

INTERIM MEMO FOR COMMENT

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This memo is in effect until further notice.

U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of the Director (MS 2000)
Washington, DC 20529-2000



U.S. Citizenship
and Immigration
Services

January 26, 2011

PM-602-0028

Policy Memorandum

SUBJECT: Notice to Applicants and Petitioners Concerning Ability to File Motions to Reopen or Reconsider; Revisions to the *Adjudicator's Field Manual (AFM)* Chapter 10.7; *AFM* Update AD11-09

Purpose

This memorandum documents USCIS policy for including information about the opportunity to file a motion to reopen or reconsider when issuing a written denial of a petition or application.

Background

8 CFR 103.3(a)(1)(iii) requires that USCIS's written denial of a petition or application include information about whether the petitioner or applicant can appeal the decision. When available, petitioners and applicants may also file motions under 8 CFR 103.5 to reopen or reconsider an adverse decision made by USCIS. Although not required by law or regulation, USCIS has determined that written decisions should also include information about the opportunity to file these motions.

Guidance

Any written decision denying a petition or application will advise the petitioner or applicant:

- Whether the petitioner or applicant may appeal the decision to the Board of Immigration Appeals or the Administrative Appeals Office (and will include the proper appeal form, if the decision is appealable); and
- If available¹, that the petitioner or applicant may file a motion to reopen, a motion to reconsider, or both, within the period specified in 8 CFR 103.5(a) (and will include Form I-290B).

¹ For example, the formal right to appeal a denial is not available for refugee status adjudications. But as a matter of policy, USCIS allows the refugee applicant to submit a Request for Review of a denial and provides information about this option to the applicant in the decision notice.

Implementation

The *AFM* is amended as follows:

☞ 1. Chapter 10.7(b)(5) is revised to read:

(b) ****

(5) A conclusion that informs the applicant or petitioner of the decision to deny and of the reason(s) for it. The decision must inform the petitioner or applicant:

- Of the opportunity to file a motion to reopen or reconsider, as specified in 8 CFR 103.5(a) (including separately the deadlines for motions to reopen and motions to reconsider); and,
- If the petitioner or applicant is entitled to appeal the decision to the BIA or AAO, of the opportunity to do so (including the deadline established by regulation for filing an appeal).

A Form I-290B must be included with any denial. If the BIA has jurisdiction to adjudicate an appeal, EOIR Form EOIR-29 must also be included with the decision.

The decision should state whether it is with or without prejudice to any other benefits that the individual is seeking or likely to seek.

☞ 2. The second paragraph of Chapter 20.3(b)(2) is revised to read:

* * * *

(b) * * *

(2) Final Decision.

* * *

If the petitioner does not overcome the basis for the revocation, or fails to respond timely, prepare a decision of revocation. A petitioner may file an appeal on a decision to revoke a petition just as if the petition had been denied originally, except that the authorized period for filing the appeal is only 15 days regardless of the type of petition. A petitioner may also file a motion to reopen or reconsider the decision revoking the decision. As required in **Chapter 10.7(b)(5)** of this manual, the revocation decision must include information about appeal rights and the opportunity to file a motion to reopen or reconsider.

* * *

☞ 3. Chapter 21.2(f)(3)(E) is revised to read:

* * *

(E) Administrative Appeals of Denied or Revoked Petitions. Traditionally, the denial or revocation of Form I-130 and Form I-360 (in specified cases) has been subject to appeal to the Board of Immigration Appeals (BIA). See 8 CFR 1003.1(b)(5).

The denial or revocation of orphan (Forms I-600 and I-600A) and fiancé(e) (Form I-129F) cases may be appealed to the Administrative Appeals Office (AAO). As required in **Chapter 10.7(b)(5)** of this manual, a decision denying or revoking approval of a Form I-600 or Form I-600A must include information about appeal rights and the opportunity to file a motion to reopen or reconsider.

* * *

☞ 4. Chapter 21.2(g)(2) is revised by adding a new paragraph at the end to read:

* * *

(2) Denials.

* * *

Notify the petitioner in writing of the decision and the right to appeal. As required in **Chapter 10.7(b)(5)** of this manual, the decision must include information about appeal rights and the opportunity to file a motion to reopen or reconsider.

