



November 4, 2015

PM-602-0124

## Policy Memorandum

SUBJECT: Initial Field Review of Appeals to the Administrative Appeals Office

### Purpose

This policy memorandum (PM) and accompanying revisions to the Adjudicator's Field Manual (AFM) provide guidance to employees of U.S. Citizenship and Immigration Services (USCIS) on the proper processing of appeals to the Administrative Appeals Office (AAO). This PM revises Chapters 10.7(b)(5) and 10.8(a) of the AFM; AFM Update AD16-02.

### Scope

Unless specifically exempted herein, this PM applies to and binds all USCIS employees.

### Authority

8 CFR 103.3

### Background

The regulation at 8 CFR 103.3 governs USCIS processing of appeals to the AAO. The Department of Homeland Security (DHS) plans to update and revise this regulation. In the interim, USCIS is issuing this PM to promote accurate and efficient processing of appeals to the AAO.

### Guidance

#### I. Overview of Initial Field Review

Appeals to the AAO are filed on Form I-290B, Notice of Appeal or Motion.<sup>1</sup> The appeal first undergoes an intake procedure to make sure that the appeal is complete and any required filing fees have been collected. After intake, the USCIS field office that made the unfavorable decision conducts an "initial field review" (IFR) of the appeal.<sup>2</sup> IFR is governed by 8 CFR 103.3(a)(2)(ii)-(v).

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<sup>1</sup> 8 CFR 103.3(a)(2)(i).

<sup>2</sup> See 8 CFR 103.3(a)(2)(ii). The term "field office" includes USCIS field and overseas offices, Service Centers, and the National Benefits Center.

For timely-filed appeals, the field office shall review the appeal to determine whether to take favorable action.<sup>3</sup> If the field office does not take favorable action, it shall promptly forward the appeal to the AAO for appellate review without issuing a new decision.

IFR is required by the regulations.<sup>4</sup> The field office must review the appeal before forwarding it to the AAO.

The purpose of IFR is to promote the efficient review of administrative appeals of field office decisions. The affected party may submit a brief and/or additional evidence with the appeal that establishes eligibility for the benefit sought.<sup>5</sup> In addition, the field office that made the unfavorable decision is already familiar with the case and may still have the record of proceeding onsite. Permitting the field office to take immediate favorable action in such cases, without further review by the AAO, enhances efficiency and promotes customer service.

The appeal process is undermined if IFR is not completed in a timely manner, or if the appeal is inappropriately terminated during IFR. Therefore, this PM provides additional guidance on the timeliness and scope of IFR.

## **II. Timeliness of IFR**

The regulations contemplate, but do not require, that the field office will complete IFR within 45 days of the appeal filing date.

Specifically, 8 CFR 103.3(a)(2)(iii) states that, “[w]ithin 45 days of receipt of the appeal,” the reviewing official may treat the appeal as a motion and take favorable action. *After* 45 days, however, “that official is not precluded from reopening a proceeding or reconsidering a decision on his or her own motion” in order to take a favorable action. *Id.* In either case, if favorable action is not taken, the field office “shall promptly forward” the appeal and related record of proceeding to the AAO. 8 CFR 103.3(a)(2)(iv).

Even though the regulations do not require the field office to complete IFR within 45 days of the appeal filing date, USCIS is adopting 45 days as the agency’s processing goal for IFR.<sup>6</sup> This processing goal will enhance the customer service and efficiency goals of IFR.

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<sup>3</sup> 8 CFR 103.3(a)(2)(iii). For untimely appeals, USCIS must determine whether the appeal meets the requirements of a motion to reopen or a motion to reconsider as described in 8 CFR 103.5(a)(2)-(3). 8 CFR 103.3(a)(2)(v)(B)(2).

<sup>4</sup> See 8 CFR 103.3(a)(2)(ii) (“The official who made the unfavorable decision being appealed *shall* review the appeal....”) (emphasis added) and 103.3(a)(2)(iii) (“The reviewing official *shall* decide whether or not favorable action is warranted.”) (emphasis added).

<sup>5</sup> An “affected party” is “the person or entity with legal standing in a proceeding.” 8 CFR 103.3(a)(1)(iii)(B).

