

List of Subjects in 5 CFR Part 890

Administrative practice and procedure, Government employees, Health facilities, Health insurance, Health professionals, Hostages, Iraq, Kuwait, Lebanon, Military personnel, Reporting and recordkeeping requirements, Retirement.

Office of Personnel Management.

Linda M. Springer,
Director.

■ For the reasons set forth in the preamble, OPM is amending 5 CFR part 890 as follows:

PART 890—FEDERAL EMPLOYEES HEALTH BENEFITS PROGRAM

■ 1. The authority citation for part 890 continues to read as follows:

Authority: 5 U.S.C. 8913; § 890.803 also issued under 50 U.S.C. 403p, 22 U.S.C. 4069c and 4069c-1; subpart L also issued under sec. 599C of Pub. L. 101-513, 104 Stat. 2064, as amended; § 890.102 also issued under sections 11202(f), 11232(e), 11246 (b) and (c) of Pub. L. 105-33, 111 Stat. 251; and section 721 of Pub. L. 105-261, 112 Stat. 2061, unless otherwise noted.

■ 2. Section 890.108 is revised to read as follows:

§ 890.108 Will OPM waive requirements for continued coverage during retirement?

(a) Under 5 U.S.C. 8905(b), OPM may waive the eligibility requirements for health benefits coverage as an annuitant for an individual when, in its sole discretion, it determines that due to exceptional circumstances it would be against equity and good conscience not to allow a person to be enrolled in the FEHB Program as an annuitant.

(b) The individual's failure to satisfy the eligibility requirements must be due to exceptional circumstances. An individual requesting a waiver must provide OPM with evidence that:

(1) The individual intended to have FEHB coverage as an annuitant (retiree);

(2) The circumstances that prevented the individual from meeting the requirements of 5 U.S.C. 8905(b) were beyond the individual's control; and

(3) The individual acted reasonably to protect his or her right to continue coverage into retirement.

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DEPARTMENT OF HOMELAND SECURITY**8 CFR Parts 103, 204, 214, 245, 245a**

[CIS No. 2287-03]

RIN 1615-AB13

Removal of the Standardized Request for Evidence Processing Timeframe

AGENCY: U.S. Citizenship and Immigration Services, DHS.

ACTION: Final rule.

SUMMARY: This rule amends Department of Homeland Security regulations to provide flexibility to U.S. Citizenship and Immigration Services in setting the time allowed to applicants and petitioners to respond to a Request for Evidence or to a Notice of Intent to Deny. This rule also describes the circumstances under which U.S. Citizenship and Immigration Services will issue a Request for Evidence or Notice of Intent to Deny before denying an application or petition, but United States Citizenship and Immigration Services will continue generally to provide petitioners and applicants with the opportunity to review and rebut derogatory information of which he or she is unaware. This rule also clarifies when petitioners and applicants may submit copies of documents in lieu of originals.

In addition to these changes, this rule removes obsolete references to legacy agencies, and it removes obsolete language relating to certain legalization and agricultural worker programs.

DATES: This final rule is effective June 18, 2007.

FOR FURTHER INFORMATION CONTACT: Rodger Pitcairn, Program and Regulations Development, U.S. Citizenship and Immigration Services, Department of Homeland Security, 111 Massachusetts Avenue, NW., Suite 3000, Washington, DC 20529, telephone (202) 272-8427.

SUPPLEMENTARY INFORMATION:**I. Background****II. Comments Received in Response to the Proposed Rule**

- A. Standards and Timeframes for RFE and NOID Responses
- B. Not Issuing at Least One RFE; Making Decisions on the Record
- C. Uniform Application of the "Preponderance of Evidence" Standard
- D. Relationship to Premium Processing Regulations
- E. Substitution of Form DS-2019; Submitting Copies
- F. Application of the Rule
- G. Use of the Term "Biometrics Capture"
- H. Technical Correction to Final Rule

III. Statutory and Regulatory Reviews**I. Background**

An applicant or petitioner seeking immigration benefits from U.S. Citizenship and Immigration Services (USCIS) must establish eligibility for such benefits. 8 CFR 103.2(b)(1). A Request for Evidence (RFE) is a notice issued by USCIS to an applicant or petitioner seeking immigration benefits requesting initial or additional evidence to establish eligibility. *Id.*, 103.2(b)(8). Currently, USCIS must issue an RFE when evidence is missing from an application or petition. *Id.* In addition, USCIS must provide twelve weeks for an applicant or petitioner to respond to an RFE. *Id.*

A Notice of Intent to Deny (NOID) is a written notice issued by USCIS to an applicant or petitioner that USCIS has made a preliminary decision to deny the application or petition. A NOID may be based on evidence of ineligibility or on derogatory information known to USCIS, but not known to the petitioner or applicant. USCIS cannot, however, issue a NOID based on missing initial evidence if an RFE has not first been issued. The NOID provides the applicant or petitioner with an opportunity to inspect and rebut the evidence forming the basis of the decision to deny the petition or application. An applicant or petitioner usually is provided thirty days to respond to the evidence.

On November 30, 2004, USCIS published a proposed rule to remove absolute requirements for, and fixed times to respond to, RFEs and NOIDs. 69 FR 69549. USCIS received thirteen comments from individuals, community-based groups that assist nonimmigrants and immigrants pursue applicants for benefits, law firms, and a national association representing immigration attorneys. This final rule adopts the proposed rule with minor changes as discussed below.

