

Immigration Information

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Overview of the Adjudication Process./10.3 General Adjudication Procedures [AD 01-34]. (2 of 2)

(2) Handling FOIA Requests. The FOIA requires the Government to respond to requests for inform are not exempt within 20 working days after receipt of the request. Your responsibility as an emplo conduct a thorough search for the records that have been requested and provide them to the FOI/ of your organization as quickly as possible. If you believe some or all of the information should not released to the public, inform the FOIA/PA officer and he or she will work with you to determine wh information can be exempted or not. Be sure to give the FOIA/PA officer a copy of all records that responsive to the request to preclude being held responsible for "arbitrary and capricious" withhold court.

(3) FOIA Exemptions. In addition to the special circumstances discussed in paragraph (4), there a exemptions which may be cited as grounds for withholding records under the FOIA:

- National defense or foreign policy matters required by executive order to be secret. Such recc be properly classified and may be inspected *in camera* by a court.
- Matters related solely to internal personnel rules and practices of an agency.
- Matters specifically exempted by some other statute.
- Certain privileged or confidential information such as trade secrets and confidential business ir
- Certain interagency or intra-agency memos or letters such as discussions and recommendati are pre-decisional in scope (e.g., attorney-client information, attorney work product, and judi drafts of decisions).
- Personnel, medical, or other files which, if disclosed, would constitute a clearly unwarranted in personal privacy.
- Law enforcement investigatory records may be withheld only if disclosure could (a) interfere w enforcement procedures; (b) prevent a fair trial; (c) constitute an unwarranted invasion of priv; disclose confidential sources and, in criminal investigations and national security intelligence investigations, disclose confidential information obtained only from a confidential source; (e) dis techniques and procedures for law enforcement investigations or prosecutions that could risk circumvention of the law; and (f) endanger the life or safety of any person.
- Audits of financial institutions.
- Geological maps and data on wells.

[AD01-34]

(4) Special Circumstances.

(A) Sensitive Law Enforcement Matters. The Freedom of Information Reform Act of 1986 creat mechanism for protecting certain especially sensitive law enforcement matters under subsecti the FOIA. These exclusions authorize federal law enforcement agencies to treat especially ser records as not subject to the requirements of FOIA. Contact the FOIA/PA section in Headquar

citing these exclusions.

(B) Third Agency Rule. Records of other agencies either loaned to USCIS or a part of the USCIS must be protected from unauthorized disclosure. The contents of an agency's report in possession of USCIS shall not be disclosed to another agency without the prior consent of the originating agency. The principle is generally known as the "third agency rule." The contents of an agency's document, other information in possession of USCIS shall not be disclosed to an individual without the prior consent of the originating agency. When processing a FOIA request involving the release of third agency information, the agency concerned shall be consulted regarding release of the document or information and the requester should be advised accordingly. When the request involves third agency information which is classified, that material should be referred to the originating agency for a determination of the issues in accordance with the Act. The requester shall be notified of the referral and that he or she should expect a determination from that agency. See **28 CFR 16.4**.

[AD01-34]

(5) FOIA Fees. Because USCIS is permitted to charge FOIA requesters, USCIS personnel should be advised of time spent processing specific FOIA requests.

(c) The Privacy Act.

(1) General. The Privacy Act of 1974, 5 U.S.C. 552a, establishes safeguards for the protection of information collected and maintained on United States citizens and lawfully admitted permanent residents. See Appendices **10-3** and **10-4**. [Appendices 10-3 and 10-4 added as of 02-06-2006, AD06-17.] Specific mandates that the Government:

Inform people at the time it is collecting information about them, why this information is being collected and how it will be used.

Publish a notice in the Federal Register of new or revised systems of records on individuals.

Publish a notice in the Federal Register before conducting computer matching programs.

Assure that the information is accurate, relevant, complete and up-to-date before disclosing it to the public.

Allow individuals access to records on themselves.

Allow individuals to find out about disclosures of their records to other agencies or persons.

Provide individuals with the opportunity to correct inaccuracies in their records.

