



HQ 70/6.1.8
HQ 70/6.1.1
AD09-48

October 9, 2009

Memorandum

TO: Field Leadership

FROM: Donald Neufeld/s/
Acting Associate Director, Domestic Operations Directorate

SUBJECT: 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

Additions to *Adjudicator's Field Manual*, Chapter 25.1(g)(6) and 25.1(h)(4) and Appendix XXXX (AFM Update AD09-48)

1. Purpose

This memorandum provides detailed guidance to USCIS Immigration Services Officers (ISOs) on the adjudication of I-751 petitions filed by a conditional permanent resident (CPR) who is the subject of a final order of removal, is in removal proceedings, has filed untimely, or has filed multiple petitions.

2. Background

A CPR who obtained his or her status through marriage of less than two years to a U.S. citizen or lawful permanent resident must file Form I-751, *Petition to Remove the Conditions on Residence*, in order to remove the conditions on his or her residence. Section 216(c)(1)(B) of the Immigration and Nationality Act (INA) states, in part, that the CPR must appear for an in-person interview and, if the I-751 is jointly filed, must appear with his or her U.S. citizen or lawful permanent resident spouse. However, section 216.4(b)(1) of Title 8, Code of Federal Regulations (8 CFR) permits the Service Center Director to waive the interview if he or she is satisfied that the marriage was not entered for the purpose of evading the immigration laws.

In a memorandum issued on January 30, 2006 entitled, "*Delegation of Authority for I-751, 'Petition to Remove Conditions on Residence,'*" Acting Associate Director of Domestic Operations, Michael Aytes, authorized service centers to deny an I-751 petition if the Service Center Director is satisfied that the marriage was entered for the purpose of evading the immigration laws, without having to relocate the case

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to a field office for an interview. That guidance did not, however, address additional instances warranting possible denial of an I-751 petition. Specifically, the guidance did not address cases in which the CPR has a final order of removal, is in removal proceedings, has filed multiple petitions, or failed to timely file.

Statute and regulations allow for distinctly different treatment of jointly filed and waiver request petitions. Jointly filed petitions must be filed within the 90-day period immediately preceding the second anniversary of the CPR's admission or adjustment to permanent residence. USCIS may excuse an untimely filing of a jointly filed petition only if it is accompanied by a reasonable explanation demonstrating extenuating circumstances. See INA § 216(d)(2)(B). There is no specified filing period for a waiver request petition.

3. Current Process

Currently, if a CPR is the subject of a final order of removal or is in pending removal proceedings, the service center relocates the petition to a field office for an interview and adjudication. This is the case with both jointly filed and waiver request petitions. This occurs even if the CPR appears clearly ineligible based on information available to the service center. Relocating unadjudicated I-751 petitions from the service centers to field offices often contributes to delays in removal proceedings, as Immigration Judges (IJs) must wait for USCIS to make a final determination on the I-751 petition before continuing with the removal hearing. Multiple filings of I-751 petitions by individuals in pending removal proceedings also contribute to delays in the proceedings.

The filing period for jointly filed I-751 petitions is within 90 days before the second anniversary of the CPR's admission or adjustment. Any failure to file during this period is evaluated for good cause by an Immigration Services Officer (ISO) at the service center. When a CPR does not submit an explanation for the late filing, the ISO sends the CPR a request for evidence (RFE) requesting a reasonable explanation for the late filing. The CPR's response is reviewed and, if it does not demonstrate good cause for the late filing, the I-751 petition is relocated to a field office.

4. Process Changes

The following sections provide guidance on process changes in the adjudication of I-751 petitions where the CPR is the subject of a final order of removal, is in pending removal proceedings, has unexcused untimely filed petition, or is filing multiple petitions.

A. I-751 petition filed by a CPR with a final order of removal

A CPR loses his or her status as a lawful permanent resident if an Immigration Judge issues a final administrative order of removal. See 8 C.F.R. § 1.1(p), and 1001.1(p). If a CPR is the subject of a final order of removal, he or she no longer has a status for which to seek removal of the conditions because that status has been terminated. If an ISO determines that a CPR is the subject of a final order of removal, the ISO will deny any I-751 filed by that CPR, regardless of whether it is a jointly filed or waiver request petition. The denial notice must clearly indicate that the denial is based on a final order of removal (see sample denial attached). The ISO will route the file to the ICE Office of Detention and Removal having jurisdiction over the individual.