II. Comments Received in Response to the Proposed Rule

This final rule addresses requirements that are procedural in nature and does not alter the substantive rights of applicants or petitioners for immigration benefits. This final rule, therefore, is exempt from notice and comment requirements under 5 U.S.C. 553(b)(A), and could have been promulgated without public notice and comment. USCIS' decision to promulgate a proposed rule does not alter the authority to promulgate this rule as a final rule. For example, the proposed rule contained a presumptive thirty-day minimum time frame for responses, but, after considering the

comments and the further development of the program, this final rule does not include a specific presumptive minimum time frame for responses. See *Hurson Assoc. Inc., v. Glickman*, 229 F.3d 277 (D.C. Cir. 2000) (rule eliminating face-to-face process in agency review of requests for approval was procedural and not subject to notice-and-comment rulemaking); *JEM Broadcasting v. FCC*, 22 F.3d 320 (D.C. Cir. 1994) (challenge to the "hard look" rules is untimely; elimination of opportunity to correct errors in application was procedural rule not subject to notice and comment); see also *Public Citizen v. Department of State*, 276 F.3d 634 (D.C. Cir. 2002) (cut-off policy was procedural and exempt from notice and comment provisions). USCIS, however, values public comment on the proposed timeframes for RFEs and NOIDs and accordingly solicited public comment on the proposed rule. The comments provided to USCIS have been valuable in considering the changes promulgated in this final rule and are discussed below.

A. Standards and Timeframes for RFE and NOID Responses

In the proposed rule, USCIS suggested eliminating the current twelve-week standard timeframe for all applicants and petitioners to respond to an RFE in favor of a more flexible approach that would tailor the timeframes to the evidence requested and circumstances. The proposed rule would have set a new minimum response window of "generally no less than 30-day[s]." The proposed rule would have made similar changes for responding to the NOID. USCIS asked for comments on specific timeframes for various kinds of applications and petitions and evidence.

No commenters suggested specific timeframes for each circumstance and case type, but two commenters suggested expanding the current twelve-week standard to give applicants and petitioners sixteen weeks to respond for cases involving asylum claimants and refugees. Another commenter suggested a general sixty-day timeframe for NOIDs. USCIS did not propose to extend the current twelve-week maximum, and will not do so in its final rule. The flexible timeframes will apply to all applicants and petitioners to whom RFEs are issued.

Several commenters focused on the proposed shift from a twelve-week standard for responding to all RFEs to flexible timeframes. Five pointed to the fact that the Department of Labor (DOL) has fixed timeframes for responding to their RFEs. USCIS evaluates petitions and applications in a far wider variety

of contexts than DOL and for a far broader array of benefits and services. This fact requires greater processing flexibility. Accordingly, USCIS declines to adopt the standards used by DOL.

Two commenters recommended that the current twelve-week RFE response period remain a standard because it is a predictable baseline. One also pointed out that the twelve-week standard actually gives a degree of flexibility because applicants and petitioners can choose to respond more quickly, often in far less than twelve weeks.

Some commenters focused on the proposed minimum response time. One objected to the idea that USCIS would "generally" give not less than thirty days to respond, and suggested an actual thirty-day minimum. Eight commenters considered thirty days to be too short. Several commenters pointed out that it can take more than thirty days to get certified copies of tax returns from the Internal Revenue Service (IRS). Five commenters noted that it is often difficult to obtain documents from foreign countries. Several pointed specifically to problems refugees and asylum claimants can experience getting documents from the country from which they fled. One commenter suggested that providing a minimum of 45 days to respond would be unreasonable for most applicants and petitioners.

USCIS recognizes the value of a predictable timeframe for responding to an RFE or NOID, and did not intend to make this an unpredictable, discretionary process with timeframes determined by individual adjudication officers. USCIS will set clear timeframes and standards for submission of different kinds of evidence in different circumstances. This rulemaking was designed to give USCIS flexibility to set the timeframes for responding to RFEs as a matter of agency practice and procedure and to more specifically set a reasonable time based upon the nature of the information requested. The timeframes would be set out in internal guidance to adjudicators. As many practitioners are aware, this guidance is, as a general matter, publicly disclosed. At this time, USCIS foresees no reason why this guidance would not be publicly disclosed after it is developed or whenever it is adjusted.

Important processing steps (such as background checks) may need to be repeated if processing extends beyond certain timeframes. Repeating these steps would significantly delay an eventual acquisition of a benefit. Longer timeframes can actually work against a timely response because applicants and petitioners given almost three months to respond may delay responding simply

because they consider that additional time in the United States to be a benefit.

Recognizing that the majority of applications and petitions are eventually approved, USCIS does not want to arbitrarily restrict a reasonable opportunity to submit material to prove eligibility. USCIS recognizes that documents from certain countries other than the United States are occasionally difficult to obtain; thus, the timeframe flexibility will take into account these situations. Nevertheless, most applicants and petitioners can provide required documents in fewer than twelve weeks. USCIS also provides information explaining how to acquire benefits through many sources such as the agency's Web site, application forms, call centers, brochures, and field offices. Applicants and petitioners can easily follow the instructions provided by these resources and obtain all required documents before filing for immigration benefits. Applicants and petitioners who submit completed applications or petitions will minimize the need for RFE and facilitate faster decision by USCIS. CIS has found that in some cases, the standard twelve week timeframe serves to encourage applicants or petitioners to submit incomplete applications or petitions, relying on the RFE process to prompt them to submit the missing documents. The RFE process and the ensuing delays slows down the processing. Certain applicants and petitioners are also exploiting the RFE process to deliberately delay the processing and thus prolong their stay in the United States. A flexible RFE timeframe will therefore encourage the applicants and petitioners to file complete applications and petitions because they risk missing the timeframe and be denied the benefits sought to do otherwise.

USCIS continues to believe a more flexible standard is necessary and appropriate to improve adjudication processes, USCIS services, and the administration and enforcement of immigration laws. The final rule maintains the current twelve-week standard as a ceiling on the response time to be provided, and sets a maximum of thirty days to respond to a NOID. USCIS intends to issue policy guidance setting clear standards for when a timeframe less than these maximums will be afforded prior to the effective date of the rule.

