

Adjudicator's Field Manual

NOTE: The [USCIS Policy Manual](#) is our centralized online repository for immigration policies. We are working quickly to update and move material from the Adjudicator's Field Manual to the Policy Manual. Please check that resource, along with our [Policy Memoranda](#) page, to verify information you find in the Adjudicator's Field Manual. If you have questions or concerns about any discrepancies among these resources, please contact PolicyFeedback@uscis.dhs.gov.

Chapter 10 An Overview of the Adjudication Process.

10.1 Receiving and Acceptance Processing has been superseded by USCIS Policy Manual, Volume 1: General Policies and Procedures as of March 5, 2020.

10.2 Record of Proceeding has been superseded by USCIS Policy Manual, Volume 1: General Policies and Procedures as of May 15, 2020.

10.3 General Adjudication Procedures has been superseded by USCIS Policy Manual, Volume 1: General Policies and Procedures on November 23, 2021.

10.4 Transferring Jurisdiction within USCIS has been superseded by USCIS Policy Manual, Volume 1: General Policies and Procedures as of May 15, 2020.

10.5 Requesting Additional Information has been superseded by USCIS Policy Manual, Volume 1: General Policies and Procedures as of June 9, 2021.

10.6 Post-Decision Case Actions has been superseded by USCIS Policy Manual, Volume 1: General Policies and Procedures as of November 23, 2021.

10.7 Preparing Denial Orders has been superseded by USCIS Policy Manual, Volume 1: General Policies and Procedures as of November 23, 2021.

10.8 Preparing the Appellate Case Record

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10.20 Adjudications Approval Stamps, Facsimile Stamps and Dry Seals has been superseded by USCIS Policy Manual, Volume 1: General Policies and Procedures as of November 23, 2021.

10.21 Approval of pending immigrant visa petitions, T or U extension applications, asylee/refugee relative petitions, or applications after death of the qualifying relative. [Added 12/16/2010; AD10-51, PM-602-0017).

10.22 Change of Gender Designation on Documents Issued by USCIS has been superseded by USCIS Policy Manual, Volume 1: General Policies and Procedures as of May 15, 2020.

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10.8 Preparing the Appellate Case Record.

(a) Administrative Appeals Office (AAO) 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/aao.

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.

Appeals to the AAO are filed on Form I-290B, Notice of Appeal or Motion. 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 I-290B appeal. IFR is governed by 8 CFR 103.3(a)(2)(ii)-(v).

(i) 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.

(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. This processing goal will enhance the efficiency goals of IFR.

(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." 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.

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

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.

<u>NOTE</u>

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.

(4) Processing the Record of Proceeding .

Offices must forward to the AAO either the complete A-file or the complete receipt file, depending on the type of file that represents the Record of Proceeding (ROP). To ensure that the AAO has all necessary evidence for the adjudication of the appeal, certification, or motion, officers should not remove documents from an A-file to create a separate ROP. As a USCIS File Control Office, the AAO may receive and review the complete A-file, as necessary.

Arrange all documents in the ROP chronologically, with the earliest submitted documentation on the bottom and the most recently submitted documentation on the top. The only exception to this chronological order concerns a brief filed in support of a Notice of Appeal (Form I-290B) or a Notice of Certification (Form I-290C). In all cases, the brief should be placed below the Form I-290B or Form I-290C, even if it is filed subsequent to the Notice. Any Notice of Entry of Appearance as Attorney or Accredited Representative (Form G-28) that is submitted on appeal, in response to certification, or on motion should be placed on top of the Form I-290B.

Note: Unlike an appeal to the BIA, an appeal or motion to the AAO does not require a brief by a USCIS counsel or other official. If the district or center chooses to prepare a brief (e.g., in rebuttal to the appellant's brief), it should be clearly identified as such.

(5) Record of Proceeding for Bond Breach Cases .

Bond breaches require special attention. The A-file or ROP of a bond breach should contain copies (listed from top of A- file or ROP to bottom) of:

- The G-28 notice of appearance if applicable

- The I-290B appeal form with attachments

- The Form I-323 breach notice

- The Form I-166

- The Form I-340 demand notice

- The postal service Form 3811 showing delivery of the Form I-340

- The questionnaire and worksheet for a surety bond

- The power of attorney for the surety, or the Form I-305 as applicable

- The Form I-352, Immigration Bond

- The appellate decision of the BIA if applicable

- The final order of the immigration judge

- The Form I-862, Notice to Appear

If the applicant or petitioner has filed a motion to reopen or a motion to reconsider (MTR) an earlier decision of the AAO (the “appellate decision”), the A-file or ROP should be returned to the AAO with the addition of the appellate decision, and finally, the MTR and attachments on top.

(b) Board of Immigration Appeals (BIA) Cases.

(1) General.

8 CFR 3.1(b) lists the types of cases which may be appealed or certified to the BIA. When an appeal is filed from a decision in one of these cases, an SDAO (or higher official) must review the case, a USCIS counsel must prepare a written brief on the matter, and a Record of Proceeding must be prepared for transmittal of the case to the BIA (the complete A-File is never sent to the BIA). Unlike appeals to the AAO, the district or

service center cannot treat the appeal as a motion, even when it finds the arguments presented in the appeal to be convincing.

(2) Preparation of a Record of Proceeding for Transmittal to the BIA .

Follow these steps in setting up an ROP for transmittal to the BIA:

- If the alien has not already been assigned an A number, create an A-file. A record going to the BIA must have an “A” file number, even if the denial was originally housed in a CLAIMS receipt file.

- Write the three letter FCO code on the folder’s tab followed by the A-file number (odd numbers on the left, even on the right)

- Place a “Record of Proceeding” stamp on the outside of a standard manila file folder

- In every case involving an alien detained by or for USCIS, ICE or DHS , or when an alien's detention is imminent, firmly stapled a conspicuously marked flag showing his or her detention status to the outside of the folder

- Place all record documents on the right side of the file using an Acco-type fastener. Set up the file in an orderly fashion using a logical chronological sequence with the appeal (Form EOIR-29) and brief on top, followed by the decision itself, the petition, supporting documentation and all other relevant record material. However, if any of the material is classified, it must be handled separately (see paragraph 3)

- Staple one copy of the decision of the district or center director (with the stamped or typed notation "BIA copy" on the bottom of the face page of the order) to the left inside of the record of proceeding folder. In addition, staple two additional copies stamped “Public Copy”, but with no identifying data deleted, to the left inside corner. [See also “Public Copies” discussion in AFM chapter 10.13.]

- Do NOT place any non-record material or duplicate material in the ROP. Such material should remain in the actual A-file jacket.

- In the original A-file, attach a copy of the EOIR-29 on top of the record side indicating the action taken.

- Insure that the case is referred to a supervisor for his/her review and to the appropriate Service counsel for preparation of a brief, following normal local procedures.

- Date the form and note that it has been forwarded to the BIA, but do not date the form or note that it has been forwarded until it has been reviewed and briefed by counsel.

- Follow local procedures for housing the A-file pending receipt of the decision by the BIA.

(3) Special Procedures for Classified Information .

When a record is sent to the BIA and the decision was based on classified information, that information must be removed from the file and mailed to the DHS representative at the BIA, with an appropriate cover memorandum, following standard procedures for transmittal of classified information. This material should be forwarded simultaneously with the record of proceedings.

10.9, Waiver of Fees has been superseded by USCIS Policy Manual, Volume 1: General Policies and Procedures as of April 1, 2024.

10.10, Refund of Fees has been superseded by USCIS Policy Manual, Volume 1: General Policies and Procedures as of April 1, 2024.

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10.12 Adjudicator's Responsibilities under FOIA/Privacy Act.

(a) General.

As employees of USCIS , you work with personal information about other people. You could not perform your job (i.e., you could not determine an applicant's eligibility for benefits) without knowing some personal information about those people. The Freedom of Information and Privacy Acts (FOIA/PA) place responsibility on USCIS , and the individual officer, for disclosure of information which the public has a "right to know," while safeguarding individuals against an invasion of their personal privacy.

(b) The Freedom of Information Act .

(1) General .

The Freedom of Information Act (FOIA) 5 U.S.C 552, provides access to all Federal agency records except those which are protected from release by exemptions (reasons an agency may deny access to a requester). The FOIA can be used by anyone to access government records regardless of citizenship. The FOIA only applies to the Executive Branch of the Federal government. It does not apply to Congress, the courts, local governments or private organizations. Requests for access to USCIS records under the FOIA must be in writing (by letter or by Form G-639 Freedom of Information/ Privacy Act Request) and when received must immediately be forwarded to the FOIA/PA officer for proper handling.