☞ 5. Chapter 21.2(h)(2)(F) is revised to read:

* * *

(F) Appeal Rights. As required in **Chapter 10.7(b)(5)** of this manual, the decision must include information about appeal rights and the opportunity to file a motion to reopen or reconsider. The petitioner has the same appeal rights from a decision to revoke upon notice as he or she would have from a decision to deny the petition. If a denial of the petition would be appealable to the BIA on Form EOIR-29, so is the revocation; if it would be appealable to the AAO on Form I-290B, so is the revocation. The petitioner also has a right to file a motion to reopen or reconsider the decision revoking the petition approval.

☞ 6. Section (b)(6)(B) of Chapter 21.3 is revised to read:

* * *

(B) Denial. If the petition is denied, notify the widow(er) in writing of the reasons for the denial. As required in **Chapter 10.7(b)(5)** of this manual, the decision must include information about appeal rights and the opportunity to file a motion to reopen or reconsider.

☞ 7. Chapter 21.4(f)(A) is revised to read:

* * *

(A) Denial. If the petitioner fails to establish eligibility for the benefit sought, the adjudicating officer shall deny the petition and notify the petitioner in writing of the reasons. As required in **Chapter 10.7(b)(5)** of this manual, the decision must include information about appeal rights and the opportunity to file a motion to reopen or reconsider.

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☞ 8. Section (e)(2) and the first paragraph of section (e)(3) of Chapter 21.5 are revised to read:

* * *

(2) Denials. If the Form I-600 cannot be approved, the adjudicating officer shall deny the petition and notify the petitioner of the reasons in writing. Pursuant to **8 CFR 103.2(b)(16)**, a notice of intent to deny is not required unless the intended denial is based upon information or evidence of which the petitioner is unaware. As required in **Chapter 10.7(b)(5)** of this manual, the decision must include information about appeal rights and the opportunity to file a motion to reopen or reconsider.

(3) Revocations. If the Department of State returns an approved Form I-600 for possible revocation following a Form I-604 determination, follow the applicable provisions of **8 CFR 205.2** regarding notice of intent to revoke and revocation. As required in **Chapter 10.7(b)(5)** of this manual, any decision revoking approval must include information about appeal rights and the opportunity to file a motion to reopen or reconsider. Remember, however, that the return of a case by the Department of State for possible revocation is only a recommendation.

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☞ 9. Chapter 21.7(d)(7)(A) is amended to read as follows:

* * *

(A) Denial. If the petitioner fails to establish eligibility for the benefit sought, the adjudicating officer shall deny the petition and notify the petitioner of the reasons in writing. As required in **Chapter 10.7(b)(5)** of this manual, the decision must include information about appeal rights and the opportunity to file a motion to reopen or reconsider.

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☞ 10. Paragraph (4)(B) of Chapter 21.8(c) is revised to read:

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(B) Denial. If the petitioner fails to establish eligibility for the benefit sought, the adjudicating officer shall deny the petition and notify the petitioner of the reasons in writing. As required in **Chapter 10.7(b)(5)** of this manual, the decision must include information about appeal rights and the opportunity to file a motion to reopen or reconsider.

* * *

☞ 11. Paragraph (4)(B) of Chapter 21.9(c) is revised to read:

* * *

(B) Denial. If the petitioner fails to establish eligibility for the benefit sought, the adjudicating officer shall deny the petition and notify the petitioner of the reasons in writing. As required in **Chapter 10.7(b)(5)** of this manual, the decision must include information about appeal rights and the opportunity to file a motion to reopen or reconsider.

* * *

☞ 12. Section (e)(2) of Chapter 21.10 is revised to read:

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(2) Denial. If the petitioner fails to establish eligibility for the benefit sought, the adjudicating officer shall deny the petition and notify the petitioner of the reasons in writing. There is no appeal from the denial of an I-730 petition. As required in **Chapter 10.7(b)(5)** of this manual, the decision must include information about the opportunity to file a motion to reopen or reconsider.

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☞ 13. The final paragraph of Section (j)(4) of Chapter 22.2 is revised to read:

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(4) National Interest Waiver of Job Offer.