With respect to minimum timeframes, the commenters' concerns should be allayed in part by the fact the final rule does not, as one commenter feared, let individual adjudicators determine when to offer less than thirty days to respond to a NOID and how long to give in such

instances. Further, USCIS' goal is to establish a single set of guidelines and standards that will cover not only requests by mail, but also requests for materials made by USCIS during an interview. When information is requested during an interview, the individual USCIS offices now set timelines for the submission of missing or required evidence, often providing less than thirty days for the applicant or petitioner to respond. This shorter response time has been very effective both for the agency and for applicants and petitioners. To ensure that USCIS uses consistent standards across the board, the final rule removes the proposed thirty-day guideline in favor of the more specific timelines USCIS will set in its field guidance.

Some of the timeframes mentioned by the commenters are not accurate. For example, the IRS may take up to sixty calendar days to process a request for an exact copy of a previously filed and processed tax return. IRS Form 4506 (revised April 2006). The fee for an exact copy of a previously filed and processed tax return at the present time is \$39. The IRS can, however, provide a transcript of the processed return within ten business days, currently at no charge. IRS Form 4506T (revised April 2006). Thus, USCIS acknowledges that it can take more than thirty days for applicants or petitioners to obtain certified copies of processed tax returns. However, USCIS permits applicants or petitioners to submit transcripts of processed tax returns; therefore, USCIS believes that applicants and petitioners will be able to submit transcripts of processed tax returns even if response times to RFEs or NOIDs are as short as thirty days.

USCIS also recognizes the variety of times required to respond to a document request. A copy of a State driver's license may easily be provided within ten days, while a standard foreign government document, such as a current passport that is certified by the issuing government, may require a longer timeframe. None of these timeframes, however, restrict the applicant's or petitioner's ability to file all of the obviously necessary and relevant documents with the original application.

Several commenters who argued in favor of retaining the twelve-week standard opportunity to respond to an RFE also asserted that USCIS should create a new process allowing extension of the twelve-week response for any good cause. Several other commenters suggested such a new continuance process should be put in place if USCIS reduces the current twelve-week

standard. One of these commenters stated the agency should consider an extension of up to thirty days where foreign documents are to be submitted. Another posited that adjudicators should have the discretion to set longer response times.

The current twelve-week standard as a maximum limit has proven effective and efficient to USCIS and its applicants and petitioners. This twelve-week maximum will remain the standard response timeframe in many instances. Creating a new process to seek continuances to submit evidence where the twelve-week cycle remains unchanged or where USCIS sets shorter response times based on the evidence requested and circumstances would defeat the purpose of increasing the efficiency and responsiveness of case processing. Such a process would also often result in aliens being allowed to remain in the United States for lengthy periods while they try to acquire evidence that should have been filed with their application or that is necessary to establishing their eligibility for the benefit sought. Accordingly, USCIS declines to adopt any additional procedures.

B. Not Issuing at Least One RFE; Making Decisions on the Record

Ten commenters suggested the proposed regulation would not increase efficiency. Four suggested that USCIS would use the rule as an inappropriate tool to reduce its backlog. Three pointed out the positive aspects of the current RFE process and the opportunity it creates to emphasize evidence already in the record that the adjudicator may not have fully considered, to clear up misunderstandings, and to clarify issues and facts. One commenter suggested that at least unrepresented applicants and petitioners should always be given an opportunity to correct problems through the RFE process. Others recommended that the rule mandate at least one RFE where there is any type of deficiency.

USCIS agrees that the RFE and NOID procedures play valuable roles. However, there is no need for an RFE or NOID process if the evidence initially submitted is sufficient to make a decision of either eligibility or ineligibility. The applicant or petitioner is responsible for providing evidence sufficient for USCIS to adjudicate the application or petition. 8 CFR 103.2(b)(1). USCIS is not responsible for advising the applicant or petitioner of the evidence that the applicant or petitioner should submit with each particular case beyond providing

general filing guidance via form instructions and regulations.

Several commenters focused on the proposed change that would allow denial of applications and petitions filed without the required initial evidence instead of sending an RFE. One commenter pointed out similarities to a previously proposed rule. 56 FR 61201 (Dec. 2, 1991). The commenter further noted that the previous rulemaking resulted in the current RFE process that USCIS now seeks to amend. 59 FR 1455 (January 11, 1994).

USCIS recognizes this similarity. When the proposed rule was issued in 1991, the application and petition forms frequently did not clearly identify the evidence required to be filed. In response to comments received in connection with the 1991 proposed rule regarding the forms, the final rule did not contain the automatic denial process.

Since the 1991 proposed rule, INS and now USCIS have revised the immigration benefit forms and instructions to list the initial evidence that applicants or petitioners need to file. The forms, with instructions in a growing number of languages, are available on paper and on USCIS' Web site. Given that the forms provide complete information regarding evidentiary requirements, USCIS believes that the twelve-week standard RFE requirement for missing initial evidence is obsolete and filings should be complete at the beginning of the process.

Recognizing the concern expressed, however, USCIS currently intends to limit the application of its discretionary authority to deny an application or petition for lack of initial evidence without an RFE to cases that are filed with little more than a signature and the proper fee, and therefore are substantially incomplete or where the applicant or petitioner has failed to demonstrate a basis for eligibility for the benefit sought (e.g. an application for adjustment of status as an immediate relative), where no information or evidence of a covered relationship is provided. These skeletal applications, or applications that are filed alleging eligibility for a benefit based upon having filed a separate benefit application which has since been denied or of which USCIS has no record, clearly do not establish eligibility. DHS wishes to make clear that an applicant or petitioner is responsible for demonstrating eligibility for the benefit sought and that clearly deficient applications or petitions will not be permitted. As with RFEs, USCIS intends to issue additional internal

guidance through policy memoranda, including a stipulated timeframe for responding to an RFE based on missing initial evidence. In such a case, even within the context of continuing an opportunity to respond to an RFE, giving a second opportunity to provide evidence need not result in deferring case processing for a full twelve weeks.

