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

U.S. Citizenship and Immigration Services

JUL 10 2013

Memorandum

TO: Maria Odom
Citizenship and Immigration Services Ombudsman

FROM: Lori Scialabba *Lori Scialabba*
Deputy Director

SUBJECT: Response to Citizenship and Immigration Services Ombudsman Formal Recommendation 56, "Improving the Process for Removal of Conditions on Residence for Spouses and Children"

Recommendations

The Citizenship and Immigration Services Ombudsman (CISOMB) recommends that U.S. Citizenship and Immigration Services (USCIS):

1. Provide timely, effective and accurate notice to petitioner(s) and their attorneys or accredited representatives on I-751 receipt, processing and adjudication requirements and decisions;
2. Ensure AFM Chapter 25 is updated, accurate and complete, or create a superseding source of consolidated information for I-751 adjudications; and
3. Train USCIS staff to apply the updated AFM or superseding guidance with an emphasis on waiver standards and procedures.

USCIS Responses to Recommendations

1. Provide timely, effective and accurate notice to petitioner(s) and their attorneys or accredited representatives on I-751 receipt, processing and adjudication requirements and decisions.

USCIS concurs in part with this recommendation.

Proper Notice

The CISOMB recommends that USCIS create a system to ensure that conditional permanent resident (CPR) status was properly conferred (as opposed to lawful permanent resident status without conditions) and indicate when a second notice is appropriate. At present, a second notice is automatically generated from our case management system approximately 120 days prior to the expiration of the CPR status. To implement the CISOMB's specific recommendation, USCIS would need to review the marriage certificate in each A-file to determine whether the classification was proper. This would be an extremely burdensome undertaking for USCIS and would likely result in an increase in processing times. As the vast

majority of CPRs are properly accorded lawful permanent resident status with conditions, USCIS is reluctant to address an issue affecting a small percentage of petitioners with a process that would disadvantage the rest. In the event of an error in classification, USCIS allows individuals to file a fee-exempt Form I-90, Application to Replace Permanent Resident Card, in order to obtain a green card with the correct classification.

As mentioned, USCIS does send a second written notification to the CPR reminding him or her of the requirement to remove the conditions on residence. However, a significant number of these notices have been returned as undeliverable mail. In many instances, this is because the current change of address system, the AR-11 system, and the system that automatically sends out the second notice, the Marriage Fraud Amendment System (MFAS), are unable to communicate with one another – i.e., any change made to the AR-11 system is not automatically reflected or updated in MFAS. The Service Centers do review all returned mail and check AR-11 for any change of address. If there is a new address in the electronic systems, the notice will be re-mailed to the applicant using the updated address. To ensure timely receipt of the second notice and improve agency operations, USCIS has identified a technical fix that will allow Service Centers to extract the CPR's address from the AR-11 system. USCIS expects this fix to be in place by the second quarter of FY2014.

Form I-751 processing ultimately will be transitioned to the USCIS Electronic Immigration System (ELIS), our new case management system. ELIS provides person-centric account-based processing that contains all cases filed by the individual. Customers are able to change their address through their accounts and can choose whether to receive electronic or paper correspondence. As part of the initial grant of CPR status, ELIS will incorporate processing flags (e.g., a system clock) to enable automatic generation of a notice to the individual 120 days prior to the expiration of the two-year CPR status, informing him/her of the Form I-751 filing requirement.

Lastly, USCIS is pleased to report that MFAS has been updated so that copies of notices are now being printed for the petitioner as well as the attorney of record.

Processing Information

The CISOMB recommends that USCIS ensure that the receipt numbers on the initial Form I-797 can be used to access My Case Status on www.USCIS.gov. At present, the action codes from MFAS do not feed into My Case Status. Consequently, customers are unable to obtain online updates regarding their case. Once Form I-751 processing is automated in ELIS, customers will have the ability to obtain case status updates online. USCIS anticipates Form I-751 processing being added to ELIS within the next two years. In the interim, customers can submit inquiries regarding the status of their petitions through the National Customer Service Center (NCSC), by calling the NCSC toll-free at 1-800-375-5283 (1-800-767-1833 TDD for the hearing impaired).

Adjudication Requirements and Decisions

The CISOMB has made a number of recommendations regarding adjudication requirements and decisions:

- Clarify what constitutes proof of good cause or extenuating circumstances in late-filed cases;
- Identify the issues that warrant referral of Form I-751 to a field office for interview;
- Require service center staff to include a written summary for district staff as to why an interview is necessary;
- Specify outstanding areas of concern or documentary deficiencies when issuing requests for evidence (RFEs); and
- Explore and implement an alternative to the MFAS that is capable of enhancing the processing of Form I-751.

