to the Netherlands, was denied without RFE on the basis that the Dutch/LPR wife was a U.S. citizen. It took a motion to reopen—at the cost to the family of attorney fees and the \$110 filing fee—to establish that indeed, the Dutch /LPR wife was still a legal permanent resident.
- A Change of Status from F-1 to H-4 was denied without an RFE, based on “immigrant intent” (which does not apply to H-4s).
- An I-485 was denied without NOID or RFE where the beneficiary of an approved I-140 petition had had an adjustment of status application pending for well over 180 days when he accepted a position with a similar type of company doing a virtually identical job. In the past, the attorney had not had luck getting correspondence about these types of changes into a file, and had been advised by the service center to just wait for what was their standard and routine RFE immediately before the adjudication of the I-485 where they asked for evidence that the job is still available. In this case, the petitioner had withdrawn its I-140 after the beneficiary left their employ. But, according to settled AC21 guidance, unless the petition is withdrawn or revoked because of fraud (not alleged and not the case), the petition remains valid for purposes of an adjustment if the conditions of the AC21 are met.<sup>43</sup> Beneficiary's I-485 was denied saying that the I-140 had been withdrawn and he was no longer eligible. This case required the time and expense of a Motion to Reopen and Reconsider, when a NOID is required under CIS policy.<sup>44</sup>
- An H-1B change of employer petition for a Cost Accountant for an international shipping company with \$1.5 million in revenue but only five employees in the US was denied without RFE. USCIS acknowledged that accounting is a professional position and the beneficiary has a degree in accounting plus many years of experience, but essentially found that a company of that size needs a bookkeeper or accounting clerk but not an accountant. No effort to clarify the issue through an RFE was made.

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<sup>43</sup> That guidance was provided in a memorandum, *Continuing Validity of Form I-140 Petition in accordance with Section 106(c) of the American Competitiveness in the Twenty-First Century Act of 2000 (AC21)(AD03-13)*, William R. Yates, HQBCIS 70/6.2.8-P (Aug. 4, 2003).

<sup>44</sup> *Id.* at 3 (if petition withdrawn and evidence of change of employment not in file, adjudicating officer “must issue a Notice of Intent to Deny the pending Form I-485.”).

- In a recent case, *prior* counsel had submitted a poorly conceptualized and badly prepared extraordinary ability petition for the alien, a graduate of Harvard University, where she earned a doctorate in biostatistics. That petition was ultimately denied. *New counsel* tried to cure the defects of the extraordinary ability filing by responding to an RFE, but also submitted a *new* self-sponsored immigrant petition for the foreign national, seeking a national interest waiver. The national interest waiver case was denied without an RFE. The denial decision named the wrong petitioner; cited the wrong filing date; referred to the wrong field of endeavor (claiming that the foreign national was a financial analyst, not a statistician); dismissed, as not persuasive, evidence that had *not been submitted* with the national interest case, but rather with the earlier extraordinary ability petition; and dismissed the import of the testimonials provided, claiming they were not supported by “primary, independent evidence.” Upon a motion to reconsider, in which virtually *no new evidence was submitted*, the case was *approved*, moving from denial to approval just because someone took the time to read and understand the submission.
- A microbiologist, with a doctorate in that field, filed an immigrant petition seeking a national interest waiver. She was employed by a world-famous medical center doing important research into the transcription process of the HIV virus. Two years after its submission, the petition was denied without an RFE. The examiner was not persuaded that the alien’s work was national in scope, thought the evidence was diminished by the fact that many of the testimonials were prepared by scientists who knew the alien or had worked with her, and found that the alien’s contributions to her field were not beyond the “capabilities” of her colleagues. Most troubling was the last sentence of the decision:

8 CFR 103.2(b)(8) *Request for evidence* states in pertinent part: If there is evidence of ineligibility is [sic] in the record, an application or petition shall be denied on that basis notwithstanding any lack of required initial evidence.

There was no evidence of *ineligibility* in this record. The examiner may not have been won over by the evidence submitted, but there was nothing in this file that hinted of “ineligibility.” If asked, the petitioner could have clarified the record and submitted more evidence to establish that her work was indeed in the national interest. This case was decided only four months after the May 4, 2004 Memo was issued. The ink was barely dry and already examiners were interpreting its guidance incorrectly, mistaking “not clearly eligible” for “ineligible.”

These are just a sampling of the cases that were erroneously denied without RFEs. Most of these cases should have been approved in the first instance. Instead, our members had to exert substantial efforts to get the results turned around, with re-filings, motions to reconsider, and appeals the order of the day. All of these efforts could have been averted with well-focused RFEs, if not approvals.

## 5. Motions, Appeals, and Re-filed Petitions Are No Alternative

In its supplementary information to the proposed regulation, the CIS offers an alternative to those whose cases are summarily denied without an RFE:

If an applicant or petitioner fails to submit the required initial evidence, and USCIS decides to deny the application or petition rather than issue an RFE, the applicant or petitioner may file a motion to reopen, with fee, as provided under 8 CFR 103.5 or file a new application or petition. The applicant or petitioner may also file an appeal of the denial.<sup>45</sup>

Those “alternatives,” which themselves use up Service resources and delay the outcome of cases, are not even available in many cases, or if available, are of questionable value. Consider these issues:

- Although we can find no authority for it in the law, the regulations, or in CIS policy, the California Service Center insists that if a denial is on appeal, the petitioner may not re-file a new petition, even for a different position.<sup>46</sup>
- There are no appeals possible from denials of applications to extend or change nonimmigrant status, or from denials of many types of adjustment of status applications. Thus, if not successful on a motion, the foreign national has come to the end of the line, and must depart.
- If an H-1B petition is denied, it is questionable whether a successful motion or an appeal will be of any value if the determination comes after the H-1B cap has been reached. The CIS has not clarified whether an approval on a motion or appeal, rendered in a fiscal year after the filing date of the H-1B petition, will act to reserve an H-1B number.<sup>47</sup>
- An I-730 asylee relative petition must be filed within two years of the petitioner’s grant of asylum; there are no appeals from its denial. If a petition is timely filed before the deadline but denied after the two-

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<sup>45</sup> 69 Fed. Reg. at 69,551.