Eight commenters expressed concerns that inexperienced staff given added discretion might make too many errors; be unaware of relevant business practices, regulations and law; and write RFEs with excessive boilerplate requests for unnecessary evidence. One commenter objected to the idea that USCIS would deny cases simply because an applicant or petitioner did not submit every piece of evidence requested in an RFE, pointing out that the current regulations let applicants and petitioners request a decision on the record. Conversely, another commenter suggested that the proposed rule at 8 CFR 103.2(b)(13)(i) would remove explicit USCIS authority to summarily deny a case as abandoned for failure to submit initial and additional requested evidence by a required date. Therefore, the commenter requested that USCIS reinstate that explicit authority under 8 CFR 103.2(b)(13)(i).

The final rule retains the current process for requesting a decision on the record. If an applicant or petitioner requests a decision on the record, USCIS will decide the case based on the record. This process has been in effect for more than a decade. The process struck a careful balance between giving a controlled process for requesting evidence and giving applicants and petitioners the opportunity to object and ask for a decision on the record. This balance is also essential to ensuring that the adjudicator will be able to deny the application or petition on the record, if additional evidence is needed, but the requested evidence is not received. An applicant's or petitioner's failure to respond to an RFE can close off a material line of inquiry or can effectively stop further processing towards granting an application or petition, and may be considered a factor in evaluating whether an applicant or petitioner has proven eligibility for the benefit sought. This final rule incorporates this concept and also clarifies USCIS' authority to summarily deny a case as abandoned for failure to reply to an RFE or a NOID by a required date. The final rule also allows USCIS to deny an application or petition if the applicant or petitioner fails to provide requested materials, such as photographs, necessary to complete

processing and issuing resultant documentation.

One commenter thought that this rule would unfairly burden applicants and petitioners due to the "failure to appear" provisions in 8 CFR 103.2(b)(13). To avoid this result, USCIS has modified the final rule. The rule now allows for exceptions where there is evidence, such as a prompt change of address or rescheduling request, that the agency concludes warrants excusing the failure to appear.

Several commenters expressed concern with the proposed elimination of 8 CFR 245.18(i), which requires USCIS to issue a NOID to a physician who does not "comply with the requirements of paragraphs (f) and (g)." After further analysis, the final rule retains the provision and simply removes the timeframes for the applicant's or petitioner's response to the NOID in favor of the timeframes USCIS will set for RFEs and NOIDs.

Another commenter highlighted that NOIDs are currently required by regulation to provide the benefit seeker with an opportunity to know and address otherwise unknown adverse information on which a decision is to be made. This final rule maintains the general requirement for a NOID prior to any denial based upon derogatory information of which the petitioner or applicant is unaware. 8 CFR 103.2(b)(16)(i).

C. Uniform Application of the 'Preponderance of Evidence' Standard

One commenter approved of the "preponderance of the evidence" standard as proposed at 8 CFR 103.2(b)(8)(i). The commenter, however, objected to the proposed language in 8 CFR 103.2(b)(8)(ii), which allows USCIS to deny an application or petition, request more evidence, or notify the applicant or petitioner of its intent to deny if the "evidence submitted does not fully establish eligibility." The commenter stated,

[c]onflating 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 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*.

(Emphases in original).

In response to these comments, USCIS has modified 8 CFR 103.2(b)(8)(i) to remove the phrase, "the preponderance of" and to modify 8 CFR 103.2(b)(8)(ii)

to remove the word "fully." USCIS is implementing these modifications because it believes that it would be inappropriate to apply a single standard in 8 CFR 103.2(b)(8)(i) and (ii) to all USCIS adjudications. Furthermore, these modifications clarify that adjudications can involve different evidentiary standards or burdens. Under current regulations, some applications or petitions must demonstrate a preponderance of the evidence, while other applications or petitions require clear and convincing evidence, to establish eligibility.

D. Relationship to Premium Processing Regulations

One commenter asserted that if applied to premium processing requests, the proposed rule would contravene the existing premium processing service regulations at 8 CFR 103.2(f). In making this statement, the commenter interpreted the current premium processing regulations to require USCIS to issue an RFE or NOID before denying any application or petition for which premium processing services have been requested. USCIS appreciates this comment and, to clarify the applicability of this regulation, 8 CFR 103.2(f) has been modified to include "denial" in the list of appropriate actions.

E. Substitution of Form DS-2019; Submitting Copies

One commenter noted that the proposed rule at 8 CFR 103.2(b)(4) refers to the obsolete Form IAP-66, and suggesting the reference be updated to the DS-2019 which replaced the IAP-66. This correction has been incorporated in the final rule.

The same commenter also requested that applicants be permitted to submit a copy of DS-2019 rather than the original, and suggested clarification with respect to when originals must be filed. The final rule clarifies that although copies of other documents may be submitted, those designed or produced for the purpose of evidence with a USCIS application, such as the DS-2019, must be submitted in the original.

As a general rule, applicants and petitioners should be allowed to keep originals unless the originals are required by regulation to be submitted. If there is reason to question the authenticity of the original document for which a photocopy has been submitted, USCIS may then request the original document. In cases where an applicant or a petitioner submits original documents when not required, due to the cost involved in returning

such documents as a matter of course, USCIS will retain the documents and make them part of the record. In such cases, applicants or petitioners who wish to have their original documents returned to them may submit a written request to the office that originally requested the records.