A late filed Form I-751 may be accepted if the petitioner can demonstrate to the satisfaction of USCIS "good cause and extenuating circumstances" for not filing the petition timely.[1] The law provides for broad discretion as to what constitutes good cause and extenuating circumstances. To assist Immigration Services Officers (ISOs) and the public, USCIS issued policy memoranda in October 2009[2] and December 2012[3] that provide several examples of good cause and extenuating circumstances. Among other things, a petitioner can present evidence of "hospitalization, long term illness, death of a family member, legal or financial problems, having to care for someone, bereavement, serious family emergency…work commitment, or a family member on active duty with the U.S. military."[4] This list is not exhaustive, and USCIS will consider all explanations presented.

USCIS does post to its website the criteria and process by which cases are referred for interview. Chapter 25.1 of the Adjudicators Field Manual (AFM) explains the three fraud levels in detail and the general percentages of each that are scheduled for interview. Under the current system, any case may "warrant" referral – be it fraud level A, B, or C. Service Centers currently use worksheets explaining why an interview is needed when transferring cases to the Field Offices. USCIS recently revised this worksheet so that ISOs can more clearly articulate the concerns with the petition and possible areas of focus for the interview.

For all RFEs, not just those pertaining to CPRs, USCIS expects ISOs to clearly specify any areas of outstanding concern or documentary deficiencies. Supervisors review a sampling of RFEs from each ISO as part of the ISO's performance evaluation. Supervisors will provide additional guidance if an ISO's RFEs are not clear and precise.

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[1] Immigration and Nationality Act section 216(d)(2)(B)

[2] USCIS policy memorandum, "Adjudication of Form I-751, Petition to Remove Conditions on Residence Where the CPR Has a Final Order of Removal, Is in Removal Proceedings, or Has Filed an Unexcused Untimely Petition or Multiple Petitions" (Oct. 9, 2009).

[3] USCIS policy memorandum, "Revised Guidance Concerning Adjudication of Certain I-751 Petitions" (Dec. 23, 2012).

[4] *Id.* at p. 3.

As the CISOMB is aware, USCIS is in the midst of its Transformation initiative. Through this multi-year, multi-release effort, USCIS is shifting its operations, which includes Form I-751 processing, from a paper-based model to an electronic, online environment. USCIS expects that Form I-751 processing will be moved from the MFAS system to ELIS within the next two years.

2. Ensure AFM Chapter 25 is updated, accurate and complete, or create a superseding source of consolidated information for I-751 adjudications.

USCIS concurs with this recommendation. In January, USCIS began transitioning to an online, centralized manual of immigration policies, which will ultimately replace the AFM. USCIS is currently working on a section of the Policy Manual that will provide one, comprehensive source of information for Form I-751 adjudications. In the interim, USCIS will continue to review and update the AFM to ensure proper guidance is provided to ISOs who are responsible for adjudicating these petitions.

3. Train USCIS staff to apply the updated AFM or superseding guidance with an emphasis on waiver standards and procedures.

USCIS concurs with this recommendation. As noted above, AFM Chapter 25 will be updated to ensure that it is accurate and complete for the benefit of both trainers and ISOs. Further, the Field Operations Directorate and the Service Center Operations Directorate will develop training on Form I-751 adjudications with a focus on waiver standards and procedures. USCIS hopes to begin the training in the 4th Quarter of FY2013.

The CISOMB also recommended that USCIS ensure that proper safe address protections are implemented even when processing occurs through contract staff. USCIS recognizes the importance of ensuring that safe address protections are in place. In FY2012, USCIS worked with the DHS Office for Civil Rights and Civil Liberties to strengthen the change-of-address process for individuals seeking protection under the Violence Against Women Act (VAWA), as well as T and U nonimmigrant statuses. These updated procedures are also being incorporated into the Customer Service section of the Policy Manual.

Quality Assurance Measures

The CISOMB proposed several other quality assurance measures:

- Review the Form I-751 filing to determine whether CPR status was properly conferred;
- Implement supervisory or secondary review of all outgoing RFEs to ensure they do not request extraneous information or documentation already submitted by the petitioner(s);
- Add "credible evidence" language and examples in RFE templates;
- Create a template for use by service center staff to explain why a transferred case requires an interview; and

- Establish an initial review process whereby district offices determine whether transferred I-751s require interviews and alert service centers when transferred cases were approvable without interview.