<sup>6</sup> The 1989 proposed rulemaking that first introduced IFR *required* field offices to complete IFR within 45 days and did not provide for any mechanism by which the field offices could take favorable action after the 45-day review period. See 54 Fed. Reg. 29344, 29345, 29347 (proposed July 12, 1989). If a field office did not take favorable action within 45 days, it was required to promptly forward the appeal to the AAO. *Id.* at 29347. The preamble to the proposed rule noted that the “45-day requirement is similar to the current requirement in [Board of Immigration Appeals and Legalization Appeals Unit] cases.” *Id.* at 29345. The 1990 final rule contained a “minor technical amendment” to clarify that “the reviewing official is not precluded from taking favorable action on his or her own motion after 45 days of receipt.” 55 Fed. Reg. 20767, 20768 (May 21, 1990). While the final rule clarified

### III. Scope of IFR

The IFR of timely appeals should be of sufficient depth and detail to enable the field office to “decide whether or not favorable action is warranted.”<sup>7</sup> Similarly, the review of an untimely appeal should be sufficient to adequately determine whether it meets the requirements of a motion.<sup>8</sup>

The regulations do not define “favorable action,” but the term is commonly understood to mean that the field office reverses its original decision and grants the underlying benefit request. Therefore, USCIS considers “favorable action” to mean the approval of the application or petition being appealed.

While IFR may result in the approval of a benefit request and make appellate review by the AAO unnecessary, the IFR process cannot undermine an affected party’s procedural right to AAO review, when applicable. Appeals and motions are separate post-adjudication remedies governed by different authorities. An appeal asks an appellate authority to review an unfavorable decision, whereas a motion seeks review by the same authority that issued the latest decision in the proceeding.<sup>9</sup> A field office may treat a timely-filed appeal as a *motion* if favorable action is warranted,<sup>10</sup> or treat an untimely appeal as a *motion* if it meets the requirements of a motion.<sup>11</sup> However, the AAO is the proper authority to adjudicate the Form I-290B *appeal* itself.<sup>12</sup>

Therefore, except in very limited circumstances, a field office may not reject, dismiss, or otherwise terminate a Form I-290B appeal.<sup>13</sup> This includes appeals that have issues relating to lack of standing, untimeliness, lack of a properly executed Form G-28, improper signatures, failure to specifically identify an error, or a request for withdrawal.<sup>14</sup>

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that a field office may reopen or reconsider its prior decision on its own motion after 45 days, it did not indicate an intent to depart from the 45-day timeframe within which to conduct IFR.

<sup>7</sup> 8 CFR 103.3(a)(2)(iii).

<sup>8</sup> See 8 CFR 103.3(a)(2)(v)(B)(2).

<sup>9</sup> Accordingly, only the AAO has jurisdiction over a motion relating to an earlier AAO decision. 8 CFR 103.5(a)(1)(ii); AFM Chapter 10.17(a), Motions to Reopen and Reconsider. Motions filed on a previous AAO decision are to be forwarded to the AAO without delay. There is no IFR for motions on AAO decisions.

<sup>10</sup> 8 CFR 103.3(a)(2)(iii).

<sup>11</sup> 8 CFR 103.3(a)(2)(v)(B)(2).

<sup>12</sup> This separation of authorities is further supported by the regulation at 8 CFR 103.3(a)(2)(v)(A)(2). The regulation allocates certain actions between the field offices and the AAO by virtue of their respective authorities over motions and appeals. Specifically, when an appeal is filed by an attorney or representative without an accompanying Form G-28, Notice of Entry of Appearance as Attorney or Accredited Representative, only the AAO has the authority to reject the appeal as improperly filed.

<sup>13</sup> An appeal may be rejected without AAO review during the intake process, which precedes the field office’s substantive review of the appeal. Such circumstances include when the Form I-290B lacks a signature or the correct filing fee. When USCIS rejects an appeal during the intake process, the appeal is returned to the sender together with any submitted filing fee. During IFR, if the field office determines that the appeal should have been rejected during the intake process, the field office may reject the appeal.

<sup>14</sup> See 8 CFR 103.3(a)(2)(v)(A)(1) (standing); 8 CFR 103.3(a)(2)(v)(B) (untimely appeal); 8 CFR 103.3(a)(2)(v)(A)(2) (lack of a properly executed Form G-28); 8 CFR 103.2(a)(2) (signatures); 8 CFR 103.3(a)(1)(v) (failure to specifically identify an error); 8 CFR 103.3(a)(2)(ix) (request for withdrawal).

## **Policy**

USCIS field offices will follow the guidance stated in the AFM, as amended by this PM, in processing Form I-290B appeals.

## **Implementation**

The AFM is revised as follows:

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

(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).