F. Application of the Rule

USCIS' ability to issue shorter RFE and NOID response times will apply to any RFE or NOID issued on or after the effective date of this rule even if the application or petition was filed before the effective date of this regulation. USCIS' discretion to deny cases for lack of required initial evidence without first issuing an RFE, however, will only extend to petitions and applications that are filed on or after the effective date of this regulation.

G. Use of the Term "Biometrics Capture"

USCIS received no comments concerning the use of the term "biometrics capture," rather than "fingerprinting" in section 103.2(b)(13)(ii) of the proposed rule. USCIS believes, however, that an explanation of why that term has been adopted in the final would be beneficial to the public. While the term, "biometrics capture" includes fingerprints, it is in fact meant to be a more inclusive term. Biometrics capture can include such things as the capture of a digital photograph or a digital signature. As technology evolves and data collection requirements change, USCIS may change the biometrics information it collects or the methods used for such collection. Any changes made to the capture of biometrics will be reflected in the instructions of the affected form type and/or request for appearance for biometrics capture.

H. Technical Correction to the Final Rule

Amendment 3.a. of the proposed rule revised the terms "the Service" or "Service" to read "USCIS" wherever they appeared in certain subparagraphs of section 103.2. On May 23, 2006, USCIS published an interim final rule in the **Federal Register** which, among other things, changed any reference to "the Service" to read "USCIS" in section 103.2.(f)(2). 71 FR 29571. Accordingly, the proposed revision to section 103.2(f)(2) is no longer necessary and has been withdrawn from the final rule.

III. Regulatory Requirements

A. Regulatory Flexibility Act

DHS has reviewed this rule in accordance with the Regulatory Flexibility Act (5 U.S.C. 605(b)), and, by approving it, DHS certifies that this rule will not have a significant economic impact on a substantial number of small entities.

Although some petitions may be submitted by small entities, namely United States employers seeking nonimmigrant or immigrant labor, this rule is intended to be more flexible in setting time limits for RFEs or NOIDs, thereby reducing the timeframe for adjudicating these petitions without imposing costs on the entities. USCIS recognizes that this change may have a small impact on small business practices or productivity due to the change in timeframes for responses to RFEs or NOIDS. However, USCIS believes that these changes ultimately will benefit affected small businesses, namely because the reduction in adjudication timeframes will allow United States employers to receive the benefit sought at an earlier date (i.e. the ability to hire temporary or permanent foreign employees).

B. Unfunded Mandates Reform Act of 1995

This rule will not result in the expenditure by State, local, and tribal governments in the aggregate, or by the private sector, of \$100 million or more in any one year, and will not significantly or uniquely affect small governments. Therefore, no actions were deemed necessary under the provisions of the Unfunded Mandates Reform Act of 1995.

C. Small Business Regulatory Enforcement Fairness Act of 1996

This rule is not a major rule as defined by 5 U.S.C. 804. This rule will not result in an annual effect on the economy of \$100 million or more; a major increase in costs or prices; or significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based companies to compete with foreign-based companies in domestic and export markets.

D. Executive Order 12866

DHS considers this rule to be a "significant regulatory action" under Executive Order 12866, section 3(f), Regulatory Planning and Review. Accordingly, it was submitted to the Office of Management and Budget for review.

DHS has assessed both the costs and the benefits associated with this final rule. There are minimal costs to USCIS associated with instructing adjudicators about the options for dealing with deficient applications and petitions. Instructions may take the form of policy memoranda, amendments to the Adjudicator's Field Manual, or local office training modules. USCIS estimates that any costs will be absorbed in the current program general expenses that cover issuing instructions and training.

There are a number of benefits to both USCIS and the public. USCIS will reduce the number of RFEs and NOIDs and the cycle time for responses to such notices, thereby reducing the pending backlog of cases. The public will receive fewer and more specific RFE or NOID notices, and will benefit from more timely approval of applications and petitions.

The cost to the public is minimal. Currently, if an RFE or NOID is issued, the applicant incurs the cost of burden hours to comply with the RFE and the cost of resubmitting the response. The procedure remains generally the same, though the processing flow and decision points have changed to improve overall adjudication efficiency.

E. Executive Order 13132 (Federalism)

This rule will not have substantial direct effects on the States, on the relationship between the National Government and the States, or on the distribution of power and responsibilities among the various levels of government. Therefore, in accordance with section 6 of Executive Order 13132, DHS has determined that this rule does not have sufficient federalism implications to warrant the preparation of a federalism summary impact statement.

F. Executive Order 12988 Civil Justice Reform

This rule meets the applicable standards set forth in sections 3(a) and 3(b)(2) of Executive Order 12988.

G. Paperwork Reduction Act

Under the Paperwork Reduction Act of 1995, Public Law 104-13, all departments are required to submit to the Office of Management and Budget (OMB), for review and approval, any reporting or recordkeeping requirements inherent in a rule. This rule does not impose any new reporting or recordkeeping requirements under the Paperwork Reduction Act.

List of Subjects**8 CFR Part 103**

Administrative practice and procedure, Authority delegations (Government agencies), Freedom of information, Privacy, Reporting and recordkeeping requirements, Surety bonds.

8 CFR Part 204

Administrative practice and procedure, Immigration, Reporting and recordkeeping requirements.

8 CFR Part 214

Administrative practice and procedure, Aliens, Employment, Reporting and recordkeeping requirements.

8 CFR Part 245

Administrative practice and procedure, Aliens, Immigration, Reporting and recordkeeping requirements.

8 CFR Part 245a

Aliens, Immigration, Reporting and recordkeeping requirements.