(2) Privacy Act Records. The Privacy Act applies to any item, collection or grouping of information on a *United States citizen or lawfully admitted permanent resident* that can be retrieved by using the person's name, social security number, alien registration number or other personal identifier. The Privacy Act applies to personal information stored in computers as well as that maintained in paper files. The Privacy Act applies to records maintained by the Executive Branch of the Federal Government. It does not apply to records of Congress, the courts, local government or private organizations. USCIS and each Federal Government agency must publish in the Federal Register a description of its record systems that are covered by the Privacy Act. A list of major Service records systems is located on the USCIS Internet web site, in the Electronic Reading Room of the FOIA/PA section. The record system with which we are most familiar is the Alien File and Central Index System. Through this record system all A-files can be retrieved by name, date of birth or A-number. For additional information on Service records systems, refer to the Records Operations Handbook.

(3) Conditions of Disclosure. The Privacy Act lists twelve conditions under which information from records pertaining to individuals may be disclosed without the prior consent of the individuals to whom the information pertains:

- To other employees of an agency, in the performance of their official duties. The Department of Security is the agency in this case, and officials of any component of DHS may be granted access to information from USCIS records without prior consent of the subject if such official has a "need to do his/her job."
- To the public, when disclosure would be required or permitted under the Freedom of Information Act. Information available to the public from personnel records includes the name, past and present titles, grades, salaries, and duty stations of specific Federal Government employees.
- For routine uses which have been published in the Federal Register in the System Notice for each Privacy Act record system.
- To the Bureau of Census, for census or survey purposes.
- To a person or another agency for statistical research or reporting purposes, when the individual identifying information is removed.
- To the National Archives for preservation of records of historical value.
- To other agencies or organizations for law enforcement purposes upon written request from the head.
- To others, under emergency circumstances affecting the health or safety of an individual.
- To the Congress or committees to the extent of matter within their official jurisdiction.
- To the Comptroller General in the course of duties of the General Accounting Office.
- By order of a court of competent jurisdiction.
- To consumer reporting agencies in accordance with section 3(d) of the Federal Claims Collection Act of 1986.

(4) Accounting for Disclosures. The Privacy Act requires an accounting of the disclosure of information from records pertaining to an individual except for disclosures to other components of the Department of Security or disclosures made under the Freedom of Information Act. The accounting record must contain the date and purpose of the disclosure and the name and address of the person or agency to whom disclosure was made. Form G-658, Record of Information Disclosure, Privacy Act, is recommended for the necessary accounting of routine uses or other conditions of disclosure.

Many USCIS forms contain personal data about individuals which may be requested by other agencies for routine uses. When these forms are used to make disclosures of personal information about individuals who are United States citizens or aliens lawfully admitted for permanent residence, an accounting is required for Privacy Act reporting purposes.

(5) Rights and Responsibilities. As a USCIS employee you "wear two hats" - one as a citizen who is entitled to the full protection and rights established by the Privacy Act, the other as a Federal employee who is responsible for records containing personal information and who shares some responsibility in carrying out the requirements of the law.

Administrative, technical, and physical safeguards are required for records, and employees who handle records must adhere to rules of conduct to protect information from the possibility of unwarranted release or access by unauthorized persons. The importance of this responsibility is evident from the penalties imposed by the Privacy Act on Federal employees who violate certain sections of the law. A fine of \$5000 can be imposed for willfully maintaining a Privacy Act record system that has not been published in the Federal Register or for willfully making an unauthorized disclosure. Information from Privacy Act records cannot be disclosed without the consent of the record subject, except for specific conditions listed in the Federal Register and specific routine uses published by USCIS with each system notice.

(6) Individual Access to and Correction of Records. Agencies must allow individuals to gain access records about themselves. They must be permitted to review the records, may be accompanied by representatives, and shall be permitted to obtain a copy of all or any portion of records in a compressed form. Individuals must be permitted to request amendment or correction of records pertaining to them; such requests must be acknowledged within 10 working days of receipt. After acknowledgment, they must correct the information in question promptly or inform the individual of his right to request a reconsideration decision by applying to the Attorney General within 60 days of receipt of the reply. If the individual is not satisfied with the decision not to amend a record, he or she must be allowed to file a statement of his or her views which must be provided to any source that has received information from the record.