<sup>46</sup> Although not included in the official notes, this position was verbally stated by CSC representatives at the AILA-CSC liaison meeting on October 27, 2004.

<sup>47</sup> The CIS discussion of this question in the Federal Register is less than clear. See, 69 Fed. Reg. 68,154 at 68,156 (Nov. 23, 2004):

“How Will USCIS Process H-1B Petitions That Were Originally Denied But Subsequently Ordered Approved by the Administrative Appeals Officer or by a Federal Court?”

USCIS has considered cases currently on appeal in its determination of cases that could count towards the statutory cap. USCIS will process approved petitions in the order that they were originally filed with USCIS or the former Immigration and Naturalization Service.”

year period, a re-filing will only be permitted for humanitarian reasons. The Nebraska Service Center rarely approves re-filings, and rarely considers motions to reopen. If an RFE were issued on a timely filed petition, rather than a flat-out denial, the petitioner could clarify eligibility without facing the possibility of a re-filing outside the two-year period. A denial without an RFE, on the other hand, would in many cases result in a re-filing barred by the two-year deadline.

- If a concurrently filed I-140 petition and adjustment of status application are denied when immigrant visa number availability in that preference category has retrogressed, a new adjustment application may not be filed, nor may applications for ancillary benefits. Thus, the foreign national whose underlying nonimmigrant status has expired would be without employment authorization or status. Even if eligible to resume a nonimmigrant status, a foreign national may encounter undue delays at consular posts for a visa interview, and may face additional delays for security clearances and technology alert list issues. Those delays may be untenable for U.S. employers, who must have continuity in their operations.
- An adjustment applicant working under an Employment Authorization Card, whose underlying nonimmigrant status has expired during the pendency of his adjustment application, will have no status to remain in the United States once the adjustment application is summarily denied. In that case, many employers will not pursue motions and appeals, knowing that they may take at least a year to be acted upon. And even if they do pursue motions and appeals, during their pendency, the foreign national will not be in status, will not have employment authorization,<sup>48</sup> and the employer will not have the benefit of the foreign national's services.
- Unless the Service changes its policies, as AILA urges,<sup>49</sup> and agrees to consider the time a foreign national spends in the United States pursuing a motion or appeal a period of stay authorized by the Attorney General, many will not be willing to risk accruing unlawful presence while pursuing a lawful remedy. Thus, the alternative of an appeal, too fraught with danger, may not be a viable solution.

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<sup>48</sup> Memorandum, *Procedures for Concurrently Filed Family-based or Employment-based Form I-485 When the Underlying Visa Petition Is Denied*, William R. Yates, File No. HQADN 70/23.1 (Feb. 28, 2003). This memorandum instructs CIS officers to deny adjustment applications and applications for ancillary benefits when the immigrant visa petition is denied. Although there is nothing in the law or regulations to compel that result, and even though the General Counsel of the legacy INS issued an opinion that clearly stated that as long as the I-140 denial might be overturned on appeal, the applications should not be denied unless the appeal is unsuccessful, the Service insists that it will deny the adjustment application and requests for work and travel authorization the moment the I-140 is denied. The General Counsel Opinion No. 91-23, *Determination of Date of Final Decision in Denied Cases*, CO 103.6-C (Feb. 21, 1991), is available at LEXIS, Immigration Library, INS and DOJ Legal Opinions File.

<sup>49</sup> See *infra*, item 16 of this comment.

- While a petitioner or applicant can provide the CIS with additional, new evidence in response to an RFE, the Service does not always permit the submission of new evidence on a motion to reopen if that evidence had been available earlier.<sup>50</sup> If the Service does not accept the new evidence, then the record on the motion will be the same as the record below, and the resulting decision will most likely be the same as the earlier one.
- On the same day it proposed this RFE regulation, the CIS also proposed a rule to more than treble the fee for motions to reopen/reconsider and appeals.<sup>51</sup> This fee increase would put an additional unfair burden on applicants whose filings already may not have received fair and full consideration.

This list is not meant to be exhaustive. It merely points out several instances in which, if an RFE were to be issued to clarify CIS questions about eligibility, dire consequences could be avoided. We do not even include the many issues of uncertainty raised by AC21, the unlawful presence provisions of INA § 212(a)(9), and the open questions that exist concerning admissions on advance parole when an underlying nonimmigrant status has not expired. For example, while a CIS memorandum specifically states that an H-1B nonimmigrant is eligible for extensions of status beyond the normal six-year limitation while an appeal of a labor certification application denial is pending before BALCA,<sup>52</sup> it did not address whether an extension of H-1B status would lie while an appeal of an I-140 petition denial is pending before the AAO. Nor has the CIS clarified what the consequences are if a nonimmigrant, the beneficiary of a still-valid H-1B petition, enters on advance parole and then the concurrently filed I-140 petition and adjustment of status application are summarily denied. Does that person's status revert to H-1B by operation of law, or is he here unlawfully?

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<sup>50</sup> See *e.g.*, 8 C.F.R. § 1003.2(c)(1) (motion to reopen not granted unless material evidence was not available and could not be presented below). We note that the supplementary information to the proposed regulation advises that a petitioner or applicant may file a motion to "reopen," and is silent about a motion to "reconsider." We assume that this was merely an oversight, and point out that there is a distinction between the two motions. *E.g.*, *Matter of Cerna*, 20 I & N Dec. 399 (BIA 1991) (in motion to reconsider, Service places itself back in time and considers the case as though prior decision not entered; in motion to reopen, new previously unavailable evidence is presented so that new decision can be entered).

<sup>51</sup> 69 Fed. Reg. 69546 (November 30, 2004).

<sup>52</sup> Memorandum, *Guidance for Processing H-1B Petitions as Affected by the Twenty-First Century Department of Justice Appropriations Authorization Act (Public Law 107-273): Adjudicator's Field Manual Update AD 03-0,9*, William R. Yates, File No. HQBCIS 70/6.2.8-P (Apr. 24, 2003) *reprinted at* 8 *Bender's Immigr. Bull.* 909 (May 15, 2003).

