

Requests for Evidence

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What is a Request for Evidence (RFE)?

8 CFR § 103.2(b)(8)

- i. **Evidence of eligibility or ineligibility.** If the evidence submitted with the benefit request establishes eligibility, USCIS will approve the benefit request, except that in any case in which the applicable statute or regulation makes the approval of a benefit request a matter entrusted to USCIS discretion, USCIS will approve the benefit request 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 benefit request will be denied on that basis.
- ii. **Initial evidence.** If all required initial evidence is not submitted with the benefit request or does not demonstrate eligibility, USCIS in its discretion may deny the benefit request 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 benefit request 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 benefit request 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 communicated by regular or electronic mail 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.



USCIS Policy Guidance

“...an RFE is not to be avoided; it is to be used when the facts and the law warrant. At the same time, an RFE is not to be issued when the evidence already submitted establishes eligibility or ineligibility in all respects for the particular benefit or service....”

USCIS Policy Memorandum 602-0085 , “Requests for Evidence and Notices of Intent to Deny” (June 3, 2013)CC

See also: USCIS Interoffice Memorandum HQOPRD 72/11.3. “The Significance of a Prior CIS Approval of a Nonimmigrant Petition in the Context of a Subsequent Determination Regarding Eligibility for Extension of Petition Validity” (April 23, 2004)

Burden of Proof & Standard of Review

- Burden of Proof lies with the Applicant or Petitioner
- Standard of review in Administrative immigration proceedings is the “Preponderance of the evidence” standard

When applying for an immigration benefit, the burden of proof lies with the petitioner or applicant. **“Except where a different standard is specified by law, a petitioner or applicant in administrative immigration proceedings must prove by a preponderance of evidence that he or she is eligible for the benefit sought.”** *Matter of Chawathe*, 25 I&N Dec. 369 (AAO 2010). *Chawathe* followed the standard already established in *Matter of E-M-*, 20 I&N Dec. 77, 79-80 (Comm’r 1989) and stated that “[t]he ‘preponderance of the evidence’ standard requires that the evidence demonstrate that the applicant’s claim is ‘probably true,’ where the determination of ‘truth’ is made based on the factual circumstances of each individual case.” *Supra* at 376.

In an effort to further clarify the preponderance of the evidence standard the court in *Chawathe* stated that “[e]ven if the director has some doubt as to the truth, if the petitioner submits relevant, probative, and credible evidence that leads the director to believe that the claim is ‘more likely than not’ or ‘probably’ true, the applicant or petitioner has satisfied the standard of proof.” *Supra* at 376.

As to what constitutes “more likely than not”, the US Supreme Court discussed this in *INS v. Cardosa-Fonseca*, 480 U.S. 421, 431 (1987) and said that “more likely than not” means a greater than 50% chance of an occurrence taking place. See also USCIS Memorandum, W. Yates, “Requests for Evidence (RFE) and Notices of Intent to Deny (NOID)” (Feb. 16, 2005).



RFE's – Practically Speaking

- How do they arrive?
- What do they look like?
- But I gave you that already!
- How should I respond?
- Recommended format?
- Should the letter come from me or my client?
- What if I don't respond?

Current Trends: Employment Based

Nonimmigrant Visas: H-1B

- Is this a specialty occupation?
- Does this degree work for the specialty?
- Can the employer pay the wage?

Conspiracy: Are you more likely to receive an RFE if you file with premium process?

Nonimmigrant Visas:

L-1A & L-1B

- Relationship between the foreign office and US office
- Managerial capacity
- Specialized knowledge



Nonimmigrant Visas:

E-1, E-2, O-1, R-1, TN

- RFE's tend to be very specific, i.e., please provide a copy of....
- Just because they ask for something specific doesn't mean something *e/se* won't work
- Read carefully to determine what they are actually "looking for."



Immigrant Classifications:

EB-1, EB-2, EB-3

- EB-1A, 1B & EB-2: To prove Extraordinary or Outstanding or Exceptional look to Kazarian v. USCIS, 596 F.3d 1115 (9th Cir. 2010) and USCIS Policy Memorandum 602-0005.1 , “Evaluation of Evidence Submitted with Certain Form I-140 Petitions” (December 22, 2010)
- EB-1C – Proving manager abroad and in US as well as companies doing business abroad and in US. But see *Matter of _____*, LIN 06 189 52335, 2008 WL 56252010 (AAO Nov. 7, 2008) for exception to business continuing abroad.
- EB-2 & EB-3 – Proving experience exists and degrees are correct



Current Trends: Family Based

- RFE's from the Service Centers and local District Offices (I-72) tend to be very specific, e.g., please provide a copy of your latest tax return, 2012 W-2, divorce decree.
- The National Visa Center (NVC) requests are very specific, e.g., please provide a copy of your 2012 W-2, police letter, photos. If you don't give them what they want, they will ask again!
- Is it me, or does NVC seem to ask for items I've already given them?

Speaking of the State Department

- What about when the Consulate asks for more evidence during a visa application?
- “221(g) Letter”
 - Known as a “Soft Denial”
 - A visa denial under section 221(g) of the INA means that the Consular Officer did not have all the information required to determine if the applicant is eligible to receive the visa.
 - The case remains pending until the information, details or documentation is complete.

Current Trends: 221(g) Requests

- **Incomplete or Further Documentation Needed:**
 - Something as simple as proof of employment (pay stubs or employment verification letters)
 - Detailed information regarding the position or company
 - US Consulates in India: requiring huge amounts of information and documentation verifying job details
- **Administrative Processing:**
 - Security Clearance
 - Name-Check
 - Advisory Opinion

CONCLUSION

There are no magic potions or pills. Expect the unexpected, and don't allow your emotions to get in the way of your response.

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