10.13 Public Copies of Decisions.

(a) General. Under the Freedom of Information Act USCIS is required to maintain a public reading room. The location of the USCIS reading room is in the Headquarters Building, Washington, D.C. In addition to general reference materials about the immigration laws, each office is required to maintain public copies, with identifying details blacked out, of decisions on various types of cases. It is not required that public copies be made of every decision. Public copies of orders need not be prepared and filed in the public reading rooms when it is known, without research, that an identical order has been prepared and filed in a similar case. USCIS is required to make available on the USCIS Internet web site much of the information which is available in public reading rooms. [See **8 CFR 103.9**.]

(b) Deletion of Identifying Data. Deletions of identifying data shall not be made on "public copies" (copies which must be made available for inspection and copying by the public) of orders in proceedings which are of a public nature or in an administrative fine case.

In any other proceeding in which the order must be made available to the public, the names and addresses of the applicant, petitioner, beneficiary, and witnesses shall be deleted from the public copies. The foregoing deletions are intended to be exclusive. Other data which would make the individual readily identifiable, such as his or her present place of employment, should also be deleted. Deletions shall be accomplished by painting over the material to be deleted with a black felt marker (deletions may also be made electronically if the denial is generated by a word processor); care shall be taken to assure that none of the deleted material is visible. Each public copy must be stamped in the lower left corner, "Identifying data deleted to prevent clearly unwarranted invasion of privacy."

Deletion of identifying data and stamping will be the responsibility of the following:

- (1) The district director or service center director, whenever an order rendered by him or her, or by an officer in charge within the geographical area over which the district director has jurisdiction has become final;
- (2) The immigration judge, whenever an order rendered has become final; and
- (3) The officer in charge outside the United States, whenever an order rendered has become final.

Under its procedure, the Board of Immigration Appeals performs the required deletions and stamping on public copies when the Board renders a final order on appeal or certification.

When deletions of names and addresses from the public copies are required under this instruction, the authority will accomplish the deletions and stamp the public copies of the order entered by that authority as the copies of the initial decisions. This will insure that identical deletions are made on all copies.

(c) Preparation of Public Copies of Initial Decisions Which Are Appealed or Certified. Upon appeal or certification to the AAO, two copies of the initial decision stamped "PUBLIC COPY" in the upper right hand corner shall be prepared.

accompany the record of proceeding (in addition to the signed record copy of that decision) when the forwarded to the AAO. Upon appeal or certification to the Board of Immigration Appeals, one copy of the decision shall be so stamped and shall accompany the record of proceeding when the case is forwarded to the Board of Immigration Appeals; this copy is in addition to the one described in the procedures for certification.

The appellate authority will transmit to the office of origin a public copy of the appellate decision, to which the appellate authority will attach a public copy of the initial decision.

(d) Coding of Orders. To facilitate sorting and filing of orders (whether granted or denied) in the reading room, each public copy shall be coded by the transmitting office at the upper left of the first page in accordance with the alphabetical letter listed in **Appendix 10-1**.

(e) Distribution of Public Copies. When an order has become final, one public copy shall be forwarded expeditiously to Headquarters. Copies from the district directors, officers in charge or immigration judges forwarded through the regional office. Service center copies shall be forwarded directly to Headquarters.

When any order entered by a USCIS office outside the United States has become final, public copies with appropriate deletions and stamps, shall be forwarded expeditiously, through the district office, to Headquarters. Service offices outside the United States shall not retain a public copy of orders, as such offices are not to make copies available, but shall maintain log copies for internal audit purposes separated by category and kept chronologically for two years.

Under its procedures, the Board of Immigration Appeals retains one public copy of each of its final orders and must be made available to the public, and transmits one public copy to the district office of origin.

Whenever a decision is made by an officer (including an immigration judge) on a motion or on a renewal application, a notation reading "Prior decision (date of prior decision)" shall be made on the public copy of the subsequent decision, immediately below the alphabetical letter designation assigned to that category of case before those copies are sent to the public reading rooms.

