U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
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U.S. Citizenship and Immigration Services

Service Center Operations Monthly Stakeholder Teleconference Motions and Appeals

Background

The USCIS Service Center Operations Directorate (SCOPS) and the Office of Public Engagement (OPE) in conjunction with the four Service Centers hold monthly stakeholder teleconferences on a variety of subject matter. On April 26, 2011, the Nebraska Service Center (NSC) hosted a stakeholder teleconference on the subject of motions and appeals. The Service Centers in Texas, Vermont, and California also participated, as did the Administrative Appeals Office (AAO). The purpose of the session was to present an overview[1] of the filing and processing of motions to reopen, motions to reconsider, and appeals to the AAO and Board of Immigration Appeals (BIA). The session was for USCIS to provide information and address questions from individual stakeholders. The engagement included a presentation, which was sent to stakeholders shortly beforehand and which can be found on the USCIS website (www.uscis.gov).

The session also allowed for the discussion of topics suggested by stakeholders prior to the engagement. This discussion is summarized below.

Discussion Topics

Concurrent Denials

Memorandum from William R. Yates, Deputy Executive Associate Commissioner, Immigration Services Division, *Procedures for concurrently filed family-based or employment-based Form I-485 when the underlying visa petition is denied* (HQADN 70/23.1) (February 28, 2003), instructs USCIS officers to deny a Form I-485 adjustment application in instances where the concurrently filed underlying Form I-130 or I-140 immigrant petition is denied. If the denial of the underlying petition is later overturned on appeal, the Form I-485 can be reopened on Service motion at that time. However, USCIS does not reopen the Form I-485 while the underlying appeal is still pending.

Form I-290B Filing Fees

In the past, applicants and petitioners were able to file a motion on letterhead without either the Form I-290B, Notice of Appeal or Motion, or a filing fee. However, regulations published in

[1] Please note that the discussion topics are general guidelines, and that these guidelines may not apply to cases that have unique procedures

September 2005 require that any motion must be filed on Form I-290B. (*See* 70 FR 50954 (2005).)

- Regulations at 8 CFR 103.5(a)(1)(iii) state that motions "shall" be filed on Form I-290B. Therefore, a letter, in lieu of Form I-290B, is no longer sufficient when a party files a motion.
- The Form I-290B filing fee must be paid; however, regulations at 8 CFR 103.7(c)(3)(vi) allow for the affected party to seek a fee waiver if the underlying petition or application was fee exempt or was eligible for a fee waiver.
- USCIS policy, as stated in the Adjudicator's Field Manual (AFM) chapter 10.10, does permit USCIS to refund a filing fee, under certain situations. However, this provision does not allow for waiver of the fee upfront. Rather, the party must pay the filing fee, and can request a refund if the party believes the circumstances addressed in chapter 10.10 exist

Officer Review of Appeals and Motions

A motion is generally adjudicated by the same officer who made the original decision. Motions that do not overcome the basis of the denial are generally reviewed by a supervisor. The Adjudicator's Field Manual notes that denial decisions are normally sent to a supervisory officer for review and signature prior to mailing. A properly filed appeal that does not overcome the basis for the denial is sent to the appropriate appellate office, either the BIA or the AAO.

Expedite Requests

Any expedite request of a pending I-290B motion is contingent on the regular expedite criteria applicable to the underlying application or petition. General guidance on expedite criteria and procedures for requesting an expedite can be found under the "Forms Guidance" section of the USCIS website at www.uscis.gov.

Premium Processing

Form I-290B appeals or motions and Form EOIR-29 appeals are ineligible for Premium Processing Service. (*See generally* 8 CFR 103.2(f)(1) & (2).)

Satisfactory Departure and Voluntary Departure After Denial

Satisfactory departure is a form of relief which exists only with respect to individuals admitted under the Visa Waiver Program. (*See* 8 CFR 217.3(a).) It is not a form of relief generally available to applicants or beneficiaries upon the denial of a petition or application.

In the past, voluntary departure was given routinely when an application was denied; however, after the statutory changes to voluntary departure that took effect in 1997 by the passage of the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA), the ability to grant voluntary departure was curtailed significantly. DHS does still have authority to grant voluntary departure, in lieu of removal proceedings. The individual must, however, specifically request voluntary departure, and must agree to depart under whatever conditions DHS may set. (*See* 8 CFR 240.25(c).)

A more significant concern is that, if the individual fails to depart by the time specified by DHS, the individual forfeits the ability to seek voluntary departure from the immigration judge. (*See* 8 CFR 1240.26(a).) Routinely granting voluntary departure could actually be disadvantageous to the individual. If, by contrast, the individual leaves the United States shortly after the denial, unlawful presence generally will not be an issue, unless the applicant has already accrued more than 180 days of unlawful presence.

Prospective New AAO Regulations

The AAO continues to work with the individual components within USCIS and DHS necessary to complete the proposed regulation prior to publication for public comment. While delays are inevitable in any regulatory process, the work continues unabated. We hope to have the regulation ready for publication this summer.