## 6. Abridgement of Rights Is Not the Solution to Backlogs

In June 2004, the CIS published a *Backlog Elimination Plan*,<sup>53</sup> which leaves no doubt that the CIS is not just backlogged; it's drowning in pending applications and petitions, some 3.7 million backlogged cases in a sea of 6.1 million pending ones. How did the agency explain its plan to deal with this problem?

Under a heading euphemistically titled "Streamlining the Process,"<sup>54</sup> the CIS advised that it is currently in the process of "analyzing and targeting for redesign" what it referred to as "impediments" to faster cycle times.<sup>55</sup> And, what might such an impediment be? Requests for evidence.<sup>56</sup> The report notes that applications that used to experience a 20 to 25 percent RFE rate "have seen rates climb to 40% and sometimes over 50%."<sup>57</sup>

The report posited two possible reasons for the flood of RFEs: Either applicants do not understand eligibility requirements, or "there has been a shift in the way that adjudicators interpret those requirements."<sup>58</sup> Rather than focusing on the latter, and questioning why the CIS is issuing unnecessary RFEs for cases that were quickly approved in the past, the report announced a "campaign" to reduce RFEs, an "effort" that will "streamline processing for another 100,000 cases."<sup>59</sup> In other words, the CIS decided to *deny* cases, rather than ask for evidence of eligibility. This poorly conceived proposed regulation seems to have been crafted in the service of that campaign. We believe the CIS would be better advised to turn its attention from "re-engineering processes" to providing safeguards to maintain due process.

## 7. Zero Sum Game: The Backlog Reduction Plan May Increase the Workload

We are skeptical of the way the CIS measures its backlog, and the way it accounts for efficiency. The CIS Backlog Elimination Plan<sup>60</sup> defines backlog as the number of *pending* cases minus the last six months' receipts, and pending cases are defined as cases received, but not yet adjudicated. To reduce the backlog, then, CIS has to speed up adjudications, and the RFE-less denial is one route to a faster adjudication. Forgetting about our due process concerns for a moment, let's ask another question. Does backlog reduction reduce the workload?

The ultimate impact of increasing the number of denials issued without RFE will be to shift the workload from one part of CIS (the service centers) to another (the

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<sup>53</sup> U.S. Citizenship and Immigration Services Backlog Elimination Plan, Update: June 16, 2004, *available at* <http://uscis.gov/graphics/aboutus/repstudies/backlog.htm>.

<sup>54</sup> *Id.* at 7.

<sup>55</sup> *Id.*

<sup>56</sup> *Id.*

<sup>57</sup> *Id.*

<sup>58</sup> *Id.*

<sup>59</sup> *Id.*

<sup>60</sup> *Supra*, note 53, at 4.

Administrative Appeals Office (AAO)), which itself will become more and more backlogged. We note that although the steady stream of denials without the benefit of an RFE will certainly increase processing times and case backlogs at the AAO, such denials would effectively *decrease* the CIS backlog. Shifting the burden from one part of CIS to another part of the same agency is not a true reduction of the backlog. It is mere cosmetic tinkering with the numbers.<sup>61</sup>

In fact, failure to issue RFEs where there is no clear evidence of ineligibility may result in more work, not less, for the CIS. For meritorious petitions there will certainly be a combination of re-filings, motions to reopen, appeals to the AAO, and actions brought in federal court, some with requests for Equal Access to Justice Act fees.<sup>62</sup> These additional filings, which could be avoided with well directed RFEs, subvert the very goals of the backlog reduction plan by tying up and wasting valuable government resources, increasing processing delays, and creating confusion and resentment in stakeholders whose cases were unfairly denied. Businesses, families and individuals need confidence in a fair and predictable immigration system. If implemented, this proposed regulation will seriously undermine that confidence and damage the integrity of the system.

Moreover, stakeholders may be forced to make a Hobson's choice when a denial is issued: pursue an appeal to the AAO, *or* file a new petition or application, with filing fee.<sup>63</sup> Re-filing a wrongly denied petition may not even be possible: for example, an H-1B or H-2B petitioner whose petition was subject to the cap cannot re-file if filing has been cut off due to the cap. Similarly, a re-filing may not be possible for the I-730 petitioner whose wrongly denied petition and re-filing would fall beyond the two-year filing requirement for such petitions.

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<sup>61</sup> We need only look to the Board of Immigration Appeals' "streamlining" program to see the impact of this kind of workload shifting. Reports abound of a marked increase in appeals to the Courts of Appeals, with a concomitant increase in workload for other components of the Justice Department to answer these appeals, as the number of inadequately explained or unjustly decided cases at the BIA increases. See, e.g., ABA Commission on Immigration Policy, Practice and Pro Bono, "Seeking Meaningful Review: Findings and Recommendations in Response to Dorsey & Whitney Study of Board of Immigration Appeals Procedural Reforms," October 2003, *available at* <http://www.abanet.org/immigration/bia.pdf>.

<sup>62</sup> The Equal Access to Justice Act provides for the award of attorney's fees in certain circumstances in litigation against the United States when an eligible party is the prevailing party before an administrative agency or in federal court. 28 U.S.C. § 2412(d)(1)(A).

<sup>63</sup> See, *supra*, note 46 and accompanying text for a discussion of whether a re-filing is permitted when a case is on appeal. This also assumes that, in an H-1B case, the petitioner is willing to pay again the \$1,500 user fee, the \$185 filing fee, perhaps the \$1,000 premium processing fee, and also the soon-to-be-imposed \$500 fraud fee.