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B. I-751 petition filed by a CPR currently in removal proceedings

USCIS has original jurisdiction over all pending I-751 petitions. An IJ cannot review an I-751 petition pertaining to a CPR in proceedings unless USCIS has first adjudicated the petition on its merits. If a CPR is in proceedings and USCIS has not yet adjudicated an I-751 filed by that CPR, USCIS must first adjudicate the petition. An I-751 petition should not be held in abeyance or denied by a service center solely because the CPR is in pending removal proceedings. If the IJ has administratively closed the proceedings to await a decision by USCIS on the I-751 petition, the ISO will expedite adjudication and route the file through appropriate channels to the ICE Office of Chief Counsel having jurisdiction over the proceedings.

An ISO can determine whether a CPR is in removal proceedings by reviewing the file for Form I-862, Notice to Appear (NTA), by checking the Executive Office for Immigration Review (EOIR) screen of the Central Index System (CIS), or by checking the Interagency Boarder Inspection System (IBIS) or Enforce Alien Removal Module (EARM). If the IJ has administratively closed the proceedings so that USCIS can adjudicate an I-751 petition, the EARM notes or the IJ decision should explain the reason and reference an I-751 petition pending with USCIS.

C. Evaluating Good Cause for Untimely Jointly Filed I-751 Petitions

A jointly filed I-751 petition must be filed within the 90-day period immediately preceding the second anniversary of the CPR's admission or adjustment. A jointly filed I-751 petition filed after the second anniversary of the CPR's admission or adjustment may be considered only if the CPR is able to demonstrate good cause and extenuating circumstances for the failure to timely file.

If a jointly filed I-751 petition is not filed within the required period, the ISO must determine whether the failure to file the petition was based on good cause and extenuating circumstances. The instructions to the Form I-751 clearly state that a CPR may file a petition untimely only if he or she includes a written explanation for his or her failure to timely file and a request that USCIS excuse the late filing. When an ISO encounters an untimely jointly filed I-751 petition, the ISO will check for a written explanation of the late filing. If the CPR did not submit a written explanation with the untimely filed petition, the ISO cannot evaluate good cause and is to deny the petition without first sending an RFE. The denial notice must clearly indicate that the case is denied based on an unexcused untimely filing (sample denial attached). The ISO will route the file to the appropriate unit for issuance of an NTA.

If the untimely jointly filed I-751 petition is accompanied by a request to excuse the late filing, the ISO will evaluate the explanation for good cause and extenuating circumstances. The law provides for broad discretion as to what constitutes good cause and extenuating circumstances. Some examples of what constitutes good cause and extenuating circumstances may include but are not limited to: hospitalization, long term illness, death of a family member, the recent birth of a child (particularly if there were complications), and a family member on active duty with the U.S. military.

D. Multiple Filings

There are no regulatory limitations on how many times a CPR may file an I-751 petition. For example, a CPR who initially files a jointly filed I-751 petition may subsequently file an I-751 waiver request

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petition. However, if an ISO encounters a subsequent I-751 petition that is appears identical to a previously denied petition, the ISO will defer to the previous decision and will review the new petition for additional evidence that may overcome the previous basis for denial.*

a. Jointly filed I-751 Petitions

If an ISO encounters a jointly filed I-751 petition subsequent to the denial for cause of a previous jointly filed I-751 petition, the ISO will first determine if the filing is timely. * If the subsequent filing is untimely, which in most cases a jointly filed petition would be untimely, the ISO will review for good cause and extenuating circumstances. If the ISO does not find good cause and extenuating circumstances, the ISO will deny the I-751 as untimely. If the subsequent filing is timely, and if the ISO finds good cause and extenuating circumstances, the ISO will review the petition to determine if the applicant has presented additional evidence different from the first petition. If there is no different or additional evidence the ISO will issue a denial notice incorporating by reference the grounds of previous denial (sample denial attached). If the subsequent filing contains additional or different evidence from the first petition, and the ISO finds that the additional or different evidence does not establish the bona fides of the marriage, the ISO will issue a denial notice stating why the evidence fails to establish the bona fides of the marriage. If the I-751 is denied, the ISO will route the file to the appropriate unit for issuance of an NTA (if the CPR is not currently in removal proceedings).