[See Appendices **10-1** and **10-2** .] [Appendices 10-1 and 10-2 added as of 02-06-2006, AD06-17.]

(2) Handling FOIA Requests .

The FOIA requires the Government to respond to requests for information that are not exempt within 20 working days after receipt of the request. Your responsibility as an employee is to conduct a thorough search for the records that have been requested and provide them to the FOIA/PA officer of your organization as quickly as possible. If you believe some or all of the information should not be released to the public, inform the FOIA/PA officer and he or she will work with you to determine whether such

information can be exempted or not. Be sure to give the FOIA/PA officer a copy of all records that are responsive to the request to preclude being held responsible for "arbitrary and capricious" withholding by a court.

(3) FOIA Exemptions .

In addition to the special circumstances discussed in paragraph (4), there are nine 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 records must 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 information.

- Certain interagency or intra-agency memos or letters such as discussions and recommendations that are pre-decisional in scope (e.g., attorney-client information, attorney work product, and adjudicator's drafts of decisions).

- Personnel, medical, or other files which, if disclosed, would constitute a clearly unwarranted invasion of personal privacy.

- Law enforcement investigatory records may be withheld only if disclosure could (a) interfere with enforcement procedures; (b) prevent a fair trial; (c) constitute an unwarranted invasion of privacy; (d) disclose confidential sources and, in criminal investigations and national security intelligence investigations,

disclose confidential information obtained only from a confidential source; (e) disclose 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 creates a new mechanism for protecting certain especially sensitive law enforcement matters under subsection (c) of the FOIA. These exclusions authorize federal law enforcement agencies to treat especially sensitive records as not subject to the requirements of FOIA. Contact the FOIA/PA section in Headquarters before citing these exclusions.

(B) Third Agency Rule.

Records of other agencies either loaned to USCIS or a part of the USCIS files 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. This principle is generally known as the "third agency rule." The contents of an agency's document, report or 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 material, the agency concerned shall be consulted regarding release of the document or information originating with them and the requester should be advised accordingly. When the request involves third agency material which is classified, that material should be referred to the originating agency for a determination as to all the issues in accordance

with the Act. The requester shall be notified of the referral and that he may 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 keep track 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 records the Government collects and maintains 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.] Specifically, it 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 others.

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 about a *United States citizen or lawfully admitted permanent resident* that can be retrieved by using the persons 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 held by 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 and by 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 records pertain:

- To other employees of an agency, in the performance of their official duties. The Department of Homeland 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 know” to do his/her job.

- To the public, when disclosure would be required or permitted under the Freedom of Information Act. Information from a public record, such as the judicial record of naturalization, may be disclosed to anyone. Information available to the public from personnel records includes the name, past and present position, 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 agency 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 or disclosures made under the Freedom of Information Act. The accounting record must contain the date, nature 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 works with 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 disclosure 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 up to \$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 Act 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 to 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 comprehensive form. Individuals must be permitted to request amendment or correction of records pertaining to them, and such requests must be acknowledged within 10 working days of receipt. After acknowledgment, the agency must correct the information in question promptly or inform the individual of his right to request a review of the decision by applying to the Attorney General within 60 days of receipt of the reply. If the individual disagrees 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 readily known, without research, that an identical order has been prepared and filed in a similar case. USCIS is also making 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 open to the public 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 are not 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 data 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 shall be stamped in the lower left corner, "Identifying data deleted to prevent clearly unwarranted invasion of personal 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 whenever 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 appellate authority will accomplish the deletions and stamp the public copies of the order entered by that authority, as well 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 accompany the record of proceeding (in addition to the signed record copy of that decision) when the case is forwarded to the AAO. Upon appeal or certification to the Board of Immigration Appeals, one copy of the initial 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 or area, 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 shall be 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 required to make copies available, but shall maintain log copies for internal audit purposes separated by category of case and kept chronologically for two years.

Under its procedures, the Board of Immigration Appeals retains one public copy of each of its final orders which 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 renewed application, a notation reading "Prior decision (date of prior decision)" shall be made on the public copies of the subsequent decision, immediately below the alphabetical letter designation assigned to that category of orders, 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 of paper, 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 area 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 s

Successively lettered categories as listed above does not warrant a separate binder, several such categories separated by dividers may be included in a single binder. The spine (back) of each looseleaf 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 public 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 behind 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 decision shall be examined to see whether it grants or denies an application or petition which the district director had 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 alphabetical 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 fine 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 fine 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, a form on which the reason for decision has been typed because the preprinted or stamped items do not apply, is 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 such voidance;

(6) Reports and recommendations on page 4 of Form **N-600** , on Form N-600A, on Form N-635, and on any other similar form relating to the disposition of an application for a certificate of citizenship under section 341 of the Act or under any predecessor statute, including those which are supported by a supplementary 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-565** , Application for a New Naturalization or Citizenship Paper; Form **N-455** , Application for Transfer of Petition for Naturalization; Form **N-470** , Application to Preserve Residence for Naturalization Purposes; and on any 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 grant or denial in such cases shall not be made available.

(j) Decisions Involving Waiver of Foreign Residence Requirement for Exchange Aliens .

A copy of each letter notifying an applicant of the approval of his application for a waiver of the foreign residence requirement under 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 director's request for the recommendation of the Department of State. Similarly, when a letter denying a waiver is sent 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 the 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 has been superseded by USCIS Policy Manual, Volume 1: General Policies and Procedures as of November 23, 2021.

10.15 Exercise of Discretion; Uniformity of Decisions has been superseded by USCIS Policy Manual, Volume 1: General Policies and Procedures as of July 15, 2020.

10.16 Denial for Lack of Prosecution has been superseded by USCIS Policy Manual, Volume 1: General Policies and Procedures as of November 23, 2021.

10.17 Motions to Reopen or Reconsider.

(a) General. [Revised 02-08-2008 to remove Note 1 and renumber notes 2-3]

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

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 or adopted decision. Furthermore, officers may only draw a different conclusion where there is a clear change or distinction in facts. Even in such instances, a supervisor must explicitly concur with the different conclusion.

Note 2

Unless there is a clear finding of fraud or substantial material misrepresentation, or the facts have clearly and distinctly changed, officers should not reopen a previously approved and valid application or petition. Even 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 USCIS or 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, and the second stage (for those motions that are reopened or reconsidered) is the rendering of a new decision. [NOTE: Although **8 CFR 103.5(a)(1)(iii)** states that the motion should be filed on Form I-290A, that form has not been in 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 cannot 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 103.5 (other than the Form I-290A requirement) must be dismissed for failure to meet those requirements, using 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 format. 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 decisions, 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 applicant or petitioner is given an opportunity to review and rebut any new evidence of which he or she was not already 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 specifically 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 adverse to the petitioner or applicant, a “notice of intent” should be used; if the new decision is favorable, the decision can 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.

(1) Certification at Headquarters Direction.

DHS or USCIS headquarters may require or direct the certification of an individual case, class of cases, or cases with particular fact patterns. A case or class of cases may be certified at the direction of Headquarters with either an initial decision or pre-decision (i.e., before an initial decision is entered), as instructed by the specific directive. Headquarters-directed certifications are not required to involve unusually complex or novel issue of law or fact. Such certifications may be appropriate to ensure agency consistency on sensitive cases, or for other reasons unrelated to case complexity or novelty.

(2) Certification to the AAO.

A decision may be certified to either the Administrative Appeals Office (AAO) or the Board of Immigration Appeals (BIA), depending on which appellate body has jurisdiction over the case. See AFM Chapter 10.8, Preparing the Appellate Case Record, for a discussion of appellate jurisdiction. In a case where the regulations do not provide for an appeal, certification may be made to the AAO, but not to the BIA.

Any case that an officer certifies to the AAO must involve an "unusually complex or novel issue of law or fact." 8 CFR 103.4(a). The AAO may remand a certified decision if the decision does not articulate an unusually complex or novel issue. Such complex or novel issues may include, but are not limited to: issues of first impression; conflicting legal authorities; issues of significant public interest; federal litigation; questions of foreign law; novel policy issues; or highly complicated factual situations.