## 8. “Lies, Damned Lies, and Statistics”<sup>64</sup>

We are skeptical of the CIS claim that, during the third quarter of 2004 as compared to the second quarter of 2004, both the RFE rate and the denial rate decreased.<sup>65</sup> In its third quarter report, the CIS made the assertion that “[t]his data demonstrates that the processing change did not adversely [sic] denial rates as some stakeholders had anticipated.”<sup>66</sup>

First, the data for one fiscal quarter for only three application/petition types is not necessarily representative of all types of applications and petitions for an entire year. We would like to see the results of a comparison between the periods May 2003 to May 2004, and May 2004 to May 2005 for a wider array of applications and petitions, when they become available. Second, the data does not tell us if the RFE rate decreased because cases that should have been approved without the issuance of a needless RFE were approved. Third, the data does not tell us if the denial rate decreased because the approval rate increased due to fewer needless RFEs. Fourth, we are aware that the service centers have long struggled with the question of how to measure denial rates. No information is provided as to what is being compared to what. Finally, because an RFE has a 12-week response time, some cases in which an RFE was issued in the second quarter were not decided until the third quarter. Therefore, we have no way of knowing whether the RFE rate in the third quarter was statistically related to the denial rates in the second and third quarter.

As a famous American statesman once observed, “Statistics are no substitute for judgment.”<sup>67</sup> With that in mind, we urge the CIS to back off from this ill-conceived attempt to sacrifice meaningful adjudications, and recognize that this proposed regulation threatens due process, confidence in a fair system, adjudicatory consistency, and the overall integrity of the system.

## 9. Preponderance of the Evidence

The preponderance of the evidence standard in civil proceedings is firmly rooted in our legal system,<sup>68</sup> and we commend the CIS for underscoring its place in immigration

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<sup>64</sup> Benjamin Disraeli.

<sup>65</sup> U.S. Citizenship and Immigration Services Backlog Elimination Plan, Fiscal Year 2004, 3<sup>rd</sup> Quarter Update: Nov. 5, 2004 at 2, *available at* [http://uscis.gov/graphics/aboutus/repstudies/BEPQ3v2\\_1.pdf](http://uscis.gov/graphics/aboutus/repstudies/BEPQ3v2_1.pdf). The report claims that the RFE rate decreased on forms I-485, I-140, and I-129, and that the denial rate also decreased for forms I-485 and I-140. For the I-129, the denial rate was unchanged.

<sup>66</sup> *Id.*

<sup>67</sup> This remark is attributed to Henry Clay.

<sup>68</sup> *Matter of E-M*, 20 I. & N. Dec. 77, 83 (BIA 1989) (preponderance of evidence is “rock bottom at the fact finding level of civil litigation,” *citing*, *Charlton v. FTC*, 543 F.2d 903, 907 (D.C.Cir.1976)). The Administrative Procedure Act and decisions under that Act define the burden of persuasion as a preponderance of the evidence. 5 U.S.C. § 556(d); *Steadman v. SEC*, 430 U.S. 91 (1981). Thus, although the CIS incorporates the preponderance standard in the proposed regulation, we remind the Service that this

adjudications by specifically enunciating it in the proposed regulation. We certainly agree with this element of the proposed regulation, which commands adjudicators to approve an application or petition if the standard—which demands 51 percent certainty that a fact is proven—is met.<sup>69</sup> However, if the quality of the evidence does not convince an examiner that the 51 percent standard has been met, doubts should be resolved by requesting clarifying evidence, thereby affording the applicant or petitioner the opportunity to explain and document eligibility. The preponderance standard, after all, unlike other standards of proof such as reasonable doubt or clear and convincing evidence, is one in which both parties “share the risk of error in roughly equal fashion.”<sup>70</sup> As written, the proposed regulation shifts a disproportionate amount of the risk to petitioners and applicants, thereby subverting the preponderance standard.

We are also concerned about the way the preponderance standard will be applied in a two-party system, in which the CIS is both the opponent of the evidence, and its judge. What we mean by this is that the preponderance standard is normally applied when there are three parties to an action: the proponent of the evidence; the opponent; and a disinterested third party serving as judge or jury. It is that third party who traditionally weighs the evidence and determines whether or not the party who bears the burden of proof has met its burden by 51 percent.

However, in cases submitted to CIS, there are only two parties, the petitioner or applicant, and the Service. The same party who may be the opponent, the CIS, is also the judge. For that reason alone, fundamental fairness compels the continued issuance of RFEs in all cases, except those in which there is clear evidence of ineligibility. In that way, petitioners and applicants will be able to understand what the CIS considers to be deficiencies in their submissions, and have an opportunity to respond. The CIS, the party in opposition, so to speak, must explain its doubts about the evidence so that the proponent can sustain its burden. To have the opponent of the evidence also serve as the judge or jury, with no obligation to explain its doubts about a case, can render the preponderance standard meaningless.

The problem is further compounded when the proposed regulation adds that a case may be denied without RFE or NOID “(i)f the evidence submitted does not **fully establish** eligibility.”<sup>71</sup> Conflating the preponderance standard with a “full eligibility” standard merges two irreconcilable concepts, *unless it is clear that a preponderance of the evidence does, indeed, establish full eligibility*. The regulation would be more

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standard is a part of civil proceedings by operation of law, and its specific inclusion in the proposed regulation adds no protection that is not already in place.

<sup>69</sup> Matter of Soo Hoo, 11 I&N Dec. 151 (BIA 1965); Ethyl Corp. v. EPA, 541 F.2d 1 (D.C. Cir. 1976) (approval “demands only 51% certainty.”); *see also*, National Lime Ass’n v. EPA, 627 F.2d 416 (D.C. Cir. 1980); In re M-B-A- 23 I. & N. Dec. 474, 484 (BIA 2002) (preponderance “requires evidence of a greater than 50% chance that an event will occur,” citing INS v. Cardoza-Fonseca, 480 U.S. 421, 431 (1987)).

<sup>70</sup> Metropolitan Stevedore Co. v. Rambo, 521 U.S. 121, 137 (1997) (*quoting* Herman & MacLean v. Huddleston 459 U.S. 375, 390 (1983)).

<sup>71</sup> § 103.2(b)(8)(ii) (proposed rule) (emphasis added).

acceptable if the language were changed to delete the “fully establish eligibility” language, and if language were added to state that the only cases that may be denied without an RFE are ones in which there is *clear evidence of ineligibility*.