b. Waiver Request I-751 Petitions

If an ISO encounters a waiver request petition subsequent to the denial of a previous waiver request petition based on the same ground (termination of a marriage entered in good faith, extreme hardship, or battery or extreme cruelty), the ISO will review the new petition to determine if the applicant has presented additional evidence different from the first petition.* If there is no additional evidence, the ISO will issue a denial notice incorporating by reference the failure to establish eligibility for the requested waiver in the first petition (sample denial attached). If the subsequent filing contains additional evidence from the first petition, and the ISO finds that the additional or different evidence fails to establish the bona fides of the marriage and/or eligibility for the requested waiver, the ISO will issue a denial notice stating why the evidence fails to establish the bona fides of the eligibility for the waiver. If the I-751 is denied, the ISO will route the file to the appropriate unit for issuance of an NTA (if the CPR is not currently in removal proceedings).

If a waiver request I-751 petition filed subsequently to a previously denied waiver request petition is based on a different ground than the previous petition, the ISO will evaluate the new petition separately from the previous denial. Similarly, if a waiver request petition follows the denial of a jointly filed petition, or a jointly filed petition follows the denial of a waiver request petition, the ISO will evaluate the new petition separately from the previous denial.*

NOTE:

The ISO should request all prior related filings pertaining to the case before making a final decision.

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E. Possible Fraud Vetting

ISOs should be aware that cases in the categories identified above (cases involving final orders, pending removal proceedings, unexcused untimely filings, or successive or multiple filings) may be more likely to exhibit fraud indicators. Such cases should be thoroughly checked against all relevant systems and vetted for possible fraud in accordance with established procedures.

If petitions cannot be adjudicated at the service center level, and it involves fraud, the ISO will relocate the petition to a field office for interview and final adjudication. The ISO should complete any other adjudicative actions, such as an RFE, prior to referring the petition to the field office.

5. Adjudicator's Field Manual Update:

The AFM is revised to add Chapter 25.1(g)(6) and 25.1(h)(4) and Appendix XXXX

25.1 Immigration Marriage Fraud Amendments of 1986.

* * *

(g) Adjudication of the Joint Petition

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(6) Adjudication of Form I-751, *Petition to Remove Conditions on Residence Conditions, Where the CPR Has a Final Order of Removal, Is in Removal Proceedings, or Has Filed an Unexcused Untimely Petition or Multiple Petitions.*
[Chapter added on (date memo signed)]

When adjudicating a Form I-751 filed by a conditional permanent resident (CPR), who is the subject of a final order of removal, is in removal proceedings, has filed untimely, or has filed multiple petitions, the ISO must follow the steps below:

A. I-751 petitions filed by CPR with a Final Order of Removal

If the ISO	Then the ISO
confirms a final order of removal in the file	will deny any I-751 petition, jointly filed or hardship waiver filed, clearly indicating why, and route the file through the chain of command to ICE Office of Detention and Removal having jurisdiction over the CPR (see denial sample attached to this memo)

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B. I-751 petitions filed by CPR currently in Removal Proceedings

If the ISO	Then the ISO
confirms a Form I-862, Notice to Appear (NTA) in the file through EOIR, CIS, IBIS, and EARM	Will adjudicate the I-751 petition first based on the merits, and route the file through the chain of command to the ICE Office of Chief Counsel having jurisdiction over the proceedings.