Standard Operating Procedures (SOPs) at local offices require ISOs to review the file to determine whether the CPR was properly accorded status prior to adjudicating the petition. USCIS will ensure that this step is included in the national SOP for Form I-751, which is currently being drafted.

The CISOMB has previously recommended supervisory review of all outgoing RFEs. As noted in earlier responses, USCIS handles millions of cases on an annual basis. While periodic reviews and "spot check" reviews currently occur, USCIS believes it would be too time-consuming and resource-intensive to routinely conduct 100% RFE review on a product line. When new guidance is issued or training has occurred, USCIS may implement 100% supervisory review for a limited time to ensure ISOs are properly applying the new guidance or training. Additionally, supervisors have the discretion to conduct 100% review as needed to ensure that an ISO is demonstrating a consistent level of proficiency.

In 1998, the Office of the General Counsel for the legacy Immigration and Naturalization Service (INS) issued a memorandum that, in part, dealt with the documentary requirements for VAWA-based cases.[5] The memorandum states in part:

> The determination of what evidence is "credible" is one that must be made by the adjudicating officer on a case-by-case basis. Frequently evidence that is credible in one setting will not be so in another....Much like the determination of extreme hardship, the determination of whether evidence is credible will often be a function of other elements of the case.[6]

Because "credible evidence" is determined on a case-by-case basis, USCIS is unable to provide examples that can be used in the RFE templates. USCIS, however, does consider all evidence presented with the petition.

Service Center ISOs do use a worksheet to explain why an interview is needed when transferring a case to a Field Office. USCIS recently revised this worksheet (see attached) so that ISOs can more clearly articulate the concerns with the petition and possible areas of focus for the interview.

USCIS appreciates the CISOMB's suggestion for Field Offices to review transferred cases to determine whether they were, in fact, approvable without an interview. Prior to the CISOMB issuing its report, the Vermont Service Center (VSC) partnered with the Northeast Regional Office (NER) to conduct a study of cases transferred for interview. The VSC and NER

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[5] *See* INS Office of the General Counsel Memorandum, "'Extreme Hardship' and Documentary Requirements for Battered Spouses and Children" (October 16, 1998).
[6] *Id.* at p. 7.

determined that 67% of the cases referred for interview were ultimately denied. The results of this study, coupled with the fact that a certain percentage of fraud level C cases (i.e., cases that appear approvable to the Service Center ISO) are transferred to Field Offices, indicate that ISOs are properly determining which cases warrant interviews.

Attachment

Worksheet – Transfer of Form I-751, Petition to Remove the Conditions on Residence

U.S. Department of Homeland Security
Address

U.S. Citizenship and Immigration Services

July 10, 2013

Memorandum

TO: FIELD OFFICE DIRECTOR
[City and State of Office]
I-751 MFAS Unit

FROM: Name
Director

Service Center

SUBJECT: Transfer of Form I-751, Petition to Remove the Conditions on Residence
A__ ___ ___ / WAC__ ___ _____
USC Spouse: [Insert Name]
CPR: [Insert Name]

The attached file contains an un-adjudicated Form I-751, filed on [Insert Date]. The (insert Center name) is referring this petition to your office for adjudication for the following reasons(s):

___ OASIS indicator is checked.

___ An interview is requested because the evidence of a bona fide marriage is insufficient; however, the applicant may still be eligible. The evidence submitted consists of: [State Reasons Why Evidence is Insufficient]

___ The Conditional Permanent Resident or the USC spouse has submitted a letter requesting withdrawal on [Insert Date] indicating his/her intent to withdraw support of this Form I-751 petition. The National SOP mandates these cases be sent to the Field Office for an interview and a fraud assessment.

___ In Part 2, item "b" is checked. The petition is for a child.
___ We're unable to determine the status of the parent, so an interview is required.
___ Parent's petition is at your office and is pending an interview update.
___ Parent's petition is at your office and is under a "Hold" category for investigation etc.
___ Parent's petition has an OASIS indicator.

___ A protection order has been issued against the USC spouse. This jointly filed petition has not been updated for an interview as MFAS generates a notice for both to appear at the same time, thereby

creating a situation that violates the protection order. As such, an interview is required. Please interview the two separately.

___ The joint petitioners are separated or have initiated divorce or annulment proceedings. The evidence of the record does not sufficiently demonstrate that the marriage was bona fide.

___ The USC spouse is a registered sex offender or has Adam Walsh issues. An interview is requested to alert the conditional resident of the USC spouse's criminal conduct and alleviate any possible danger concerns.