Finally, the regulation must contain a clear explanation of the preponderance standard and an admonition that any doubts must result in the issuance of an RFE rather than a denial. The Board of Immigration Appeals (BIA) notes the preponderance standard is not actually explained in the law or regulations but the proposed regulation can correct that shortcoming. The proposed regulation should include the BIA’s ultimate conclusion that “when something is to be established by a preponderance of the evidence it is sufficient that the proof only establish that it is probably true.”<sup>72</sup>

### **10. The Proposed Rule Contravenes the Premium Processing Regulations**

The regulations that govern premium processing<sup>73</sup> do not contemplate a denial of a petition without the issuance of an RFE. The supplementary information to the premium processing rule states that if an applicant or a petitioner pays for the premium processing service, the CIS will issue “an approval notice, notice of intent to deny, request for evidence, or notice of an investigation for fraud or misrepresentation within 15 days.”<sup>74</sup> If the notice or request is not issued on time, the fee will be refunded.<sup>75</sup> The actual regulation codifies this:

The Service will refund the fee for Premium Processing Service, but continue to process the case, unless within 15 calendar days of receiving the application or petition and Form I-907, issues and serves on the petitioner or applicant an approval notice, a notice of intent to deny, a request for evidence, or opens an investigation relating to the application or petition for fraud or misrepresentation.<sup>76</sup>

Since the premium processing regulation demands the issuance of an approval, an RFE, or a NOID, the proposed regulation could not have application in the premium processing realm. That would lead to a rather bizarre result: If you pay \$1,000, you’re guaranteed another opportunity to persuade the CIS of eligibility for a benefit. If you don’t, you may find yourself howling for redress at the AAO.

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<sup>72</sup> Matter of E-M- 20 I. & N. Dec. 77, 79-80. (BIA 1989) (citations omitted).

<sup>73</sup> 8 C.F.R. § 103(2)(f).

<sup>74</sup> 66 Fed. Reg. 29,682 (June 1, 2001).

<sup>75</sup> *Id.*

<sup>76</sup> 8 C.F.R. § 103.2(f). Despite the clear language of the regulation, AILA is aware of a number of cases filed with premium processing units in which a petition was denied without the issuance of an RFE, and without a return of the \$1,000 filing fee.

## **11. CIS Guidelines on the Time to Respond to an RFE**

It is not at all clear to us, nor we fear to the CIS, how exactly the timelines for responding to RFEs will be determined, if the proposed rule is implemented. We only know that the regulation would eliminate the fixed, predictable, reasonable opportunity to respond within 12 weeks. In the proposed system, the response time would “generally” be at least 30 days, but not necessarily. For the reasons stated below, the existing response times to RFEs should remain unaltered, and the response time to a NOID should be increased to 60 days. In addition, there should be a provision allowing for extending the 12-week response time if good cause is shown by an applicant or petitioner.

If it is proposed that the CIS examiner would evaluate each petition on a case-by-case basis to determine the appropriate RFE response time, it is not clear how this assists in “streamlining” or reducing the overall processing of the case. Applying the stated factors<sup>77</sup> to make an appropriate evaluation for each case would require a substantial amount of thought and time on the part of CIS examiners.

For example, CIS examiners might need to refer to the State Department’s Foreign Affairs Manual to determine the general availability of requested documents; research conditions in the country from which the document is sought to evaluate how long it will take to obtain a document; anticipate the end of the year or August vacations of company personnel authorized to sign immigration documents; assess a company’s ability to secure requested company documents, such as audited financial statements; or evaluate whether an applicant denied a benefit will immediately accrue unlawful presence, or has other immigration options as alternatives upon denial. All of these individualized determinations—were they actually to be made—would require substantial time and thought, and could be expected to result in an uneven playing field as individual CIS examiners apply their own subjective standards to cases before them.

In our experience, the CIS is simply not equipped to accurately predict how long it typically takes to provide the documentation requested in its RFEs and to prepare a response to the issues raised. Government estimates of how long it takes to prepare applications are notoriously inaccurate and unrealistic. For example, the instructions to an asylum application (Form I-589) state that the average time to prepare an asylum application is 12 hours. In a previous version of this form, the time estimate was even shorter. Given the current burden of proof on an asylum applicant, preparing an approvable application for asylum takes, at a minimum, 20 hours and usually far longer, even for a straightforward application prepared by an experienced attorney.

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<sup>77</sup> Those factors include an evaluation of the type of evidence needed for adjudication, depending on the nature of the application or petition involved; the source and availability of documentation, both foreign and domestic; the effect of a denial on the applicant, petitioner or beneficiary, which would require weighing the impact of loss of a long-held priority date, loss of valid status, loss of interim benefits; the delivery mechanisms used, and other factors. 69 Fed. Reg. at 69,550 (supplementary information).

Similarly, the Board of Immigration Appeals form for filing a Notice of Appeal has an estimated preparation time of 30 minutes. In order to avoid summary dismissal, the Notice of Appeal must state with specificity the factual and legal basis for the appeal, citing appropriate law. It is a rare case indeed that would take only the estimated 30 minutes. The CIS simply should not put itself in a position to make subjective evaluations without all of the facts, information, and experience.

Indeed, we have already seen examples of unrealistic timeframes given for RFE responses. Several district offices, either unaware of existing regulations or mistakenly believing that this proposed rule already is in effect, have recently issued RFEs allowing only 30, or in one case 15, days to respond to requests for extensive or hard-to-obtain documentation. Efficiency and streamlining will be better served with one fixed, reasonable, and predictable response time of 12 weeks.

Finally, we would like to point out that when evidence is available, most parties do not wait 12 weeks before submitting it. Applicants and petitioners are eager to obtain the immigration benefits they seek, and in our experience, respond to RFEs the moment they have amassed the evidence requested. We also remind the CIS that if its adjudicators were better trained to issue RFEs that were well-directed, instead of the RFEs that resemble discovery requests in civil litigation, petitioners and applicants would be able to respond more expeditiously.