C. Evaluating Good Cause for Unexcused Untimely Jointly Filed I-751 Petitions

If the ISO	Then the ISO
confirms that the jointly filed I-751 petition is not filed within 90 day period before the second anniversary of the CPR’s lawful admission or adjustment for permanent resident.	<p>will review the late filing for a written explanation for good cause and extenuating circumstance.</p> <p>If the CPR does not submit a written explanation and a request to excuse the late filing, the ISO will deny the case, clearly indicating untimely filing (see denial sample attached to this memo), The ISO will route the file to the appropriate unit for issuance of a NTA.</p> <p>If the CPR does submit a written explanation and a request to excuse the late filing, the ISO will evaluate the explanation for good cause and extenuating circumstances and make a final determination on accepting the untimely jointly filed petition.</p>

Note
 In evaluating good cause and extenuating circumstances, the ISO will refer to memo entitled *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*. See Appendix XXXX;

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Additions to *Adjudicator’s Field Manual*, Chapter 25.1(g)(6) and 25.1(h)(4) and Appendix XXXX (AFM Update AD09-48)

D. Multiple Filings

Jointly Filed I-751 petitions

If the ISO	Then the ISO
<p>encounters a jointly filed petition submitted subsequent to the denial for cause.</p>	<p>will review the petition to determine if the petition was filed timely.</p> <p>If the subsequent filing is timely, the ISO will review the petition to determine if the additional evidence is sufficient to overcome the reasons for the prior denial</p> <p>If the CPR does not submit any additional evidence , the ISO will deny the second petition incorporating by reference the reasons for the denial of the first petition (see denial sample attached) and will route the file to the appropriate unit for issuance of an NTA addressing both decisions and place the CPR in removal proceedings (if the CPR is not currently in removal proceedings)</p> <p>If the CPR does submit additional evidence and the adjudicator finds the evidence sufficient to establish eligibility for removal of conditions, the ISO will approve the petition.</p> <p>If the subsequent filing is untimely, which in most case it would be, the ISO will review for good cause and extenuating circumstances.</p> <p>If the CPR does not submit a written explanation for good cause and extenuating circumstances, the ISO will deny the petition as untimely.</p> <p>If the CPR does submit a written explanation for good cause and extenuating</p>

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	circumstances and submits additional evidence sufficient to establish eligibility for removal of conditions , the ISO will approve the petition.
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Appendix 22-xx Form-751 Adjudication Steps for USCIS Immigration Services Officers (ISOs) Appendix added [date memo signed; AD09-48]

I-751 Hardship waiver request petition

If the SC ISO	Then the SC ISO
encounters a hardship waiver petition submitted subsequent to the denial of the previous hardship waiver based on the same ground.	<p>will review the new petition to determine if the applicant has presented additional evidence sufficient to overcome the prior denial.</p> <p>If the CPR does submit additional evidence sufficient to establish eligibility for removal of conditions, the ISO will approve the petition.</p> <p>If the CPR does not submit additional evidence, the ISO will deny the second petition incorporating by reference the reasoning for the denial of the first petition (see denial sample attached) and will route the file to the appropriate unit for issuance of an NTA addressing both decisions and place the CPR in removal proceedings (if the CPR is not already in removal proceedings)</p>

AFM Transmittal Memoranda Revisions. The *AFM* Transmittal Memoranda button is revised by adding new entries, in numerical order, to read:

AD09-48 [dated memo signed]	<p>Chapters:</p> <ul style="list-style-type: none"> • 25.1(h)(4) • 25.1(g)(6) <p>Appendix 22-XX</p>	This memorandum revises AFM 25.1 to add Chapter 25.1 (g)(6) and 25.1(h)(4) and provide guidance on “Adjudication of Form I-751, <i>Petition to Remove Conditions on</i>
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		Residence, Where the CPR has a Final Order of Removal, Is in Removal Proceedings or Has Filed an Unexcused Untimely Petition or Multiple Petitions”.
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6. Use

This memorandum is intended solely for the training and guidance of USCIS personnel in performing their duties relative to the adjudication of applications. 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.

7. Contact

Any questions regarding the memorandum should be directed through appropriate supervisory channels to Felicia Cameron, Program Manager, Office of Service Center Operations or to the Office of Field Operations’ mailbox “OFO AOS & Legalization.”

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