



## Business Immigration Practice Tip: Responding to a Request for Evidence

While it's not a happy experience to receive a Request for Evidence (RFE), your response provides an opportunity to build a strong administrative record. Following these steps should reduce the risk of a denial for failure to address the issues raised by the adjudicator and improve the likelihood that the next notice will be an approval. Although there will be occasions when a thorough response still results in a denial, your efforts to improve the record could lay a foundation to litigate the case if necessary.

### **What to do first? Calendaring.**

Before you focus on the substance of the RFE, locate and calendar the due date. Many malpractice insurers require that deadlines be recorded in two separate locations. Check the regulations to determine if your client is entitled to any additional time, such as the USCIS regulation providing for an additional three days if the RFE notice is served by mail. But also remember that if your client used premium processing and you receive the RFE by fax, the three-day rule does not apply.

### **What about your client?**

You must notify the client promptly that USCIS has issued an RFE. Unless the RFE is extremely straightforward, you should not discuss the substance until you have prepared an assessment (discussed further below).

### **What should you accomplish in your first reading?**

Read with purpose, but don't get bogged down. Start by determining what issues USCIS has raised.

### **What should you look for in your second reading?**

- Has USCIS accurately stated the applicable law and implementing regulations? Be alert for overstatements, such as adding to the criterion for extraordinary ability of authoring scholarly articles in the field a nonexistent requirement of evidence of the "research community's reaction."
- Did USCIS apply the correct legal standard for the visa classification requested? For example, did the RFE claim that the petitioner must submit evidence about the qualifications of subordinates to be supervised by the beneficiary while ignoring or rejecting evidence that the beneficiary qualifies by managing a function?

## **What about the evidence already submitted? Is additional evidence needed?**

To help you decide, consider the following questions.

- Did the petitioner submit evidence responsive to each requirement for the visa classification? A USCIS RFE Template (if available for the classification) can be helpful in determining what evidence USCIS considers responsive to a particular criterion.
- If so, why didn't USCIS find the evidence to be sufficient?
- Did USCIS overlook evidence offered by the petitioner to meet a particular requirement or consider it only for a different purpose?
- If so, does the evidence need to be "repackaged" (i.e., organized or highlighted in a different way)?
- Did USCIS give insufficient weight to any evidence?

## **How should you prepare the client?**

Prepare assessment:

- Explain what USCIS is requesting.
- Outline response strategy, including identifying which requirements for the classification USCIS considered to have been met.
- Describe types of additional evidence that would be responsive to issues raised by RFE.
- Ask client to review RFE and tell you what other evidence may be available.
- Advise if any action must be taken to protect the beneficiary's status.
- Review client's obligations for legal fees and costs associated with RFE response.
- Review whether the petitioner has the option of withdrawing and filing again instead of responding. Some factors to consider:
  - What would happen to beneficiary's status?
  - Is adjudicator "fixated" on a type of documentation petitioner cannot provide?
  - Is petitioner unable to provide additional evidence by the response deadline?
  - Could petition package be better organized/prepared?

## How should you structure the response?

- Prepare the response for the petitioner. Factual statements and documentation must come from/through the petitioner. Attorney statements are not evidence.
- Attorney can provide “road map,” including how law applies to facts.
- Follow USCIS' Instructions.
- Be clear and concise.
- Correct misstatements of law or regulation or standard of review.
- Respond to each issue raised by USCIS (generally should follow RFE's order in headings). This may include explaining why an issue is not applicable.
- Review any additional evidence from petitioner for direct relevance to issues raised in RFE before including.
- Discuss relevance of evidence previously submitted and any additional evidence.
- Provide document index. Use index as another opportunity to explain relevance.

If, despite all your hard work, your client's petition is still denied, you may want to consider litigating the case in federal court. The American Immigration Council may be able to assist in litigation. For information regarding the Council's potential assistance, please view our [screening criteria](#) for co-counseling business immigration cases or contact Leslie Dellon, the Council's Business Litigation Fellow, at [LDellon@immcouncil.org](mailto:LDellon@immcouncil.org).