Therefore, in response to the CIS request that we provide it with “suggestions on actual timeframes that should be adopted based on either the application or petition being filed,”<sup>78</sup> our answer is: 12 weeks.

## **12. It’s the Fact of the RFE, Not the Timing**

What is most troubling about this proposed regulation is that it leaves the question of whether an RFE will issue at all completely within the discretion of adjudicators. While the CIS would fashion a test that would balance any number of factors in determining the amount of time permitted to respond to an RFE, no such test was fashioned to explain when, or if, an RFE would issue in the first place. Instead, it simply reserves for itself “greater flexibility”<sup>79</sup> in deciding cases based on the information received. We posit that the reason the CIS did not enumerate the factors it would consider in determining if an RFE would issue is that no such test is possible. The CIS recognizes that decisions would have to be made on a case-by-case basis, with individual examiners imposing whatever opinion—or point of view—they form about a case. In other words, the CIS would substitute the rule of law that now exists with a rule of whim.

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<sup>78</sup> 69 Fed. Reg. at 69,551 (supplementary information).

<sup>79</sup> 69 Fed. Reg. 69,550 (supplementary information).

Consider this example. In the summer of 2004, the CIS announced that as of July 15, 2004, it will adjudicate I-130 petitions only as visa numbers become available.<sup>80</sup> Depending on the preference category, petitions will now pend anywhere between four and 14 years before they are adjudicated. And while the CIS claims that it will factor in long-held priority dates in determining how much time it will allow for responding to an RFE, it does not even pretend that the same factor will guide it in issuing the RFE in the first place. Under this proposed rule, a petitioner and beneficiary who have waited 14 years for the Service to review the filing can't even be assured that they'll be given the opportunity to respond to a perceived deficiency in the submission. The result? The loss of a 14-year-old priority date.

### **13. Shifting the Burden: Backlogs and RFE Response Time**

The CIS has mistakenly attributed its backlog not to its own inability to process applications and petitions expeditiously, but instead to the 12-week outside limit given to respond to RFEs. Properly used, the RFE is an important investigatory tool for the Service. To appropriately balance its investigatory role with customer service, it is critical that the Service provide petitioners with a full opportunity to obtain the information an RFE requests.

Furthermore, the provision of a fair and reasonable response period, such as the 12 weeks currently in place, does not have a significant impact on processing times. A review of processing times for the four service centers shows that on average, an employment-based application for permanent residence pends for well over two years. For instance, throughout 2004, processing times among the four centers averaged between 24 and 27 months. A 12-week response period does not create a significant processing impact on applications that routinely remain on the shelf awaiting initial review for an average of 104 to 116 weeks.

Let's take another example. The January 2005 processing report of the Vermont Service Center states that it is now processing I-140 petitions for extraordinary ability cases filed in December 2002; outstanding researcher and professor petitions filed in June 2003; advanced degree or exceptional ability cases filed in January 2003. In January 1998, the Vermont Service Center was taking only 30 to 60 days to adjudicate I-140 petitions. That's a difference between as little as 30 days and more than two years. Are we, then, to believe that these delays are due to a maximum 84-day response time to an RFE? It rather strains credibility.

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<sup>80</sup> USCIS Public Notice, "Notice of All Customers with a Pending I-130 Petition", July 15, 2004, *available at* [http://uscis.gov/graphics/publicaffairs/newsrels/I\\_130\\_07\\_01\\_04.pdf](http://uscis.gov/graphics/publicaffairs/newsrels/I_130_07_01_04.pdf).

#### **14. The Complex Standards Applied to Petitions for the Extraordinary, the Outstanding, the Exceptional, and Those Seeking National Interest Waivers Are Too Subjective to Be Denied Without an RFE**

When it enacted IMMACT 90,<sup>81</sup> Congress created several employment-based immigrant visa petition categories requiring subtle, attentive, and arguably subjective review and analysis by service adjudicators, far more so than those associated with the generally cut and dry labor certification based I-140 petitions. Realizing that foreign nationals of outstanding achievements and abilities add untold riches to our society, Congress permitted them to gain permanent residence without having to go through the labor certification process. Yet, this proposed regulation would have a disproportionately adverse impact on the very elite sub-universe of the employment-based population who stand most to benefit the United States.

IMMACT 90 added three novel bases for employment-based immigration, each contingent upon a statutorily mandated qualitative predicate; extraordinary ability (EB1-1), outstanding ability (EB1-2); and exceptional ability for some applicants seeking job offer waivers under the national interest waiver provisions (EB-2). In addition to the perplexing array of overlapping categories created by IMMACT 90, examiners are still confronted with the second kind of exceptional ability category, the Department of Labor's Schedule A Group II. Finally, *New York State Department of Transportation's*<sup>82</sup> designation as a precedent decision applicable to the review of all national interest waiver petitions (except for the special category created for some physicians) has significantly increased the burden of judicious adjudication on beleaguered immigration examiners.

The legacy INS understood that the subtle complexities in, and merely apparent similarities among, the statutory mechanisms introduced in 1990, not to mention the juxtaposition of these novel mechanisms with Schedule A precertification, might require an expertise in adjudicators not found at the district office level. To deal with that problem, it eliminated concurrent filing (then done at the district office), and as part of its initial implementation of IMMACT 90, it mandated the filing of employment-based petitions at the four service centers.<sup>83</sup>

Yet, despite the transfer of these cases to the service centers, the Congressionally enacted distinctions among the extraordinary, the outstanding, and the exceptional have met with misapplication and confusion among adjudicators, engendering federal court and AAO decisions admonishing the legacy INS to refrain from applying the distinctly

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<sup>81</sup> *Supra* note 14.