When an order which must be made available for inspection by the public is not on 8 1/2" x 11" sheets, the public copies shall be machine-reproduced on sheets of paper that size before they are distributed.

(f) Maintenance of Opinions and Orders in Public Reading Rooms. Public copies of unpublished decisions shall be filed in chronological sequence by category of case, and shall be maintained in the reading room or where the public may inspect them in Headquarters. Hardcover, looseleaf, three-ring binders shall be used to house the orders, or they will be made electronically available on-line. If the volume of orders in any category is large enough to so warrant, a separate binder shall be maintained for each such category. On the other hand, if the volume in any successively lettered categories as listed above does not warrant a separate binder, such categories separated by dividers may be included in a single binder. The spine (back) of each loose binder shall be appropriately labeled.

When a public copy of a decision by an officer (including an immigration judge) is received for filing in a reading room, and the public copy bears a notation reading "Prior decision (date of decision)", the prior decision referred to shall be removed from the chronological sequence in which it had been filed, shall be stapled to the subsequent decision, and both decisions shall then be filed in the appropriate category, chronologically according to the date of the subsequent decision.

Similarly when a district office receives a public copy of a Board of Immigration Appeals decision, that copy shall be examined to see whether it grants or denies an application or petition which the district director previously denied. If it does, and if the public copy of the district director's decision has been sent previously to the public reading room, before the public copy of the Board's decision is filed in the public reading room, a notation "Prior decision (date of prior decision)" shall be inserted on that copy, immediately below the a

letter designation accorded to the Board's decision, and the prior decision shall be disposed of in the same manner indicated in the preceding paragraph. The same action shall be taken with respect to public copies of Board decisions in final proceedings.

(g) Assistance to the Public in Locating Orders. When a member of the public requests access to a copy of an order relating to a specifically named individual, he or she shall be informed of the manner in which public copies of decisions are filed and informed that identifying data is deleted to prevent unwarranted invasion of personal privacy except when the decision is entered in an expulsion, naturalization, or administrative final proceeding or any other proceeding that was open to the public. If a member of the public nevertheless states that he or she desires to see an unpublished decision relating to a specifically named individual in a type of case in which identifying data is deleted from the public copy of the decision, he or she shall be advised to file an application under the Freedom of Information Act as provided in **8 CFR 103.10**.

(h) Matters Not Within Purview of 8 CFR 103.9. The following are not decisions within the meaning of 8 CFR 103.9 and, therefore, are not available to the public:

(1) Notices of approval or denial communicated to an applicant or petitioner by a form on which only a preprinted or stamped item is checked or inserted (e.g., Forms I-541, I-542, I-171, I-180). However, forms on which the reason for decision has been typed because the preprinted or stamped items do not meet the requirements of 8 CFR 103.9 are not exempt from being made available for public inspection;

(2) Notations by check mark, stamp or other brief endorsement on an application or petition showing approval or denial;

(3) Memoranda of creation of records of lawful permanent residence (Forms **I-181**);

(4) Immigration offices' admission stamp on immigrant visas, passports or Forms I-94;

(5) Notices of voidance of nonresident alien border crossing cards bearing a stamped reason for voidance;

(6) Reports and recommendations on page 4 of Form **N-600**, on Form N-600A, on Form N-635, or on other similar form relating to the disposition of an application for a certificate of citizenship under the Act or under any predecessor statute, including those which are supported by a supplemental report;

(7) Reports and recommendations completed on preprinted Form N-580, Application for a Certificate of Naturalization or Repatriation; Form N-577, Application for a Special Certificate of Naturalization; Form N-570, Application for a New Naturalization or Citizenship Paper; Form **N-455**, Application for Transfer of Residence for Naturalization; Form **N-470**, Application to Preserve Residence for Naturalization Purposes; and on any other preprinted form used for the purpose of cancelling a certificate of citizenship under section **342** of the Act on the sole ground that respondent has confessed alienage;

(8) Memoranda of designated examiners and regional directors pursuant to **8 CFR 335.12**; and

(9) Summary decisions of immigration judges, and oral opinions dictated into the record by an immigration judge and not transcribed.