■ Accordingly, Chapter I of Title 8 of the Code of Federal Regulations is proposed to be amended as follows:

PART 103—POWERS AND DUTIES; AVAILABILITY OF RECORDS

■ 1. The authority citation for part 103 continues to read as follows:

Authority: 5 U.S.C. 301, 552, 552a; 8 U.S.C. 1101, 1103, 1304, 1356; 31 U.S.C. 9701; Public Law 107–296, 116 Stat. 2135 (6 U.S.C. 1 *et seq.*); E.O. 12356, 47 FR 14874, 15557, 3 CFR, 1982 Comp., p. 166; 8 CFR part 2.

■ 2. Section 103.2 is amended by:

- a. Revising the term “INS office or Service Center” to read “USCIS office” in paragraph (a)(6);
- b. Revising the term “Service Center” to read “service center” wherever that term appears in the last sentence of paragraph (a)(7)(i);
- c. Revising paragraph (b)(1);
- d. Revising paragraph (b)(4);
- e. Revising paragraph (b)(5);
- f. Revising paragraph (b)(8);
- g. Revising paragraph (b)(11);
- h. Removing the term “initial” in paragraph (b)(12), first sentence;
- i. Revising paragraph (b)(13);
- j. Revising term “regional commissioner” to read “USCIS Director or his or her designee” in paragraph (b)(16)(iii);
- k. Revising the term “regional commissioner” to read “USCIS Director or his or her designee” in the second sentence, and the term “regional commissioner’s” to read “USCIS

Director’s or his or her designee’s” in the third sentence in paragraph (b)(16)(iv);

- l. Revising paragraph (b)(17);
- m. Removing and reserving paragraphs (c) and (d);
- n. Revising paragraph (f)(1).

The revisions read as follows:

§ 103.2 Applications, petitions, and other documents.

* * * * *

(b) * * *

(1) *Demonstrating eligibility at time of filing.* An applicant or petitioner must establish that he or she is eligible for the requested benefit at the time of filing the application or petition. All required application or petition forms must be properly completed and filed with any initial evidence required by applicable regulations and/or the form’s instructions. Any evidence submitted in connection with the application or petition is incorporated into and considered part of the relating application or petition.

* * * * *

(4) *Submitting copies of documents.* Application and petition forms, and documents issued to support an application or petition (such as labor certifications, Form DS 2019, medical examinations, affidavits, formal consultations, letters of current employment and other statements) must be submitted in the original unless previously filed with USCIS. Official documents issued by the Department or by the former Immigration and Naturalization Service need not be submitted in the original unless required by USCIS. Unless otherwise required by the applicable regulation or form’s instructions, a legible photocopy of any other supporting document may be submitted. Applicants and petitioners need only submit those original documents necessary to support the benefit sought. However, original documents submitted when not required will remain a part of the record.

(5) *Request for an original document.* USCIS may, at any time, request submission of an original document for review. The request will set a deadline for submission of the original document. Failure to submit the requested original document by the deadline may result in denial or revocation of the underlying application or benefit. An original document submitted in response to such a request, when no longer required by USCIS, will be returned to the petitioner or applicant upon completion of the adjudication. If USCIS does not return an original document within a reasonable time after completion of the

adjudication, the petitioner or applicant may request return of the original document by submitting a properly completed and signed Form G–884 to the adjudicating USCIS office.

* * * * *

(8) *Request for Evidence; Notice of Intent to Deny—(i) Evidence of eligibility or ineligibility.* If the evidence submitted with the application or petition establishes eligibility, USCIS will approve the application or petition, except that in any case in which the applicable statute or regulation makes the approval of a petition or application a matter entrusted to USCIS discretion, USCIS will approve the petition or application only if the evidence of record establishes both eligibility and that the petitioner or applicant warrants a favorable exercise of discretion. If the record evidence establishes ineligibility, the application or petition will be denied on that basis.

(ii) *Initial evidence.* If all required initial evidence is not submitted with the application or petition or does not demonstrate eligibility, USCIS in its discretion may deny the application or petition for lack of initial evidence or for ineligibility or request that the missing initial evidence be submitted within a specified period of time as determined by USCIS.

(iii) *Other evidence.* If all required initial evidence has been submitted but the evidence submitted does not establish eligibility, USCIS may: deny the application or petition for ineligibility; request more information or evidence from the applicant or petitioner, to be submitted within a specified period of time as determined by USCIS; or notify the applicant or petitioner of its intent to deny the application or petition and the basis for the proposed denial, and require that the applicant or petitioner submit a response within a specified period of time as determined by USCIS.

(iv) *Process.* A request for evidence or notice of intent to deny will be in writing and will specify the type of evidence required, and whether initial evidence or additional evidence is required, or the bases for the proposed denial sufficient to give the applicant or petitioner adequate notice and sufficient information to respond. The request for evidence or notice of intent to deny will indicate the deadline for response, but in no case shall the maximum response period provided in a request for evidence exceed twelve weeks, nor shall the maximum response time provided in a notice of intent to deny exceed thirty days. Additional time to respond

to a request for evidence or notice of intent to deny may not be granted.

* * * * *

(11) *Responding to a request for evidence or notice of intent to deny.* In response to a request for evidence or a notice of intent to deny, and within the period afforded for a response, the applicant or petitioner may: submit a complete response containing all requested information at any time within the period afforded; submit a partial response and ask for a decision based on the record; or withdraw the application or petition. All requested materials must be submitted together at one time, along with the original USCIS request for evidence or notice of intent to deny. Submission of only some of the requested evidence will be considered a request for a decision on the record.