<sup>82</sup> 22 I & N Dec. 215 (Assoc. Comm. 1998)

<sup>83</sup> See 56 Fed.Reg. 60,897 (Nov. 29, 1991) (supplemental information), implementing 8 C.F.R. § 204.5(b).

higher extraordinary ability standard to national interest waiver petitions, particularly those submitted by advanced degree professionals.<sup>84</sup>

Particularly because adjudicators frequently misapply and misunderstand the evidentiary standards for EB-1 and EB-2 cases, and especially because unlike all other categories, there is not even a list of initial evidence that must be submitted for national interest waiver cases, these cases should never be denied without the issuance of RFEs. This is all the more true because many EB-1 and EB-2 beneficiaries, particularly those who are research scholars at universities, often attempt *pro se* filing of these petitions.

Additionally, the opportunity to respond to RFEs is critical in cases where Service officers seek to discredit otherwise probative and relevant testimony as biased because it comes from mentors, research collaborators, or former professors. Finally, the inappropriateness of RFE-less denial in the advanced degree professional national interest waiver context is reinforced by the Service's recent RFE-less denials of several national interest waiver petitions. In several cases that we know of, these denials were reversed by the submission of motions for reconsideration, adding no new evidence, but rebutting inappropriate Service rejection of unbiased and relevant evidence previously submitted. This additional burden of a motion for reconsideration should not have been necessary.

Ultimately, unless there is clear evidence of ineligibility, no statutorily appropriate petition under these four qualitative evaluative review categories should ever be denied without a RFE.

## **15. Adjustment of Status for Certain Physicians**

The proposed regulation would remove 8 C.F.R. § 245.18(i). That provision concerns adjustment applications filed by physicians who qualify for immigrant status under the national interest waiver provisions of INA § 203(b)(2)(B)(ii) by working in a medically underserved area or a Veterans Affairs medical facility for five years. Paragraph (g) of § 245.18 requires the physician to submit documentation of compliance with the service requirement two years after approval of the I-140 petition, while paragraph (h) requires submission of documentation upon completion of five years of service. Paragraph (f) requires CIS to provide the physician with notice of the requirements of paragraphs (g) and (h). Paragraph (i) currently requires the CIS to issue a NOID to a physician who does not “comply with the requirements of paragraphs (f) and (g).”<sup>85</sup>

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<sup>84</sup> See, e.g., *Mnayer v. INS*, No. 94-263-CIV-Marcus, 1995 U.S. Dist. LEXIS 21932 (S.D. Fla. June 20, 1995) (court reversed INS denial of national interest waiver petition; chastised agency for applying extraordinary abilities test to national interest waiver case).

<sup>85</sup> It appears that paragraph (i) incorrectly refers to “paragraphs (f) and (g).” Paragraph (f) places no requirements on the physician, but sets forth requirements for the CIS to provide notice to the physician of the two-year and five-year documentary submission requirements. Presumably, paragraph (i) should refer to the requirements of paragraphs (g) and (h).

If 8 C.F.R. § 245.18(i) were removed, the CIS could simply revoke approval of the I-140 petition without notice or warning, and similarly deny the adjustment application for the physician and any dependent family members. It could do this even if the physician had in fact complied with the filing deadlines, but the CIS had no record of the submissions. Moreover, it is our experience that even though the CIS is required under paragraph (f) to provide the physician with a notice of the filing requirements, it frequently fails to do so.

National interest waiver physicians, by definition, are busy working at least 40 hours a week in medically underserved areas or at VA facilities. Their failure to make the requisite progress report filings are certainly unintentional, since they gain nothing by delay, and it is supremely in their interest to comply and obtain permanent resident status. The issuance of a NOID, with just a 30-day response time, is the only way to avert petition revocation and loss of status to them and their family members. It would also prevent the tremendous hardship for the medical facility and the many patients who may otherwise go untreated, were these physicians left without status. This is particularly so if the denial occurs at the two-year anniversary, when the physician well may be in the middle of a five-year service commitment.

Moreover, the physician in fact may have made the required filing, but the service center may deny the adjustment application if it fails to match up the physician's filing to the correct adjustment file. This type of error is not uncommon at the service centers, where backlogs in the mailroom unfortunately are often the norm.

When the legacy INS issued the interim national interest waiver regulations for physicians on September 6, 2000,<sup>86</sup> with an opportunity for comment, AILA urged the Service to abandon the double compliance system, which required submission of these progress reports under tight filing deadlines. The imposition of a rule that required the physician to complete his five year service obligation within six years was *ultra vires* in the first place, and the creation of the dual compliance system to monitor progress toward fulfilling that questionable obligation was unwieldy, at best. In its comments to the interim regulation, AILA warned:

Given the long backlogs which prevail at INS service centers and the agency's concerns about "unfounded mandates," [sic] it is somewhat ironic that the INS would impose what is, in essence, an unfounded [sic] mandate on itself by regulation when there is no indication that Congress intended that the agency do so.<sup>87</sup>

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<sup>86</sup> 65 Fed. Reg. 53,889-96 (Sept. 6, 2000).

<sup>87</sup> AILA Comments to the Interim Rule Implementing the §203(b)(2)(B)(ii) Provisions of the Immigration and Nationality Act as Relating to Immigrant Visa Petitions Filed under the Job Offer Waiver/National Interest Waiver Provisions for Alien Physicians, November 6, 2000, p. 23

We believe that the dual compliance system should be abolished. But absent that, the current provision at 8 C.F.R. § 245.18(i), requiring that CIS issue a NOID, must remain in place. It protects the interests of the public, the medical facilities, the health professional shortage areas, the patients, and the physicians. It also ensures that physicians who in fact have completed or are completing the lengthy five-year service commitment are granted permanent resident status without interruption of their work authorization or status. Otherwise, a physician who, by definition, has just spent five years advancing the national interest of our country may be summarily shut out from reaping the immigration benefits of his work.

## **16. Unlawful Presence Should Not Apply to Appeals**

As stated above, an immigration petition or application should not be denied without first issuing an RFE. Assuming the CIS does deny a petition or application, however, the time an appeal is pending should be deemed a period of stay authorized by the Attorney General for purposes of INA § 212(a)(9)(B).