(i) Cases Involving National Security, Foreign Policy and Confidentially Furnished Information. Cases involving national security, foreign policy and confidentially furnished information, and for that reason, orders of denial in such cases shall not be made available.

(j) Decisions Involving Waiver of Foreign Residence Requirement for Exchange Aliens. A copy of each decision notifying an applicant of the approval of his application for a waiver of the foreign residence requirement shall not be made available.

section **212(e)** of the Act on the basis of exceptional hardship or persecution shall be processed and forwarded to the reading room in the manner set forth above. In addition, there shall be attached a copy of the request for the recommendation of the Department of State. Similarly, when a letter denying a waiver is issued to an applicant, the reason for denial shall be given and a copy of the letter shall be routed to the reading room. If a request was made for the State Department's recommendation, a copy of the request shall be attached to the reading-room copy of the denial letter.

A copy of each letter notifying an alien of the approval or denial of a section **212(e)** waiver, based upon a request of an interested government agency or based upon a written statement of the alien's country of nationality or last residence that it has no objection to the waiver, shall be processed and forwarded to the reading room in the manner set forth above.

10.14 Directed Decisions.

[(b)(2) or (b)(7)(E)]

10.15 Exercise of Discretion; Uniformity of Decisions.

Although all types of adjudications involve proper application of laws and regulations, a few also involve an exercise of discretion: adjustment of status under **section 245** of the Act, change of status under **section 245** of the Act and various waivers of inadmissibility are all discretionary applications, requiring both an application and a consideration of the specific facts relevant to the case. An exercise of discretion does not mean that a decision can be arbitrary, inconsistent or dependant upon intangible or imagined circumstances. Although regulations can provide guidelines for many of the types of factors which are appropriate for consideration, a regulation cannot dictate the outcome of a discretionary application. [See, for example, HHS Poverty Guidelines Appendix 10- 3.] For each type of adjudication, there is also a body of precedent case law which is intended to provide guidance on how to consider evidence and weigh the favorable and adverse factors present in the case. The adjudicator must be familiar with the common factors and how much weight is given to each factor in the body of precedent case law. The case law and regulatory guidelines provide a framework to assist in making decisions which are consistent and fair, regardless of where the case is adjudicated or by whom.

It will be useful, particularly for inexperienced adjudicators, to discuss unusual fact patterns and novel cases requiring an exercise of discretion with peers and supervisors. In particularly difficult or unusual cases, a decision may be certified for review to the Administrative Appeals Office. Such certifications may ultimately result in an expansion of the body of precedent case law. Discretionary decisions or those involving complex facts, whether the outcome is favorable or unfavorable to the petitioner or applicant, require supervisory review.

NOTE: Even in non-discretionary cases, the consideration of evidence is somewhat subjective. For example, when considering an employment-based petition, the adjudicator must examine the beneficiary's employer's experience and determine if the experience meets or exceeds, in quality and quantity, the experience requirement stated on the labor certification by the employer. However, a subjective consideration of evidence should not be confused with an exercise of discretion. Like an exercise of discretion, a subjective consideration of evidence does not mean the decision can be arbitrary, inconsistent or dependant upon intangible or imagined circumstances.

10.16 Denial for Lack of Prosecution.

Any application or petition may be denied, pursuant to **8 CFR 103.2(b)**, if a petitioner or applicant fails to appear for a required interview, fails to provide an original document when requested to do so, fails to appear for fingerprinting as directed or fails to provide additional evidence when requested. When an application is denied for lack of prosecution, the petitioner, applicant or attorney of record, as appropriate, must be notified in writing of the decision. If such a notice of denial is returned undeliverable, place the notice, including the original mail envelope, in the appropriate file as evidence of attempted service. Such a denial is without prejudice to the applicant's right to reapply.

re-filing of the application or petition.