When applicable, each decision will include guidance on the procedures for filing appeals and motions, including instructions for where to find the appropriate forms. Appeals to the BIA are filed on Form EOIR-29, and appeals to the AAO are filed on Form I-290B.

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

### **NOTE 1**

Subject to any specialized guidance from headquarters, denial notices for petitions appealable to the BIA should include the following language:

This decision will become final unless you appeal it by filing a completed Form EOIR-29, *Notice of Appeal to the Board of Immigration Appeals from a Decision of a USCIS Officer*. Although the appeal will be decided by the Board of Immigration Appeals (BIA), you must send the Form EOIR-29 and all required documents, including the appropriate filing fee, to the [INSERT NAME OF DENYING OFFICE HERE] at the following address: [INSERT ADDRESS OF DENYING OFFICE HERE]. The Form EOIR-29 must be received 30 days from the date of this decision notice. The decision is final if your appeal is not received within the time allowed.

If you, the petitioner, intend to be represented on appeal, your attorney or accredited representative must submit Form EOIR-27 with Form EOIR-29.

If you or your attorney wishes to file a brief in support of your appeal, the brief must be received by the USCIS office where you file your appeal either with your appeal or no later than

30 days from the date of filing your appeal. Your appeal will be sent for further processing 30 days after the date USCIS receives it; after that time, no brief regarding your appeal can be accepted by the USCIS office.

For more information about filing requirements for appeals to the BIA, please see [8 CFR 1003.3](#) and the Board of Immigration Appeals Practice Manual available at [www.usdoj.gov/eoir](http://www.usdoj.gov/eoir).

Revocation notices for petitions appealable to the BIA should include the same language. Although [8 CFR 205.2](#) provides for only 15 days for revocation appeals, the BIA applies the standard 30-day appeal timeframe for both denials and revocations, pursuant to 8 CFR 1003.3(a)(2).

Decisions in New York *Stokes* cases that require an interview transcript should omit the third paragraph of the above denial language. Once an interview transcript is provided, the petitioner should be afforded 30 days in which to file a brief.

**NOTE 2**

The final denial and final revocation notice must reflect the correct number of days in which the petitioner or self-petitioner has to appeal the decision when it is appealable to the AAO. For standard denials, a petitioner or self-petitioner has 30 calendar days to appeal the decision; 33 calendar days if the USCIS decision was served by mail. For revocations of the approval of petitions pursuant to 8 CFR 205.2 (i.e., revocations on notice), a petitioner or self-petitioner has 15 days to appeal the decision; 18 calendar days if the USCIS decision was served by mail. If the last day of the appeal period falls on a Saturday, Sunday, or a legal holiday, the period shall run until the end of the next day which is not a Saturday, Sunday, or a legal holiday.

**NOTE 3**

8 CFR 103.2(b)(15) provides that when USCIS denies a petition or application for lack of prosecution due to abandonment, the denial cannot be appealed (although the affected party can file a motion).

☞ 2. Chapter 10.8(a) is revised to read as follows:

(a) Administrative Appeals Office Cases.

(1) General.

In most cases, the field office must prepare an appellate case record prior to sending a case to the AAO for review. A case may be subject to AAO review based on either an appeal (8 CFR 103.3) or the certification of a decision for review (8 CFR 103.4). Additionally, a petitioner or applicant may file a motion on an earlier AAO decision (8 CFR 103.5). While the AAO holds the

appellate record during the motion period, a field office may be required to forward the record to the AAO if the affected party files a late motion.

(2) Jurisdiction.

Certain unfavorable decisions may be appealed to the AAO. Under the authority that the Secretary of DHS delegated to USCIS, the AAO maintains appellate jurisdiction over approximately 50 different case types. The regulations cite to an obsolete provision - deleted 8 CFR 103.1(f) (2003) - that described the jurisdiction of the AAO prior to the creation of DHS. Currently, the case types within the AAO's jurisdiction are enumerated at [www.uscis.gov/ao](http://www.uscis.gov/ao).

In addition to the appeal process, a field office may choose to certify an initial decision to the AAO for appellate review if the case involves an unusually complex or novel issue of law or fact. An initial decision may be certified to the AAO for review even if there is no appeal available for that case type, such as an application to adjust status (Form I-485, Application to Register Permanent Residence or Adjust Status) under section 245(a) of the Act.

An initial decision may not be certified to the AAO; however, if the BIA has appellate jurisdiction, such cases may be certified to the BIA. The BIA's appellate jurisdiction is listed at 8 CFR 1003.1(b). See also Chapter 10.18, Certification of Decisions.