Officers should discuss within the chain of command whether a decision involves sufficient complexity or novelty to warrant certification and, if so, whether to certify. If a case involves an issue that requires a legal interpretation or policy, the chain of command will determine whether to elevate through the certification mechanism or through direct referral to the USCIS Office of Chief Counsel (OCC) and/or the Office of Policy and Strategy. The AAO relies upon OCC for guidance in matters of legal interpretation and defers to the USCIS Senior Policy Council to prescribe agency policy.

NOTE

Although the AAO carefully considers certifications as candidates for the precedent decision process, the resulting decision is most frequently issued as a non-precedent decision. A non-precedent decision resulting from a certification only resolves the novel or complex issues of law or fact contained in that individual case.

USCIS officers may not rely upon, nor cite to, non-precedent AAO decisions as legal authority in other decisions. A USCIS officer may, however, read a non-precedent decision for instructional value regarding the issue(s) in that same case. See AFM Chapter 14.4, Decisions of Administrative Appellate Bodies.

A case may be certified to the AAO for appellate review "only after an initial decision is made." 8 CFR 103.4(a)(4). By regulation, an officer must adjudicate the benefit request that is to be certified and then notify the affected party in writing of the initial decision. The written decision must be accompanied by a Notice of Certification (Form I-290C), which notifies the affected party of their right to submit a brief. To allow full opportunity for a comprehensive legal brief, the initial decision should carefully articulate the unusually complex or novel issue of law or fact that is to be reviewed. The decision may be in the form of an approval, a denial, or a revocation, if the revocation is based on a properly issued notice of intent to revoke.

On certification, the AAO will review the officer's initial decision and enter a final appellate order that either affirms or overturns the decision, or withdraws the decision and remands the case for further action. The AAO will remand or return any case that is certified without an initial decision.

A certified decision is not considered final until the AAO issues its disposition. Any related cases- such as derivative applications filed for dependent family members- may not be decided until the AAO has made a final decision on the certified case. While a certification is pending, it is not uncommon for a petitioner or applicant to file a new petition or application seeking the same or similar benefit. To avoid inconsistent decisions, if an affected party files a new petition or application seeking the same benefit as a certified case pending before the AAO, the officer should hold the new petition or application in abeyance and consult with the AAO. If an officer discovers that a new petition or application has been adjudicated during the pendency of a certification, the officer should notify the AAO of this action.

(3) Certification after AAO Remand.

The AAO also relies on the certification process for procedural purposes related to remands.

On appeal, the AAO occasionally will withdraw an officer's decision and remand the case for further action, with an order that it be certified back to the AAO if the new decision is adverse to the affected party. This order is not meant to compel approval of the remanded case, but is designed to preserve the affected party's ability to seek appellate review without payment of a second appeal fee.

On certification, the AAO may remand a case if the officer failed to enter an initial decision or articulate an unusually novel or complex issue of law or fact. On remand, the adjudicating officer may cure the defect in a new decision and again certify the case for review. If the officer does not certify the new decision, the officer must re-issue any unfavorable decision to afford the applicant or petitioner the full opportunity to file an appeal (if permitted) or motion. Alternatively, if the officer does not certify the new decision but determines that the case is approvable, he or she may approve the case in accordance with standard procedures. See AFM Chapter 10.3, General Adjudication Procedures.

(b) Procedures for Forwarding.

To certify a case to the AAO, the office preparing the initial decision must assemble a complete record of proceeding in the same manner as a record prepared for an appeal or motion, including the "Board" and "Public" copies. The certifying official must prepare a formal written order and a completed Form I-290C. See National SOP, Certifications, for technical processing requirements.

10.19 Use of Classified Information in Adjudications Decisions has been superseded by USCIS Policy Manual, Volume 1: General Policies and Procedures as of November 23, 2021.

10.20 Adjudications Approval Stamps, Facsimile Stamps and Dry Seals has been superseded by USCIS Policy Manual, Volume 1: General Policies and Procedures as of November 23, 2021.

10.21 Approval of pending immigrant visa petitions, T or U extension applications, asylee/refugee relative petitions, or applications after death of the qualifying relative. [Added 12/16/2010; AD10-51, PM-602-0017).

(a) General. For many decades, USCIS policy interpreted the INA to mean that if the approval of an immigrant visa petition, refugee/asylee relative petition, or application for immigration benefits requires the existence of a family relationship between the alien and another individual, the death of the individual, while the case is pending, generally meant that the alien was no longer eligible for the benefit. By regulation, 8 CFR 205.1(a)(3)(iii), USCIS had discretion to allow the approval of an immediate relative and family-based petition to remain in effect, even if the petitioner died after USCIS approved the petition. INA 204(l) gives USCIS much broader discretion to permit an alien's case to be approved, even if the petitioner or principal beneficiary has died. This chapter provides guidance for exercising that discretion.

(b) Widow(er)s of Citizens. If a U.S. citizen filed a Form I-130 and this Form I-130 was approved before his or her death, then this Form I-130 is automatically converted to a widow(er)'s Form I-360. See 8 CFR 204.2(i)(1)(iv). In light of the amendment to INA 201(b)(2)(A)(i) by section 568(c) of Public Law 111-83, this conversion takes place even if the U.S. citizen and alien were married for less than 2 years when the U.S. citizen died.

There are two significant advantages available if the widow(er) of a U.S. citizen immigrates on the basis of a Form I-130 that has been converted to a Form I-360.

- First, the widow(er)'s child(ren) may accompany or follow to join the widow(er), even if the deceased petitioner never filed a petition for the child(ren). See INA 204(a)(1)(A)(ii).
- Second, while a widow(er) and his or her child(ren), when immigrating on the basis of a Form I-360, must show that they are not likely to become public charges, they are not required to submit a Form I-864, Affidavit of Support. See INA 212(a)(4)(C)(i)(I).

Note: As specified in INA 101(b), a child is an unmarried person under 21 years of age (as determined under the Child Status Protection Act, if necessary).

Widow(er)s of U.S. Citizens with K-visas. In the case of a K-1 nonimmigrant who marries the petitioner within 90 days of admission, the K-1 nonimmigrant (and any K-2 child(ren) who may be otherwise eligible) may obtain adjustment of status without the need for Form I-360, just as they would have been eligible for adjustment without Form I-130 if the petitioner had not died. Termination of the marriage does not end the adjustment eligibility. *Matter of Sesay* 25 I&N Dec. 431 (BIA 2011). As a widow(er) and child, the K-1 and K-2 would no longer need to submit a Form I-864.

If an alien was admitted as a K-3 or K-4 nonimmigrant, the Form I-130 filed for the K-3 is converted to a Form I-360 upon the U.S. citizen petitioner's death. The K-4 can then "accompany or follow to join" the K-3 based on that Form I-360.

Remarried Widow(er)s of U.S. Citizens. A widow(er)'s eligibility for adjustment as a widow(er) ends if the widow(er) remarries before obtaining lawful permanent resident (LPR) status. The U.S. Court of Appeals for the Eleventh Circuit (11th Circuit court) has held, however, that 8 CFR 204.2(i)(iv) cannot properly be applied to prevent the alien from seeking relief under INA 204(l). *Williams v. DHS Secretary*, 741 F.3d 1228 (11th Cir. 2014). USCIS has decided to follow *Williams* even for cases arising outside the 11th Circuit.

For this reason, if the widow(er) of a U.S. citizen no longer qualifies as an immediate relative under the second sentence in INA 201(b)(2)(A)(i), the widow(er) can still seek relief under INA 204(l). For example, the widow(er)'s remarriage would prevent the widow(er) from qualifying under the second sentence of 201(b)(2)(A)(i), but USCIS would still have discretion to approve the Form I-130 (or to reinstate a prior approval) under INA 204(l), notwithstanding the widow(er)'s remarriage.

The two specific advantages to the widow(er) of filing a Form I-360 are not available to him or her if the alien widow(er) no longer qualifies under the second sentence of INA 201(b)(2)(A)(i) and instead seeks relief under INA 204(l). If the U.S. citizen spouse had not filed petitions for the alien spouse's child(ren), the child(ren) cannot "accompany or follow to join" the alien parent. Also, the widow(er) will need to submit a Form I-864 from a substitute sponsor, unless 8 CFR 213a.2 exempts the widow(er) from this requirement. See INA 213A(f)(5)(B); cf. Chapter 10.21(c)(4)(i) of this AFM.

Williams applies only to the widow(er) of a U.S. citizen (and any eligible child(ren)). The surviving spouse (widow or widower) of an LPR may seek relief only under INA 204(l) or 8 CFR 205.1(a)(3)(iii)(C).