* * *

When a petition is denied because eligibility for the national interest waiver has not been established, the decision must include information about appeal rights and the opportunity to file a motion to reopen or reconsider, as required in **Chapter 10.7(b)(5)** of this manual.

* * *

☞ 14. The first paragraph of Section (l)(2) of Chapter 22.2 is revised to read:

* * *

(2) Denial of Petitions. The denial should be written in clear and comprehensive language, and all grounds for denial should be covered. Refer in your denial to the controlling statute or regulations and to any relevant precedent decisions. As required in **Chapter 10.7(b)(5)** of this manual, the decision must include information about appeal rights and the opportunity to file a motion to reopen or reconsider. The denial decision may be appealed to the Administrative Appeals Office (AAO). The denied petition should then be held locally until the time period for an appeal or motion has passed.

Note: A petitioner may not appeal a denial decision that is based upon lack of labor certification. A petitioner may appeal a case that is denied because the alien does not qualify for the Schedule A designation or for the waiver of the job offer in the national interest, or because you determine that a successor in interest does not exist.

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☞ 15. The second bullet of Section (b)(10) and paragraph (B) of Section (r)(3) of Chapter 22.3 are revised to read:

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(10) Closing Actions.

* * *

- Denial. Using a properly issued denial stamp and security ink, the adjudicator stamps “denied” in the Action Block on the petition and signs the form on a line over the stamp number and below the date of the denial. If the petition is denied, the petitioner shall be informed of the reasons for denial. As required in **Chapter 10.7(b)(5)** of this manual, the decision must include information about appeal rights and the opportunity to file a motion to reopen or reconsider. The denial may be appealed to the Administrative Appeals Office.

* * *

(r) U.S. Armed Forces Members.

* * *

(3) Closing Action.

* * *

(B) Denial. If the petitioner has failed to establish eligibility for the benefit sought, deny the petition, and prepare a formal decision to inform the petitioner of the reasons for denial. As required in **Chapter 10.7(b)(5)** of this manual, the decision must include information about appeal rights and the opportunity to file a motion to reopen or reconsider. The denial is appealable to the Administrative Appeals Office.

* * *

☞ 16. Section (e)(2) of Chapter 31.3 is revised to read:

* * *

(2) Denial. Prepare a notice of denial, also on Form I-797. As required in **Chapter 10.7(b)(5)** of this manual, the decision must include information about appeal rights and the opportunity to file a motion to reopen or reconsider. Retain the file, in accordance with local procedures, until the appeal period expires or the appeal is received.

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☞ 17. The first paragraph (but not the Note) of Section (i)(2) of Chapter 31.4 is revised to read:

* * *

(2) Denial. Prepare a notice of denial. As required in **Chapter 10.7(b)(5)** of this manual, the decision must include information about appeal rights and the opportunity to file a motion to reopen or reconsider. The AAO has jurisdiction over the appeal. Retain the file, in accordance with local procedures, until the appeal period expires or an appeal is received.

* * *

☞ 18. The first paragraph (but not the Note) of Section (h)(2) of Chapter 31.5 is revised to read:

* * *

(2) Denial. Prepare a notice of denial. As required in **Chapter 10.7(b)(5)** of this manual, the decision must include information about appeal rights and the opportunity to file a motion to reopen or reconsider. The AAO has jurisdiction over the appeal. Retain the file, in accordance with local procedures, until the appeal period expires or an appeal is received.

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☞ 19. Section (c)(2) of Chapter 31.6 is revised to read:

* * *

(2) Denial. Prepare a notice of denial, also on Form I-797. As required in **Chapter 10.7(b)(5)** of this manual, the decision must include information about appeal rights and the opportunity to file a motion to reopen or reconsider. The AAO has jurisdiction over the appeal. Retain the file, in accordance with local procedures, until the appeal period expires or the appeal is received.

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☞ 20. Section (b)(2) of Chapter 31.7 is revised to read:

* * *

(2) Denial. Prepare a notice of denial, also on Form I-797. As required in **Chapter 10.7(b)(5)** of this manual, the decision must include information about appeal rights

and the opportunity to file a motion to reopen or reconsider. The AAO has jurisdiction over the appeal. Retain the file, in accordance with local procedures, until the appeal period expires or the appeal is received.