* * * * *

(13) *Effect of failure to respond to a request for evidence or a notice of intent to deny or to appear for interview or biometrics capture—(i) Failure to submit evidence or respond to a notice of intent to deny.* If the petitioner or applicant fails to respond to a request for evidence or to a notice of intent to deny by the required date, the application or petition may be summarily denied as abandoned, denied based on the record, or denied for both reasons. If other requested material necessary to the processing and approval of a case, such as photographs, are not submitted by the required date, the application may be summarily denied as abandoned.

(ii) *Failure to appear for biometrics capture, interview or other required in-person process.* Except as provided in 8 CFR 335.6, if USCIS requires an individual to appear for biometrics capture, an interview, or other required in-person process but the person does not appear, the application or petition shall be considered abandoned and denied unless by the appointment time USCIS has received a change of address or rescheduling request that the agency concludes warrants excusing the failure to appear.

* * * * *

(17) *Verifying claimed permanent resident status—(i) Department records.* The status of an applicant or petitioner who claims that he or she is a permanent resident of the United States or was formerly a permanent resident of the United States will be verified from official Department records. These records include alien and other files, arrival manifests, arrival records, Department index cards, Immigrant Identification Cards, Certificates of Registry, Declarations of Intention

issued after July 1, 1929, Permanent Resident Cards (Form I-551), Alien Registration Receipt Cards (Form I-151), other registration receipt forms (Forms AR-3, AR-3a, and AR-103, provided that such forms were issued or endorsed to show admission for permanent residence), passports, and reentry permits. An official record of a Department index card must bear a designated immigrant visa symbol and must have been prepared by an authorized official of the Department in the course of processing immigrant admissions or adjustments to permanent resident status. Other cards, certificates, declarations, permits, and passports must have been issued or endorsed to show admission for permanent residence. Except as otherwise provided in 8 CFR part 101, and in the absence of countervailing evidence, such official records will be regarded as establishing lawful admission for permanent residence.

(ii) *Assisting self-petitioners who are spousal-abuse victims.* If a self-petitioner filing a petition under section 204(a)(1)(A)(iii), 204(a)(1)(A)(iv), 204(a)(1)(B)(ii), or 204(a)(1)(B)(iii) of the Act is unable to present primary or secondary evidence of the abuser's status, USCIS will attempt to electronically verify the abuser's citizenship or immigration status from information contained in the Department's automated or computerized records. Other Department records may also be reviewed at the discretion of the adjudicating officer. If USCIS is unable to identify a record as relating to the abuser, or the record does not establish the abuser's immigration or citizenship status, the self-petition will be adjudicated based on the information submitted by the self-petitioner.

* * * * *

(c) Reserved.

(d) Reserved.

* * * * *

(f) *Requests for Premium Processing Service—(1) Filing information.* A petitioner or applicant requesting Premium Processing Service shall submit Form I-907 with the appropriate fee to the Director of the service center having jurisdiction over the application or petition. Premium Processing Service guarantees 15 calendar day processing of certain employment-based petitions and applications. The 15 calendar day processing period begins when USCIS receives Form I-907, with the fee, at the designated address contained in the instructions to the form. USCIS 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, USCIS issues and serves on the petitioner or applicant an approval notice, a denial 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.

* * * * *

§ 103.2 [Amended]

■ 3. Section 103.2 is further amended by:

■ a. Revising the terms “the Service” or “Service” to read “USCIS” wherever those terms appear in the following paragraphs:

- i. Paragraph (a)(7)(i), in the first sentence and the first time it appears in the last sentence;
- ii. Paragraph (b)(2)(ii), in the last sentence;
- iii. Paragraph (b)(2)(iii);
- iv. Paragraph (b)(3);
- v. Paragraph (b)(6);
- vi. Paragraph (b)(7);
- vii. Paragraph (b)(9), in the introductory text;
- viii. Paragraph (b)(10);
- ix. Paragraph (d)(2);
- x. Paragraph (e)(1);
- xi. Paragraph (e)(2);
- xii. Paragraph (e)(3), in the introductory text;
- xiii. Paragraph (e)(3)(iii);
- xiv. Paragraph (e)(4)(i);
- xv. Paragraph (e)(4)(iii), in the introductory text;
- xvi. Paragraph (e)(4)(iii)(C);
- xvii. Paragraph (e)(4)(iv), in the second sentence;
- xviii. Paragraph (f)(3), the first and last time the term appears in the last sentence;
- xix. Paragraph (f)(4), the first time the term appears in the first sentence;
- xx. Paragraph (f)(4), the first time the term appears in the second sentence; and
- xxi. Paragraph (f)(4), in the third sentence.

■ b. Revising the term “Service’s” to read “USCIS’ ” in the following paragraphs:

- i. Paragraph (b)(15);
- ii. Paragraph (e)(3)(iii); and
- iii. Paragraph (e)(4)(iii)(C).

PART 204—IMMIGRANT PETITIONS

■ 4. The authority citation for part 204 continues to read as follows:

Authority: 8 U.S.C. 1101, 1103, 1151, 1153, 1154, 1182, 1186a, 1255, 1641; 8 CFR part 2.

§ 204.1 [Amended]

■ 5. Section 204.1 is amended by removing paragraph (h).

§ 204.2 [Amended]

- 6. Section 204.2 is amended by:
- a. Removing paragraph (c)(3)(ii) and by redesignating paragraph (c)(3)(iii) as (c)(3)(ii);
- b. Removing paragraph (e)(3)(ii) and by redesignating paragraph (e)(3)(iii) as (e)(3)(ii).