The immigration agency already recognizes that unlawful presence does not apply in a number of areas not explicitly mentioned by the statute.<sup>88</sup> For example, noncitizens with properly filed adjustment of status applications under INA § 245 are considered to be lawfully present. According to a 2002 INS memo, lawful presence continues if the adjustment application is denied and renewed in proceedings before an immigration judge, through review by the BIA.<sup>89</sup>

The statute itself tolls unlawful presence for up to 120 days, pending a timely “nonfrivolous” application for change or extension of status, providing the applicants were not employed without authorization.<sup>90</sup> The immigration agency has decided to extend that statutory provision to include the entire time a change or extension of status application is pending, even if the agency takes more than 120 days to decide the application.<sup>91</sup>

Similarly, the agency should interpret “a period of stay authorized by the Attorney General” to include the time an appeal is filed and pending after a denial. The agency does this in other analogous areas, such as appeals of certain denied adjustment applications. As a matter of fairness and due process the agency should also interpret lawful presence to continue for appeals taken after an application is denied. As stated

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<sup>88</sup> Memorandum, *Unlawful Presence*, Johnny N. Williams, File No. HQADN 70/21.1.24-P (June 12, 2002), available at <http://www.aila.org/infonet> (Doc. No. 02062040). See generally 5 Charles Gordon, Stanley Mailman & Stephen Yale-Loehr, *Immigration Law and Procedure* § 63.10[2] (2004).

<sup>89</sup> Memorandum, *Unlawful Presence*, Johnny N. Williams, File No. HQADN 70/21.1.24-P (June 12, 2002), available at <http://www.aila.org/infonet> (Doc. No. 02062040).

<sup>90</sup> INA § 212(a)(9)(B)(iv), 8 U.S.C. § 1182(a)(9)(B)(iv).

<sup>91</sup> Memorandum, Michael Pearson, File No. HQADN70/21.1.24-P (Mar. 3, 2000) (amending INS Adjudications Field Manual § 30.1(d)), reprinted in 77 *Interpreter Releases* 316 (Mar. 13, 2000), 5 *Bender's Immigr. Bull.* 286 (Mar. 15, 2000).

earlier in this comment, many times a petition is denied not because of clear ineligibility, but because the CIS overlooked some important facts already in the record or because of an incorrect legal interpretation. See the cases noted in item 4 of this comment. A person should not be forced to suffer twice by the CIS's mistake: once for an erroneous denial, and again for incurring unlawful presence while pursuing an appeal.

## 17. Submitting Original Documents

Rather strangely, in a section of the proposed regulation titled "Submitting *copies* of documents,"<sup>92</sup> the proposed rule addresses the submission of *original* documents. While it has long been a part of Service regulations to require the submission of originals of certain documents, *e.g.*, IAP-66 (now the DS-2019), results of medical examinations, and labor certifications, the proposed regulation is too broad—and too vague—when it demands the submission of originals of "other statements."<sup>93</sup> Particularly since the CIS is reserving for itself the authority to deny petitions and applications without the issuance of an RFE, the Service could simply deny a petition or application for failure of the proponent to submit the original of a nondefined "other" document.

If RFEs were to continue to issue as a matter of course in appropriate cases, there would be some assurance that if a copy of an "other statement" were submitted, rather than the original, the proponent would be given the opportunity to submit the original. But under the rules the CIS is now proposing, the failure to submit an undefined "other statement" could result in an outright denial. Therefore, we strongly urge the CIS either to eliminate the "other statement" language, or to provide an all-inclusive list of documents that must be submitted in the original.

## 18. Elimination of NOIDs

Although the reasons are not explained in the supplementary information section of the proposed rulemaking, the amendments themselves eliminate many regulations that compel the issuance of NOIDs.<sup>94</sup> NOIDs are currently required by regulation when an adverse decision is proposed on the basis of evidence not submitted by the applicant/petitioner. This is an extremely important process to allow the benefit seeker the opportunity to know and address otherwise unknown adverse information on which a decision is to be made. To have the applicant or petitioner first learn of this information in a denial will only serve to further slow the application process, and will rob the applicant or petitioner of due process. The NOID process must be kept in place to retain any integrity in the process itself.

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<sup>92</sup> 69 Fed. Reg. at 69,552 (proposed 8 CFR § 103.2(b)(4)) (emphasis added).

<sup>93</sup> *Id.*

<sup>94</sup> *See, e.g.*, 69 Fed. Reg. at 69,554, amendments to section 214.2.

## **19. Failure to Appear for Fingerprinting or Interview**

The proposal that “if an individual requested to appear for fingerprinting or an interview does not appear and USCIS has not received either a request for rescheduling by the date of the fingerprinting appointment or interview, or a withdrawal of the application or petition, the application or petition shall be considered abandoned and denied accordingly”<sup>95</sup> unfairly shifts to the applicant the burden of overcoming the numerous problems with the CIS’ appointment and fingerprinting systems.

Even absent the many problems, discussed below, with the CIS’ scheduling systems, this is an unduly harsh consequence for the many misunderstandings and miscommunications that occur in the course of pursuing an application. Too often, notices are lost in the mail, an address change is not recorded in the CIS files, or the person is simply out of town at the time the notice is received. To deny an application that has been pending many years without the opportunity to correct the problem is nothing short of outrageous.

To compound the problem, the CIS’ scheduling system is faltering badly in many jurisdictions, with the result that scheduling or rescheduling of appointments is not even available. In many places, Application Support Center (ASC) appointments are unavailable, and there is no means by which to record even an effort to request scheduling or rescheduling. Similarly, the advent of the Infopass system for appointments at district offices has had the same result—appointments are completely unavailable in many districts, with no means of recording an effort to schedule or reschedule an appointment.

A “fix” for these problems does not seem near. Implementing a regulation that would punish applicants, whose applications often have been pending for years, by denying their applications for being unable to schedule or reschedule an appointment, is the height of injustice and must be deleted from the regulation.

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<sup>95</sup> 69 Fed. Reg. at 69,553 (proposed 8 CFR § 103.2(b)(13)(ii)).

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**Conclusion**

We urge the CIS to revisit these proposals in light of these comments.

Sincerely,

AMERICAN IMMIGRATION LAWYERS ASSOCIATION