An Approved Petition Prior to October 28, 2009. A USCIS officer may encounter a case in which a petition or application was approved before October 28, 2009, despite the death of the U.S. citizen spouse who filed the petition. The approval may have occurred because USCIS was unaware of the death. In some circuits, but not all, there were precedents from the relevant courts of appeals supporting approval of an immediate relative spousal Form I-130 after the petitioner's death. In light of those precedents, and given the intent of section 568(c) of Public Law 111-83, USCIS will consider the approved petition and the grant of adjustment proper, and will not seek to rescind a grant of adjustment, if the sole basis for doing so is the death of the U.S. citizen spouse and the resulting invalidity of the Form I-864 filed by the U.S. citizen spouse.

(c) Effect of Section 204(l) of the Act. . Paragraph (a) of this chapter does not apply, and a petition or application may be approved despite the death of the qualifying relative, if section 204(l) of the Act, as amended by section 568(d) of the FY2010 DHS Appropriations Act, Public Law 111-83, applies to the case. See paragraph (c)(6) of this chapter concerning the authority to deny these cases on discretionary grounds.

Section 568(d)(2) of Public Law 111-83 specifies that new section 204(l) does not "limit or waive" any eligibility requirements or bars to approval of a petition or application other than the lack of a qualifying relative due to the qualifying relative's death. Thus, no other eligibility requirements are changed by the enactment of section 204(l).

(1) When Section 204(l) Applies. Section 204(l) of the Act applies to any immigrant visa petition, refugee/asylee relative petition, or application adjudicated on or after October 28, 2009, even if the petition or application was filed before that date. Section 204(l) allows the approval of a pending petition or application, despite the death of the qualifying relative, if the alien seeking the benefit of section 204(l):

- Resided in the United States when the qualifying relative died;
- Continues to reside in the United States on the date of the decision on the pending petition or application; and
- Is at least one of the following:
 - The beneficiary of a pending or approved immediate relative visa petition;
 - The beneficiary of a pending or approved family-based visa petition, including both the principal beneficiary and any derivative beneficiaries;

- Any derivative beneficiary of a pending or approved employment-based visa petition;
- The beneficiary of a pending or approved Form I-730, Refugee/Asylee Relative Petition;
- An alien admitted as a derivative "T" or "U" nonimmigrant; or
- A derivative asylee under section 208(b)(3) of the Act.

The new section 204(l) does not expressly define the "qualifying relative." From the list of aliens to whom new section 204(l) applies, USCIS infers that "qualifying relative" means an individual who, immediately before death was:

- The petitioner in an immediate relative or family-based immigrant visa petition under section 201(b)(2)(A)(i) or 203(a) of the Act;
- The principal beneficiary in a widow(er)'s immediate relative or a family-based visa petition case under section 201(b)(2)(A)(i) or 203(a) of the Act;
- The principal beneficiary in an employment-based visa petition case under section 203(b) of the Act;
- The petitioner in a refugee/asylee relative petition under section 207 or 208 of the Act;
- The principal alien admitted as a T or U nonimmigrant;
- The principal asylee, who was granted asylum under 208 of the Act.

Section 204(l) applies to a petition or application adjudicated on or after October 28, 2009, even if the qualifying relative died before October 28, 2009. If a petition or application was denied on or after October 28, 2009, without considering the effect of section 204(l), and section 204(l) could have permitted approval, USCIS must, on its own motion, reopen the case for a new decision in light of section 204(l). See chapter 10.21(c)(8) of this AFM for guidance on cases denied before October 28, 2009.

Section 101(a)(33) of the Act governs the determination whether an alien "resided" in the United States when the qualifying relative died, and whether the alien continues to reside in the United States. A person's "residence" is his or her "principal, actual dwelling place in fact, without regard to intent." If the alien's "residence" was in the United States at the required times, the alien "resided" here. The statute does not bar an alien who was actually abroad when the qualifying alien died from proving that the alien still resides in the United States. Also, section 204(l) of the Act does not require the alien to show that he or she was, or is, residing here lawfully. Execution of a removal order, however, terminates an alien's residence in the United States.

Sections 203(d), 207(c)(2)(A), and 208(b)(3)(A) permit the spouse or child of a principal alien to accompany or follow to join a principal alien. If any one beneficiary of a covered petition meets the residence requirements of section 204(l) of the Act, then the petition may be approved, despite the death of the qualifying relative, and all the beneficiaries may immigrate to the same extent that would have been permitted if the qualifying relative had not died. But it is not necessary for each beneficiary to meet the residence requirements in order to have the benefit of section 204(l).

(2) Widow(er)s of Citizens. See (b) of this chapter concerning the effect of INA 204(l) in the case of Form I-130 filed by a now-deceased U.S. citizen on behalf of his or her spouse. Please refer to Chapter 10.21(c)(5) concerning the effect of section 204(l) on the widow(er)'s ability to seek a waiver of inadmissibility after the death of the U.S. citizen spouse.

(3) Action in Pending Petition Cases. Provided the alien was residing in the United States when the qualifying relative died, and still resides in the United States, an officer now has authority to approve any

immigrant visa petition or refugee/asylee relative petition that was pending when the qualifying relative died if the petition is covered by section 204(l) of the Act, provided the petition was approvable when filed and still is approvable, apart from the death of the qualifying relative. Therefore, assuming all other requirements for approval of a petition are met, the death of the qualifying relative no longer requires denial of a petition in a case involving an alien who meets the requirements of new INA section 204(l).

Section 568(d)(2) of Public Law 111-83 specifies that new section 204(l) does not “limit or waive” any eligibility requirements or bars to approval of a petition or application other than the lack of a qualifying relative due to the qualifying relative’s death. Thus, no other eligibility requirements are changed by the enactment of section 204(l). For example, a petition to which section 204(l) applies may still be subject to denial under section 204(c) of the Act (relating to prior marriage fraud) or any other statutory bar to approval. Note also that paragraph (c)(6) of this chapter provides guidance concerning the authority to deny a case under section 204(l) as a matter of discretion.

An immigrant visa petitioner may withdraw a pending petition at any time before the admission or adjustment of the principal beneficiary. 8 C.F.R. § 103.2(b)(6). USCIS cannot adjudicate a petition that has been withdrawn. See *Matter of Cintron*, 16 I&N Dec. 9 (BIA 1976). Pursuant to section 204(l) of the Act, whether an employment-based petitioner is able to withdraw the petition and possibly affect the ability of principal beneficiary’s alien widow(e) or children to immigrate on the employment-based visa, depends on when that petitioner is attempting to withdraw the petition. If the principal beneficiary is alive when the employer petitioner requests withdrawal of the petition, then USCIS will honor that request. On the other hand, if the withdrawal is dated after the death of the principal beneficiary, then USCIS will not give effect to the request for withdrawal since the employment-based petitioner no longer has any legal interest in the immigration of the principal beneficiary’s widow(er) or children.

The situation of a family-based petitioner is different. A family-based petitioner must generally assume the affidavit of support requirements for the principal beneficiary’s spouse and children. Thus, unlike employment-based petitioners, the immigration of the derivatives does have an effect on the family-based petitioner. Under section 204(l) of the Act, the petitioner may certainly continue to seek approval of the petition, after the death of the principal beneficiary, if at least one derivative was residing in the United States when the principal died, and continues to do so. USCIS will presume that the family-based petitioner wants the case to continue to adjudication. But USCIS does not interpret section 204(l) of the Act as requiring the petitioner to do so. The death of the principal beneficiary does not alter the family-based immigrant visa petitioner’s right to withdraw a petition. If the petitioner chooses to withdraw the petition, USCIS will honor that decision, and refrain from adjudicating the petition. See *Matter of Cintron*.

Section 204(l) of the Act requires that a T or U nonimmigrant surviving relative must have been admitted as a T or U nonimmigrant derivative at the time of death of the qualifying relative T or U nonimmigrant principal. Therefore, USCIS may not approve derivative status for a surviving relative whose qualifying relative died prior to approval of the derivative T application (I-914A) or derivative U petition (I-918A). However, USCIS officers should thoroughly review the case to determine whether the surviving relative may qualify as a principal T or U nonimmigrant. Also, if the surviving relative already had status as a T or U nonimmigrant derivative at the time of death of the qualifying relative, the surviving relative may apply for adjustment of status, as specified in paragraph (c)(4) of this chapter, notwithstanding the death of the principal, once the surviving relative has the requisite continuous physical presence in the U.S. If the principal dies prior to accrual of the requisite physical presence, the surviving relative may file a Form I-539 to apply for an extension of his or her T or U nonimmigrant status, notwithstanding the death of the principal, if necessary, until the surviving relative has accrued sufficient physical presence to apply for adjustment of status.