* * *

☞ 21. The first paragraph of Section (f) (but not the Note) of Chapter 33.4 is revised to read:

* * *

(f) Denial. The petitioner will be notified of a denial on Form I-797, with attachments as necessary, which will set forth the reasons for the denial. As required in **Chapter 10.7(b)(5)** of this manual, the decision must include information about appeal rights and the opportunity to file a motion to reopen or reconsider. The AAO has jurisdiction over the appeal. There is no appeal from a decision to deny an extension of stay to the alien.

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☞ 22. The first paragraph of Section (f) (but not the Note) of Chapter 33.5 is revised to read:

* * *

(f) Denial. The petitioner will be notified of a denial on Form I-797, with attachments as necessary, which will set forth the reasons for the denial. As required in **Chapter 10.7(b)(5)** of this manual, the decision must include information about appeal rights and the opportunity to file a motion to reopen or reconsider. The AAO has jurisdiction over the appeal. There is no appeal from a decision to deny an extension of stay to the alien.

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☞ 23. The first paragraph of Section (f) (but not the Note) of Chapter 33.6 is revised to read:

* * *

(f) Denial. The petitioner will be notified of a denial on Form I-797, with attachments as necessary, which will set forth the reasons for the denial. As required in **Chapter 10.7(b)(5)** of this manual, the decision must include information about appeal rights and the opportunity to file a motion to reopen or reconsider. The AAO has jurisdiction over

the appeal. There is no appeal from a decision to deny an extension of stay to the alien.

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☞ 24. The first paragraph of Section (f) (but not the Note) of Chapter 33.7 is revised to read:

* * *

(f) Denial. The petitioner will be notified of a denial on Form I-797, with attachments as necessary, which will set forth the reasons for the denial. As required in **Chapter 10.7(b)(5)** of this manual, the decision must include information about appeal rights and the opportunity to file a motion to reopen or reconsider. The AAO has jurisdiction over the appeal. There is no appeal from a decision to deny an extension of stay to the alien.

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☞ 25. Section (f)(4)(E) of Chapter 71.1 is revised to read:

* * *

(E) Denial. If the application is denied, the denial must give the reasons for the denial in writing. As required in **Chapter 10.7(b)(5)** of this manual, the decision must include information about appeal rights and the opportunity to file a motion to reopen or reconsider. The AAO has jurisdiction over the appeal.

☞ 26. The *AFM* **Transmittal Memoranda** button is revised by adding, in numerical order a new entry to read:

AD11-09 1/26/2011	Chapter 10.3 Chapter 10.7(b)(5), Chapter 20.3(b)(2), Chapter 21.2(f)(3)(E), Chapter 21.2(h)(2)(F), Chapter 21.3(b)(6), Chapter 21.4(f)(A), Chapter 21.5(e)(2), Chapter 21.5(e)(3), Chapter 21.7(d)(7)(A), Chapter 21.8(c)(4)(B), Chapter 21.9(c)(4)(B), Chapter 21.10(e)(2),	Revises the <i>AFM</i> to require that notice of the right to file a motion to reopen or reconsider be included in all denial decisions.
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	Chapter 22.2(j)(4), Chapter 22.2(l)(2), Chapter 22.3(b)(10), Chapter 22.3(r)(3)(B), Chapter 31.3(e)(2), Chapter 31.4(l)(2), Chapter 31.5(h)(2), Chapter 31.6(c)(2), Chapter 31.7(b)(2), Chapter 33.4(f), Chapter 33.5(f), Chapter 33.6(f), Chapter 33.7(f), and Chapter 71.1(f)(4)(E)	
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Use

This memorandum is intended solely for the instruction and guidance of USCIS personnel in performing their duties relative to adjudications. It is not intended to, does not, and may not be relied upon to create any right or benefit, substantive or procedural, enforceable at law or by any individual or other party in removal proceedings, in litigation with the United States, or in any other form or manner. In addition, the instructions and guidance in this memorandum are in no way intended to and do not prohibit enforcement of the immigration laws of the United States.

Contact information

Questions regarding this guidance should be directed through appropriate channels to the Office of Policy and Strategy.