10.17 Motions to Reopen or Reconsider.

(a) General. **[Revised 04-20-2006 to include Notes 1-3]** A motion to reopen or a motion to reconsider a decision may be filed provided the request meets the requirements of 8 CFR 103.5. Motions to the BIA must meet the requirements of 8 CFR 3.2. Ordinarily a motion is adjudicated by the same officer who made the original decision. In all cases, the motion must be considered by the same office (district, service center, immigration court, AAO, or BIA) which most recently decided the case. A motion may be filed by the applicant or petitioner or by USCIS.

Note 1: Officers are not to reopen, revoke, or rescind applications or petitions that USCIS previously approved and that have expired.

Note 2: When considering any form of extension or similar benefit, and where the same parties are involved, USCIS will give deference to the previous decision. Deference is required even if there is a precedent decision. Furthermore, officers may only draw a different conclusion where there is a clear change of circumstances or in facts. Even in such instances, a supervisor must explicitly concur with the different conclusion.

Note 3: Unless there is a clear finding of fraud or substantial material misrepresentation, or the facts have changed and distinctly changed, officers should not reopen a previously approved and valid application or petition. In these circumstances, a supervisor must explicitly concur with the different conclusion.

(b) Motion Filed by Applicant or Petitioner. A motion filed by the applicant or petitioner for consideration by the BIA is filed in writing with the fee prescribed in **8 CFR 103.7**. Consideration of a motion is a two-stage process: the first stage is a determination as to whether the case should be reopened or reconsidered; the second stage (for those motions that are reopened or reconsidered) is the rendering of a new decision. Although **8 CFR 103.5(a)(1)(iii)** states that the motion should be filed on Form I-290A, that form has no legal existence as an approved form since 1994 (and prior to that date was only used for a different purpose). Accordingly, the moving party cannot be held to that particular requirement and a motion made in writing may be rejected simply because it is not on that particular form.]

A motion to USCIS which does not meet one or more of the requirements for a motion set forth in 8 CFR 103.7 (other than the Form I-290A requirement) must be dismissed for failure to meet those requirements, with a written order describing the deficiencies. The fee is not refunded in such a situation, unless it is determined that there was some USCIS error involved in the applicant or petitioner submitting the motion.

If the case is accepted for reopening or reconsideration, a new decision must be issued in formal order. Such decision might be:

- To approve the application or petition, if all reasons for the original denial have been overcome and no new reasons have arisen;
- To deny the application or petition for the same reasons as in the original decision, but with an explanation as to why the arguments submitted in the motion were not persuasive;
- To deny the application or petition for reasons not contained in the original decision, provided the petitioner is given an opportunity to review and rebut any new evidence of which he or she was not aware; or
- A combination of the second and third possibilities (reaffirmation of the original reasons plus the addition of new reasons).

(c) USCIS Motions. If you determine that a petition should not have been approved but there are no specific applicable grounds for revocation in the regulations, or that a petition should not have been denied, the petition may be reopened on USCIS motion and a new decision issued. [See **8 CFR103.5(a)(5)**.] If the motion is granted, a “notice of intent” should be used; if the new decision is favorable, the decision should be issued without any prior notice. A new appeal period commences with the issuance of a new adverse decision. [See also “Petition Revocation” in Chapter 20 of this manual.]

10.18 Certification of Decisions.

(a) General. A certification is a request by the deciding official for review of a decision (approval or denial) by the appropriate appellate authority. A decision may be certified to the appropriate appellate authority (AAO or BIA). In cases where there is no appeal provided by regulation, certification is to the AAO. Certification should be initiated in the following case where:

- Headquarters has directed certification of an individual case, class of cases or cases with particular patterns;
- the deciding official believes the facts or issues of a case are so novel or complex that review by a higher level of authority is an appropriate means of obtaining guidance.

A certification, whether the decision is to approve or deny a case, requires a formal written order and use of Form I-290C. A certified decision is not considered final until the order has been considered by the appellate body. [See **8 CFR103.4**.]

(b) Procedures for Forwarding. In order to certify a case, the office preparing the initial decision must maintain a complete record of proceedings in the same manner as a record prepared for an appeal, including the original and “Public” copies.

10.20 Adjudications Approval Stamps, Facsimile Stamps and Dry Seals [reserved]

Reserved under major revision.

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