(4) Action in Pending Adjustment Cases. (i) General. An officer also has authority, now, to approve an adjustment of status application that was pending when the qualifying relative died, if the related visa petition is approved under section 204(l), or if a pre-death approval is reinstated. In the adjustment of status context, the alien must have been eligible to apply for adjustment of status at the time that application was filed. See Chapter 10.21(c)(5) for the impact of section 204(l) on waiver and other related applications.

Section 568(d)(2) of Public Law 111-83 specifies that new section 204(l) does not “limit or waive” any eligibility requirements or bars to approval of a petition or application other than the lack of a qualifying relative due to the qualifying relative’s death. Thus, no other adjustment eligibility requirements are changed by the enactment of section 204(l).

For example, the death of the qualifying relative does not relieve the alien who is seeking adjustment under section 245(a) of the Act of the need to qualify for adjustment of status under section 245(a) of the Act. That is, unless the alien qualifies under section 245(i) of the Act, the alien must still establish a lawful inspection and admission or parole and is otherwise eligible for adjustment. An alien may not apply for adjustment before an immigrant visa is “immediately available.” Section 245(c) of the Act may make the alien ineligible, if section 245(i) or (k) of the Act does not apply to the alien. However, if there was a properly filed adjustment application pending and the beneficiary or the derivative beneficiary was eligible to adjust, approval or reinstatement of approval of a visa petition under section 204(l) will preserve any eligibility for adjustment that existed immediately before the qualifying relative died. For example, if an immediate relative petition is approved or a pre-death approval is reinstated under section 204(l) of the Act, the beneficiary remains eligible for the immediate relative exemptions in section 245(c), assuming the beneficiary is not barred from adjustment under sections 245(d) or 245(f) of the Act.

The death of a principal *refugee* has not, historically, affected the eligibility of a derivative refugee for adjustment under section 209(a) of the Act. See Memorandum from William R. Yates to Field Offices, “Procedural Guidance on Admission and Adjustment of Status for Refugees” at p. 9 (May 15, 2000). Thus, while section 204(l) may benefit the beneficiary of a Form I-730, if the principal dies before the derivative is admitted, reliance on section 204(l) is not necessary for a derivative who has already been admitted. By contrast, section 204(l) can benefit an alien who seeks adjustment based on a derivative asylum grant, under section 209 of the Act, as a derivative T nonimmigrant under section 245(l) of the Act, or as a derivative U nonimmigrant under section 245(m) of the Act. Any one of these aliens may still be eligible for adjustment, in light of section 204(l) of the Act, despite the death of a qualifying relative. But the alien must still establish that he or she is eligible for adjustment, apart from the qualifying relative’s death, under the governing statute.¹

Similarly, the applicant must be admissible, or must obtain any available waiver of inadmissibility. Section 204(l) of the Act, by its terms, does not automatically waive any ground of inadmissibility that may apply to an adjustment applicant. See Public Law 111-83, § 568(d)(2). Thus, an adjustment applicant whose case is governed by section 204(l) of the Act may need to apply for a waiver or other relief from inadmissibility. See paragraph (c)(5) of this chapter concerning the effect of section 204(l) of the Act on applications for waivers or other relief from inadmissibility.

Because section 204(l) of the Act does not waive the standard eligibility requirements for applying for adjustment, an alien who did not already have an adjustment application pending when the qualifying relative died may not be able to seek adjustment in every case in which a pending petition was approved, or an approved petition was reinstated, under section 204(l) of the Act. An alien whose petition has been approved or reinstated under new section 204(l) of the Act, but who is not eligible to adjust status, would not be precluded from applying for an immigrant visa at a consular post abroad.² The approval of a visa petition under section 204(l) of the Act does not give an alien who is not eligible for adjustment of status,

and who is not in some other lawful immigration status, a right to remain in the United States while awaiting the availability of an immigrant visa.

The death of the qualifying relative also does not relieve the alien of the need to have a valid and enforceable Form I-864, Affidavit of Support, if required by sections 212(a)(4)(C) and 213A of the Act and 8 C.F.R. § 213a.2. If the alien is required to have a Form I-864, and the visa petition is approved under section 204(l), a substitute sponsor will need to submit a Form I-864. Pub. L. 111-83, § 568(e), 123 Stat. at 2187. A substitute sponsor is needed *even* if the deceased petitioner had filed a Form I-864. A Form I-864 is not a “petition” nor is it an application or “related application.” The Form I-864 is a contract between the sponsor and the Government, submitted as evidence in support of a visa or adjustment application. DHS regulations clearly provide, moreover, that a sponsor’s obligations under a Form I-864 do not take force until the alien actually immigrates. 8 C.F.R. § 213a.2(e)(1). It is the grant of LPR status that is the Government’s “acceptance” of the sponsor’s offer to be bound by the Form I-864. The sponsor’s obligations terminate with the sponsor’s death. 8 C.F.R. § 213a.2(e)(2)(ii).

Also, the affidavit of support has an important role, beyond establishing that the sponsored alien is not inadmissible on public charge grounds. The sponsor’s income may be deemed to the sponsored alien in determining the sponsored alien’s eligibility for means-tested public benefits. 8 U.S.C. §§ 1631 and 1632. The sponsor is also responsible for reimbursing an agency for the costs of any means-tested public benefit provided to the sponsored alien. Section 213A(b) of the Act.

Accepting as still valid a Form I-864 from someone whom USCIS knows to be dead would work against each of these vital aspects of the affidavit of support requirement. Thus, there is no longer a valid and enforceable Form I-864 if the sponsor dies while the petition, visa application, or adjustment application is pending.³

(ii) Adjustment not subject to conditions under section 216 of the Act. An alien who acquires LPR status based on a marriage entered into less than 24 months before the alien acquires LPR status on a conditional basis under section 216 of the Act. Generally, the alien must then petition, two years later, for removal of the conditions. If the qualifying marriage has already ended by death, however, a conditional for removal of the conditions already exists. For this reason, if a Form I-130 and Form I-485 are approved under section 204(l) of the Act, the alien's LPR status will not be subject to the conditions under section 216 of the Act. The alien, therefore, will not need to file Form I-751.

(iii) Removal of conditions under section 216A of the Act. An alien who acquires LPR status based on a qualifying investment under section 203(b)(5) of the Act does so on a conditional basis under section 216A of the Act. If the derivative beneficiary of a Form I-526 obtains approval of the Form I-526 and Form I-485 under section 204(l) of the Act, the alien remains subject to the conditions imposed by section 216A of the Act. Unlike the death of a petitioning spouse under section 216 of the Act, the death of the Form I-526 petitioner does not, by itself, provide a basis for removing the section 216A conditions. Rather, under 8 C.F.R. § 216.6(a)(6), the derivative beneficiaries must still file, two years later, a Form I-829 and show that the requirements for removal of the conditions have been met.

(5) Waivers and Other Related Applications. The text of new section 204(l) provides that the new approval authority applies not only to the visa petition, but to an adjustment application and “any related applications.” Section 568(d)(2) of the FY2010 DHS Appropriations Act specifies that section 568(d)(1) does not waive grounds of inadmissibility. But the provision does remove “ineligibility based solely on the lack of a qualifying family relationship” as a basis for denying relief. USCIS has determined, therefore, that section 204(l) does give USCIS the discretion to grant a waiver or other form of relief from inadmissibility to an alien described in section 204(l), even if the qualifying relationship that would have supported the waiver has ended through death.

Note that it is not necessary for the waiver or other relief application to have been pending when the qualifying relative died. Section 204(l) of the Act permits the approval of a waiver or other relief application despite the death of a qualifying relative if:

- a petition or application specified in paragraph (c)(1) of this chapter was pending or approved when the qualifying relative died;
- the alien was residing in the United States when the qualifying relative died; and
- the alien still resides in the United States.

If a pending petition or application to which section 204(l) applies is denied, despite section 204(l) of the Act, then the alien may not obtain approval of a waiver or other relief under section 204(l).