As a statutory exception, DHS maintains sole jurisdiction over Adam Walsh Act risk determinations in family-based immigrant visa petition proceedings. As such, certification of an initial decision containing a risk determination under the Adam Walsh Act must be directed to the AAO, not the BIA. Once the AAO has resolved the Adam Walsh Act risk determination, a denied family-based immigrant visa petition can be certified to the BIA, if necessary.

(3) Initial Field Review of Form I-290B Appeals.

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(A) Overview of Initial Field Review.

For timely-filed appeals, the field office shall review the appeal to determine whether to take favorable action. If the field office does not take favorable action, it shall promptly forward the appeal to the AAO for appellate review without issuing a new decision.

For untimely appeals, USCIS must determine whether the appeal meets the requirements of a motion to reopen or a motion to reconsider as described in 8 CFR 103.5(a)(2)-(3).

IFR is mandatory for appeals to the AAO. The field office must review the appeal before forwarding it to the AAO.

The purpose of IFR is to promote the efficient review of administrative appeals of field office decisions. The appeal process is undermined if IFR is not completed in a timely manner or if the appeal is inappropriately terminated during IFR.

(B) Timeliness of IFR.

The regulations contemplate, but do not require, that the field office will complete IFR within 45 days of the appeal filing date.

Specifically, 8 CFR 103.3(a)(2)(iii) states that, “[w]ithin 45 days of receipt of the appeal,” the reviewing official may treat the appeal as a motion and take favorable action. *After* 45 days, however, “that official is not precluded from reopening a proceeding or reconsidering a decision on his or her own motion” in order to take a favorable action. *Id.* In either case, if favorable action is not taken, the field office “shall promptly forward” the appeal and related record of proceeding to the AAO. 8 CFR 103.3(a)(2)(iv).

Even though the regulations do not require the field office to complete IFR within 45 days of the appeal filing date, USCIS is adopting 45 days as the agency’s processing goal for IFR. This processing goal will enhance the customer service and efficiency goals of IFR.

(C) Scope of IFR.

The IFR of timely appeals should be of sufficient depth and detail to enable the field office to “decide whether or not favorable action is warranted.” 8 CFR 103.3(a)(2)(iii). Similarly, the review of an untimely appeal should be sufficient to adequately determine whether it meets the requirements of a motion.

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**NOTE**

Only the AAO has jurisdiction over a motion relating to an earlier AAO decision. 8 CFR 103.5(a)(1)(ii); Chapter 10.17(a), Motions to Reopen and Reconsider. Motions filed on a previous AAO decision are to be forwarded to the AAO without delay. There is no IFR for motions on AAO decisions.

A field office may treat a timely-filed appeal as a *motion* if favorable action is warranted, or treat an untimely appeal as a *motion* if it meets the requirements of a motion. However, the AAO is the proper authority to adjudicate the Form I-290B *appeal* itself.

Therefore, except in very limited circumstances, a field office may not reject, dismiss, or otherwise terminate a Form I-290B appeal. This includes appeals that have issues relating to lack of standing (8 CFR 103.3(a)(2)(v)(A)(1)), untimeliness (8 CFR 103.3(a)(2)(v)(B)), lack of a properly executed Form G-28 (8 CFR 103.3(a)(2)(v)(A)(2)), improper signatures (8 CFR

103.2(a)(2)), failure to specifically identify an error (8 CFR 103.3(a)(1)(v)), or a request for withdrawal (8 CFR 103.3(a)(2)(ix)).

**NOTE**

An appeal may be rejected without AAO review during the intake process, which precedes the field office's substantive review of the appeal. Such circumstances include when the Form I-290B lacks a signature or the correct filing fee. When USCIS rejects an appeal during the intake process, the appeal is returned to the sender together with any submitted filing fee. During IFR, if the field office determines that the appeal should have been rejected during the intake process, the field office may reject the appeal.

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(4) Processing the Record of Proceeding.

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(5) Record of Proceeding for Bond Breach Cases.

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☞ 3. The AFM Transmittal Memoranda table is updated as follows:

AD16-02 November 4, 2015	Chapters 10.7(b)(5) and 10.8(a)	Guides USCIS officers on the processing of administrative appeals under 8 CFR 103.3.
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**Use**

This PM is intended solely for the guidance of USCIS personnel in the performance of their official duties. 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.

**Contact Information**

Questions or suggestions regarding this PM should be addressed through appropriate directorate channels to the AAO.