PART 214—NONIMMIGRANT CLASSES

- 7. The authority citation for part 214 continues to read as follows:

Authority: 8 U.S.C. 1101, 1102, 1103, 1182, 1184, 1185 (pursuant to Executive Order 13323, published January 2, 2004), 1186a, 1187, 1221, 1281, 1282, 1301–1305; 1372; 1379; 1731–32; sec. 643, Pub. L. 104–208; 110 Stat. 3009–708; section 141 of the Compacts of Free Association with the Federated States of Micronesia and the Republic of the Marshall Islands, and with the Government of Palau, 48 U.S.C. 1901, note, and 1931, note, respectively.

§ 214.2 [Amended]

- 8. Section 214.2 is amended by:
- a. Removing paragraph (h)(10)(ii) and by redesignating paragraph (h)(10)(iii) as (h)(10)(ii);
- b. Removing paragraph (k)(10)(iii);
- c. Removing paragraph (l)(8)(i) and by redesignating paragraphs (l)(8)(ii) and (l)(8)(iii) as (l)(8)(i) and (l)(8)(ii) respectively;
- d. Revising paragraph (o)(7); and
- e. Revising paragraph (p)(9).

The revisions read as follows:

§ 214.2 Special requirements for admission, extension, and maintenance of status.

* * * * *

(o) * * *

(7) The petitioner shall be notified of the decision, the reasons for the denial, and the right to appeal the denial under 8 CFR part 103.

* * * * *

(p) * * *

(9) The petitioner shall be notified of the decision, the reasons for the denial, and the right to appeal the denial under 8 CFR part 103. There is no appeal from a decision to deny an extension of stay to the alien or a change of nonimmigrant status.

* * * * *

- 9. Section 214.11 is amended by revising paragraph (k)(2) to read as follows:

§ 214.11 Alien victims of severe forms of trafficking in persons.

* * * * *

(k) * * *

(2) *Determination by USCIS.* An application for T–1 status under this section will not be treated as a bona fide application until USCIS has provided

the notice described in paragraph (k)(3) of this section. In the event that an application is incomplete or if the application is complete but does not present sufficient evidence to establish prima facie eligibility for each required element of T nonimmigrant status, USCIS will follow the procedures provided in 8 CFR 103.2(b) for requesting additional evidence, issuing a notice of intent to deny, or adjudicating the case on the merits.

* * * * *

- 10. Section 214.15 is amended by revising paragraph (d) to read as follows:

§ 214.15 Certain spouses and children of lawful permanent residents.

* * * * *

(d) *The definition of “pending petition.”* For purposes of this section, a pending petition is defined as a petition to accord a status under section 203(a)(2)(A) of the Act that was filed with USCIS under section 204 of the Act on or before December 21, 2000, and has not been adjudicated. In addition, the petition must have been properly filed according to 8 CFR 103.2(a), and if, subsequent to filing, USCIS returns the petition to the applicant for any reason or makes a request for evidence or issues a notice of intent to deny under 8 CFR 103.2(b), the petitioner must comply with the request within the time period set by USCIS. If USCIS denies a petition but the petitioner appeals that decision, the petition will be considered pending until the administrative appeal is decided by USCIS. A petition rejected by USCIS as not properly filed is not considered to be pending.

* * * * *

PART 245—ADJUSTMENT OF STATUS TO THAT OF PERSON ADMITTED FOR PERMANENT RESIDENCE

- 11. The authority citation for part 245 continues to read as follows:

Authority: 8 U.S.C. 1101, 1103, 1182, 1255; sec. 202, Pub. L. 105–100, 111 Stat. 2160, 2193; sec. 902, Pub. L. 105–277, 112 Stat. 2681; 8 CFR part 2.

- 12. Section 245.18 is amended by revising paragraph (i) to read as follows:

§ 245.18 How can physicians with approved Forms I–140 that are serving in medically underserved areas or at a Veterans Affairs facility adjust status?

* * * * *

(i) *What if the physician does not comply with the requirements of paragraphs (f) and (g) of this section?* If an alien physician does not submit (in accordance with paragraphs (f) and (g) of this section) proof that he or she has

completed the service required under 8 CFR 204.12(a), USCIS shall serve the alien physician with a written notice of intent to deny the alien physician's application for adjustment of status and, after the denial is finalized, to revoke approval of the Form I–140 and national interest waiver. The written notice shall require the alien physician to provide the evidence required by paragraph (f) or (g) of this section. If the alien physician fails to submit the evidence within the allotted time, USCIS shall deny the alien physician's application for adjustment of status and shall revoke approval of the Form I–140 and of the national interest waiver.

* * * * *

PART 245a—ADJUSTMENT OF STATUS TO THAT OF PERSONS ADMITTED FOR LAWFUL TEMPORARY OR PERMANENT RESIDENT STATUS UNDER SECTION 245A OF THE IMMIGRATION AND NATIONALITY ACT

- 13. The authority citation for part 245a continues to read as follows:

Authority: 8 U.S.C. 1101, 1103, 1255a and 1255a note.

- 14. Section 245a.20 is amended by revising paragraph (a)(2) to read as follows:

§ 245a.20 Decisions, appeals, motions, and certifications.

(a) * * *

(2) *Denials.* The alien shall be notified in writing of the decision of denial and of the reason(s) therefore. An applicant affected under this part by an adverse decision is entitled to file an appeal on Form I–290B Notice of Appeal to the Administrative Appeals Office (AAO), with the required fee specified in 8 CFR 103.7(b)(1). Renewal of employment authorization issued pursuant to 8 CFR 245a.13 will be granted until a final decision has been rendered on appeal or until the end of the appeal period if no appeal is filed. After exhaustion of an appeal, an alien who believes that the grounds for denial have been overcome may submit another application with fee, provided that the application is submitted on or before June 4, 2003.

* * * * *

§ 245a.33 [Amended]

- 15. Section 245a.33 is amended by removing the second sentence of paragraph (b).

Dated: March 27, 2007.

Michael Chertoff,
Secretary.

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