Some waivers require a showing of extreme hardship to a qualifying relative, who must be either a citizen or a permanent resident. Since the legislation intends to have the new section 204(l) of the Act extend not only to the approval of the pending petition, but also to any related applications, the fact that the qualifying relative has died will be noted in the decision and deemed to be the functional equivalent of a finding of extreme hardship. Note that 204(l) applies in this context only when, the hardship being claimed by the surviving beneficiary, would have been on account of claimed extreme hardship that would have been suffered by the qualifying relative were he or she still alive. Additionally, it should be noted that the finding of extreme hardship merely permits, and never compels a favorable exercise of discretion. See *Matter of Mendez-Moralez*, 21 I&N Dec. 296 (BIA 1996). That is, as with any other waiver case, a waiver application decided in light of section 204(l) requires the weighing of all favorable factors against any adverse discretionary factors. Extreme hardship is just one positive factor to be weighed. See *id.* The inadmissibility ground sought to be waived is, itself, an adverse factor. See *INS v. Yang*, 519 U.S. 26 (1996). For example, inadmissibility based on a conviction for a violent or dangerous crime requires proof of exceptional or extremely unusual hardship, or some other extraordinary circumstance, in order for a waiver application to be approved. 8 C.F.R. § 212.7(d).

The preceding paragraph assumes that the qualifying relative was already a citizen or permanent resident at the time of death. If the qualifying relative was not already a citizen or permanent resident, then the qualifying relative's death does not make the alien eligible for a waiver that would not have been available if the qualifying relative had not died. If the qualifying relative was not a citizen or permanent resident, then the alien may not be able to obtain a waiver of inadmissibility unless there is yet another individual who has the requisite status and family relationship to meet the requirements of the waiver provision, or the waiver provision does not require a family relationship and/or extreme hardship.

As noted in Chapter 10.21(c)(2), section 204(l) does not apply to Form I-130 that was filed by a now-deceased citizen for his or her spouse, who is now the widow(er) of a citizen. Once the citizen has died, the widow(er) becomes the visa petitioner. USCIS has determined, however, that if the widow(er) was the beneficiary of a pending or approved Form I-130 when the original petitioner died, and the widow(er) meets the residence requirements in section 204(l), then section 204(l) preserves the widow(er)'s ability to have a waiver application approved as if the now deceased citizen had not died. As with any other waiver application that is covered by section 204(l), the fact that the citizen petitioner has died will be noted in the decision and deemed to be the functional equivalent of a finding of extreme hardship. But the finding of extreme hardship merely permits, and never compels a favorable exercise of discretion. See *Matter of Mendez-Moralez*, *supra*. The widow(er) must still establish that he or she merits a favorable exercise of discretion.

As noted in paragraph (b) of this chapter, a Form I-130 filed by a U.S. citizen for the U.S. citizen's spouse becomes a Form I-360 if the U.S. citizen has died. The widow(er) becomes the visa petitioner, and

generally does not need to rely on INA 204(l). USCIS has determined, however, that if the widow(er) was the beneficiary of a pending or approved Form I-130 when the original petitioner died and the widow(er) meets the residence requirements in INA 204(l), then INA 204(l) preserves the widow(er)'s ability to have a waiver application approved as if the now deceased U.S. citizen had not died. If the widow(er) remarries and then requests and obtains relief under section 204(l) and *Williams v. DHS Secretary*, 741 F.3d 1228 (11th Cir. 2014), the remarried widow(er) may also rely on INA 204(l) in seeking a waiver of inadmissibility. As with any other waiver application that is covered by INA 204(l), the fact that the U.S. citizen petitioner has died will be noted in the decision and deemed to be the functional equivalent of a finding of extreme hardship. But the finding of extreme hardship merely permits, and never compels, a favorable exercise of discretion. See *Matter of Mendez-Morales*, *supra*. The widow(er) must still establish that he or she merits a favorable exercise of discretion.

(6) Discretionary Denial under Section 204(l). Section 204(l) gives USCIS discretion to deny a petition or application that may now be approved despite the qualifying relative's death, if USCIS finds, as a matter of discretion, "that approval would not be in the public interest." Section 204(l)(1) of the Act, 123 Stat. at 2187. This exercise of discretion, moreover, is "unreviewable." *Id.*

USCIS officers will not, routinely, use this discretionary authority to deny a visa petition that may now be approved, despite the death of the qualifying relative. In a visa petition proceeding that is not subject to section 204(c) of the Act or some other approval bar, the overriding issue is simply whether the beneficiary qualifies for the visa classification sought. Inadmissibility, for example, does not warrant denial of a visa petition. See *Matter of O-*, 8 I&N Dec. 295 (BIA 1959). Section 204(l) now provides that an alien described in section 204(l) can still qualify for the benefit sought, despite the qualifying relative's death. Thus, only truly compelling discretionary factors should be cited as a basis to deny a visa petition under section 204(l), on the ground "that approval would not be in the public interest." Section 204(l)(1) of the Act, 123 Stat. at 2187. Before denying a visa petition on this basis, the USCIS officer must consult with the appropriate Headquarters Directorate, through appropriate channels.

This consultation requirement also applies to all cases, other than visa petition cases, that may now be approved under section 204(l) despite the qualifying relative's death. The USCIS officer must consult the appropriate Headquarters Directorate before denying a case on the ground "that approval would not be in the public interest." Section 204(l)(1) of the Act, 123 Stat. at 2187. Consultation is not required if the USCIS officer will deny the case based solely on the traditional discretionary factors that would have applied to the particular type of case, even if the qualifying relative were still alive. For example, unwaived or unwaivable fraud or criminal inadmissibility, or security grounds, may warrant denial as a matter of discretion under ordinary circumstances, and consultation is not required in such a case. Rather, consultation is required only if the USCIS officer intends to deny the case as a matter of discretion on the "not . . . in the public interest" ground.

(7) Humanitarian Reinstatement. Under DHS regulations at 8 C.F.R. § 205.1(a)(3)(i)(C), approved immediate-relative and family-based petitions filed under section 204 are automatically revoked upon the death of the petitioner or the beneficiary. Since approval under section 204(l) is a matter of agency discretion, enactment of section 204(l) does not supersede this long-standing regulation. But 8 C.F.R. § 205.1(a)(3)(iii)(C)(2) also gives USCIS discretion to decide not to revoke the approval for "humanitarian reasons." In light of section 204(l), it would generally be appropriate to reinstate the approval of an immediate-relative or family-based petition if the alien was residing in the United States when the petitioner dies and if the alien continues to reside in the United States. In those circumstances, reinstating the approval of an immediate-relative or family-based petition is appropriate even if the death that resulted in the automatic revocation occurred before October 28, 2009.

The fact that USCIS already denied reinstatement before October 28, 2009, does not preclude a new request.

Under DHS regulations at 8 C.F.R. § 205.1(a)(3)(iii)(B), approved employment-based petitions filed under INA section 203(b) are automatically revoked upon the death of the petitioner or the beneficiary. There is no comparable regulatory provision that allows for the reinstatement of the approval of employment-based petitions based upon “humanitarian reasons.” Similarly, the DHS regulation at 8 C.F.R. §205.1(a)(3)(iii)(C)(2) does not provide for reinstatement of approval of an immediate-relative or family-based visa petition if it is the principal beneficiary, rather than the petitioner, who has died. In light of section 204(l), however, USCIS officers may act favorably on requests to reinstate approvals under section 205 of the Act and 8 C.F.R. part 205.

See Chapter 21.2(h)(1)(C) of this AFM for further guidance on reinstating approval of visa petitions. Chapter 21.2(h)(1)(C) specifies the information that the beneficiary should submit with the written request for reinstatement and also specifies that the written request should be submitted to the USCIS service center or field office that approved the petition except that, if the beneficiary has properly filed an application for adjustment of status with USCIS, the request should be submitted to the USCIS office with jurisdiction over the adjustment application.

USCIS may still deny a request to reinstate approval as a matter of discretion. As stated in chapter 10.21(c)(6) of the AFM, however, the USCIS officer must consult the appropriate Headquarters Directorate through appropriate channels, if the USCIS officer intends to deny reinstatement solely based on a finding under section 204(l) that granting it “would not be in the public interest.”

(8) Application of New Section 204(l) to Cases Adjudicated before October 28, 2009.

(i) Denials. New section 204(l) does not, by its terms, require USCIS to reopen or reconsider any decision denying a petition or application, if the denial had already become final before October 28, 2009. For this reason, enactment of new section 204(l) is not a reason for USCIS to reopen or reconsider, on its own motion, any decision that was made before October 28, 2009. Given the intent of section 204(l), USCIS has decided to allow an alien to file an untimely motion to reopen a petition, adjustment application, or waiver application that was denied before October 28, 2009 if new section 204(l) would now allow approval of a still-pending petition or application. A motion to reopen, rather than a motion to reconsider, would be the proper type of motion, since the alien would need to present new evidence: proof of the relative’s death and proof both that the alien was residing in the United States when the relative died and that the alien continues to reside in the United States. The alien must pay the standard filing fee for each motion, unless the alien qualifies for a fee waiver under 8 C.F.R. § 103.7(c)(5). If the alien establishes that he or she was residing in the United States when the qualifying relative died, and that he or she continues to reside in the United States, it would be appropriate for USCIS to exercise favorably the discretion to reopen the petition and/or application(s), and to make new decisions in light of new section 204(l).

Note that an alien who is present in the United States unlawfully does not accrue unlawful presence while a properly filed adjustment application is pending. AFM chapter 40.9.2(b)(3)(A). If USCIS grants, under section 204(l) of the Act, a motion to reopen a Form I-485 that was denied, the Form I-485 will, once again, be pending, and is deemed to be pending from the original date of filing. Thus, reopening a Form I-485 under section 204(l) of the Act will cure any unlawful presence that may have accrued between the original denial and the new decision. The result is that the alien will not have accrued any unlawful presence from the original filing of the Form I-485 until there is a final decision after the reopening of the Form I-485. If the alien is otherwise inadmissible because of unlawful presence accrued before applying for adjustment, a waiver may be available, as discussed in paragraph (c)(5) of this chapter.

(ii) Approvals. A USCIS officer may encounter a case in which a petition or application was approved, before October 28, 2009, despite the death of a qualifying relative. The approval may have occurred because USCIS was unaware of the death, or because the alien persuaded USCIS that the death did not end eligibility. Although some courts of appeals had held that the death of a citizen did not end the eligibility of the citizen's spouse for classification as an immediate relative, there was no nationwide ruling on this issue. Nor was there any binding precedent concerning relatives other than widow(er)s of citizens. The spousal immediate relative cases, however, could be seen as at least persuasive authority that USCIS could approve other types of visa petitions, despite the petitioner's death. Given the intent of section 204(l), USCIS will deem the approval of the petition and the grant of adjustment proper, and will not seek to rescind a grant of adjustment, if the sole basis for doing so is the death of the qualifying relative or the resulting invalidity of the Form I-864 filed by the visa petitioner.

NOTES:

¹In the past, USCIS has been willing to grant asylum as a principal to a derivative asylee who no longer qualified as a derivative. This action would preserve the derivative's ability to adjust even if the derivative was no longer the spouse or child of a principal. Section 204(l) of the Act makes this step unnecessary, if the reason for the loss of derivative status is the death of the principal.

²The alien must have been continuing to reside in the United States in order for the petition to have been approved. Once it has been approved, however, the alien's departure to obtain a visa would not change the fact that the alien met the residence requirements when the officer adjudicated the petition.

³A substitute sponsor's Form I-864 is not needed if the alien is not required to have a Form I-864 at all. For example, an alien may already have, or be entitled to be credited with, sufficient quarters of coverage under the Social Security Act to be exempt from the Form I-864 requirement. See 8 C.F.R. § 213a.2(a)(2)(ii)(C). Also, as with any Form I-864, the substitute sponsor may rely on the financial resources of the sponsored alien to meet the Form I-864 requirements. See *id.* § 213a.1 (including sponsored alien's lawful income in the United States in "household income") and § 213a.2(a)(iii)(B) (including sponsored alien's assets).

10.22, Change of Gender Designation on Documents Issued by USCIS, has been superseded by USCIS Policy Manual, Volume 1: General Policies and Procedures as of May 15, 2020.

Appendix 10-1 New Attorney General Memorandum on FOIA, October 12, 2001 [added 02-06-2006]



U.S. Department of Justice
Immigration and Naturalization Service

HQFPB 160/5-C

Office of the Executive Associate Commissioner

425 I Street NW
Washington, DC 20536

JANUARY 17, 2002

MEMORANDUM FOR MANAGEMENT TEAM
REGIONAL DIRECTORS
DISTRICT DIRECTORS
SECTION CHIEFS
SERVICE CENTER DIRECTORS

ATTENTION: ADMINISTRATIVE CENTER FOIA/PA OFFICERS

FROM: George H. Bohlinger, III /S/
Executive Associate Commissioner
Office of Management

SUBJECT: Freedom of Information Act Policy

The purpose of this memorandum is to provide you with the new Freedom of Information Act (FOIA/PA) policy memorandum issued by Attorney General John Ashcroft. Please disseminate to all FOIA offices within your area of jurisdiction.

The attached Attorney General's FOIA memorandum establishes a new "sound legal basis" standard. Generally, the Department of Justice will defend the application of exemptions which are in proper compliance with the law and which will be withheld when challenged in court. This differs from the foreseeable harm standard established under Attorney General Reno, which encouraged release of exempt information where no harm was present. Under the new standard we should protect exempt records/information, while ensuring that we can articulate both a factual and legal basis for all withholdings.

The memorandum emphasizes the purpose of the FOIA and the importance of maintaining openness in government, informing the public of the activities of the government,

Memorandum for Management Team, et al.
Subject: Freedom of Information Act Policy

Page 2

and ensuring that the leaders remain accountable. At the same time, it reminds agencies to remain committed to protecting records and information that contain matters that are subject to exemptions under the FOIA. The exemptions most commonly applied to Immigration and Naturalization documents are those that protect information that:

1. is established by Executive Order to be in the interest of national security
2. constitutes trade secrets and commercial or financial information
3. is deliberative inter-agency or intra-agency memorandums and letters
4. consists of personal privacy records
5. includes records or information compiled for law enforcement purposes

The Attorney General paid particular attention to discretionary decisions to disclose information protected under the FOIA. Disclosure should be made only after full consideration of the implications of release; e.g., legal privileges and deliberative information protected under Exemption 5 of the FOIA 5 U.S.C. §552 (b)(5). He did not eliminate discretionary disclosure, but instead cautioned agencies to be cognizant of the law.

This memorandum supersedes the Office of Management Memorandum of November 24, 1993 in part to include only the references to discretionary disclosures based on harm. The Presidential statement on the FOIA that was issued and attached thereto also remains in effect.

If you have any questions, please contact Mildred Carter, Acting Director, FOIA/PA Branch at (202) 514-1722.

Attachment

Appendix 10-2 Freedom of Information Act Policy, June 11, 2001 [added 02-06-2006]

October 15, 2001

MEMORANDUM TO: Principal FOIA Administrative and Legal
Contacts at All Federal Agencies

FROM: Richard L. Huff
Daniel J. Metcalfe
Co-Directors
Office of Information and Privacy

SUBJECT: New Attorney General Memorandum on the FOIA

Enclosed is a new policy memorandum on the Freedom of Information Act that was issued by Attorney General John Ashcroft this past Friday evening, October 12, 2001.

As you can see, Attorney General Ashcroft's FOIA Memorandum establishes a new "sound legal basis" Standard governing the defense of Freedom of Information Act lawsuits by the Department of Justice. It also recognizes the continued agency practice of making discretionary disclosures of exempt information under the Act, subject to statutory prohibitions and careful agency consideration of all institutional, commercial, and personal interests involved.

This new statement of FOIA policy supersedes the FOIA policy statement that was issued by the Department of Justice in October 1993, and it is effective immediately. The presidential statement on the FOIA that was issued in 1993 remains in effect.

Please ensure that this new FOIA policy memorandum is distributed widely within your agency as expeditiously as possible. Additionally, we will be distributing and discussing it at a FOIA Officers Conference to be held on Thursday, October 18, at the Commerce Department's Main Auditorium, at 10:00 a.m. It also is being made available through FOIA Post on the Department of Justice's FOIA Web site as of today.

Do not hesitate to contact OIP, through its FOIA Counselor service, at (202) 514-3642, with any question about this FOIA policy memorandum or any other aspect of FOIA administration.

Enclosure

October 12, 2001

MEMORANDUM FOR HEADS OF ALL FEDERAL DEPARTMENTS AND AGENCIES

FROM: John Ashcroft
Attorney General

SUBJECT: The Freedom of Information Act

As you know, the Department of Justice and this Administration are committed to full compliance with the Freedom of Information Act (FOIA), 5 U.S.C. 552 (2000). It is only through a well-informed citizenry that the leaders of our nation remain accountable to the governed and the American people can be assured that neither fraud nor government waste is concealed.

The Department of Justice and this Administration are equally committed to protecting other fundamental values that are held by our society. Among them are safeguarding our national security, enhancing the effectiveness of our law enforcement agencies, protecting sensitive business information and, not least, preserving personal privacy.

Our citizens have a strong interest as well in a government that is fully functional and efficient. Congress and the Courts have long recognized that certain legal privileges ensure candid and complete agency deliberations without fear that they will be made public. Other privileges ensure that lawyers' deliberations and communications are kept private. No leader can operate effectively without confidential advice and counsel. Exemption 5 of the FOLK, 5 U.S.C. 552(b)(5), incorporates these privileges and the sound policies underlying them.

I encourage your agency to carefully consider the protection of all such values and interests when making disclosure determinations under the FOIA. Any discretionary decision by your agency to disclose information protected under the FOIA should be made only after full and deliberate consideration of the institutional, commercial, and personal privacy interests that could be implicated by disclosure of the information.

In making these decisions, you should consult with the Department of Justice's Office of Information and Privacy when significant FOIA issues arise, as well as with our Civil Division on FOLK litigation matters. When you carefully consider FOLK requests and decide to withhold records, in whole or in part, you can be assured that the Department of Justice will defend your decisions unless they lack a sound legal basis or present an unwarranted risk of adverse impact on the ability of other agencies to protect other important records.

This memorandum supersedes the Department of Justice's FOLK Memorandum of October 4, 1993, and it likewise creates no substantive or procedural right enforceable at law.

Appendix 10-3 Privacy Act Policy, January 17, 2002 [added 02-06-2006]



U.S. Department of Justice
Immigration and Naturalization Service

HQFPB 160/5.1-P

Office of the Executive Associate Commissioner

425 I Street NW
Washington, DC 20536

Dated June 11, 2001

MEMORANDUM FOR ALL IMMIGRATION AND NATURALIZATION SERVICE EMPLOYEES

/s/
FROM: George H. Bohlinger, III
Executive Associate Commissioner
Office of Management

SUBJECT: Privacy Act Policy

This memorandum reaffirms the Immigration and Naturalization Services' (INS) policy to all INS employees regarding the Privacy Act (PA). Several issues have occurred involving the PA that have prompted the Office of Management to reissue the following guidance. Each INS employee has the responsibility under the PA to protect the security of personal information concerning a United States citizen or a lawful permanent resident; to ensure the accuracy, relevance, timeliness and completeness of the of the information; to avoid unauthorized disclosures either orally or in writing; and to ensure that no system of records retrieved by personal identifier (e.g., name, social security number, alien number, or other identifying number, symbol or particular) is maintained without prior public notice in the Federal Register. Further, the PA prohibits information pertaining to individuals, obtained for a particular purpose, from being used or made available for another purpose without the individual's consent.

Only those employees with a "need to know" to perform their official duties can have access to PA information. Accessing information from a "system of records" for personal use is a violation of the PA. Further, providing this type of information to someone else is a violation of the PA, subject to a fine up to \$5,000.

If an individual knows that his/her personal information has been accessed for a non-official use and without their consent, he/she has the option of filing a grievance and/or bringing a civil suit for damages against the agency for failing to comply with the PA's requirements.

It is imperative that each employee be aware of and conform to these mandates. If you have any questions, please contact Magda S. Ortiz, Director, FOIA/PA Branch, or Robin Moss, FOIA/PA Program Analyst at (202) 514-1722.

cc: Official File
HQFPB Read File
HQORS
HQMGM
HQFPB – M. Ortiz

INS:FOIA/PA:R.Moss:514-1722:RM/GG:1/17/01:CADM-820-2000-PA-REVIEW.DOT

Appendix 10-4 Privacy Act Requirements Concerning Sharing of Immigration and Naturalization Service (INS) Information, August 23, 2001 [added 02-06-2006]



U.S. Department of Justice
Immigration and Naturalization Service

HQFPB 160/5-C

Office of the Executive Associate Commissioner

425 I Street NW
Washington, DC 20536

August 23, 2001

MEMORANDUM FOR ALL IMMIGRATION AND NATURALIZATION SERVICE EMPLOYEES

FROM: George H. Bohlinger, III /s/
Executive Associate Commissioner
Office of Management

SUBJECT: Privacy Act Requirements Concerning Sharing of Immigration and Naturalization
Service (INS) Information

Each INS employee has a responsibility to ensure that Privacy Act (PA) information is properly protected. Further, the PA has certain requirements that agencies must follow when disclosing PA information to individuals and entities outside of the Department of Justice. "In order to ensure fairness to individuals, the PA states that individuals must be able to determine who has had access to their records." Therefore, agencies must "keep an accurate accounting" regarding each disclosure of a record made to any person or to another agency (5 U.S.C. § 552a(c)).

The PA further states that an agency "need not keep a running tabulation of every disclosure at the time it is made." However, "the agency must be able to reconstruct an accurate and complete accounting of disclosures so as to be able to respond to an individual's request in a timely fashion."

INS Form G-658, Record of Information Disclosure (Privacy Act) is available to keep the accounting. (See attachment.) You may obtain this form from the Forms Center. Use of this form is not mandatory, but it is the easiest way to "account" for every disclosure of information. Upon completion of this form, a copy should be placed in the record subject's file or maintained in such a way that it could be retrieved when requested. The form also contains instructions for the placement of copies for other recordkeeping purposes. Please adhere to these instructions. If you have any questions, please contact Magda S. Ortiz, Director, FOIA/PA Branch, or Robin Moss, FOIA/PA Program Analyst at (202) 514-1722.

Attachment (1)

U. S. Department of Justice
Immigration and Naturalization Service

RECORD OF INFORMATION DISCLOSURE (PRIVACY ACT)

		File Location (FCO)
		File Number
Name		
Date of Birth	Place of Birth	
Date of Disclosure	By Whom Released	
Purpose of Disclosure		
Information Disclosed		
Method of Disclosure <input type="checkbox"/> Form No. _____ <input type="checkbox"/> Review <input type="checkbox"/> Copy <input type="checkbox"/> Briefing <input type="checkbox"/> Other		
Disclosure to (Agency/Name and Address)		
Signature of Authorized Representative		
Fact of Disclosure <input type="checkbox"/> is <input type="checkbox"/> is not accountable to individual. Reason:		

RECORD COPY (INS USE ONLY)

Form G-658 (Rev. 09-14-01)Y

INSTRUCTIONS

This form may be used to record disclosures of Information for which an accounting may be required under the provisions of the Privacy Act of 1974. Such disclosures include routine uses of information from INS systems of records (requests by other government agencies; investigations by INS officers; etc.) or other requests for which Form G-639, Freedom of Information/Privacy Request, is not used. The Record Copy shall be placed in the individual's file unless the information has been exempted from disclosure accounting. The Report Copy shall be placed in the Privacy Act Reporting file and may be used only for INS official reporting purposes.

Appendix 10-5 Executive Order 12958 on Classified Information.

<http://www.dss.mil/seclib/eo12958.htm>

Appendix 10-6 Intragency Border Inspection System Standard Operating Procedures (IBIS SOP) and Fraud Detection and National Security Standard Operating Procedures (FDNS SOP) has been superseded by USCIS Policy Manual, Volume 1: General Policies and Procedures as of November 23, 2021.

Appendix 10-7 United States Postal Service Hurricane Katrina Impacted Zip Codes has been superseded by USCIS Policy Manual, Volume 1: General Policies and Procedures as of April 1, 2024.

Appendix 10-8, Complying with Particular Timeframes When Processing Cases, has been superseded by USCIS Policy Manual, Volume 1: General Policies and Procedures as of May 15, 2020.

Appendix 10-9, Standard Timeframes for Applicants or Petitioners to Respond for Requests for Evidence (RFE), has been superseded by USCIS Policy Manual, Volume 1: General Policies and Procedures as of May 15, 2020.

Appendix 10-10 Fee Waiver Guidelines has been superseded by USCIS Policy Manual, Volume 1: General Policies and Procedures as of April 1, 2024.

Appendix 10-22, Sample Language for Health Care Certification, has been superseded by USCIS Policy Manual, Volume 1: General Policies and Procedures as of May 15, 2020.