USCIS Should Enforce Its Policy against Broad-Brush Requests for Evidence

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May 6, 2021

Seyfarth Synopsis: *This is the third installment in a series of recommendations to the Biden Administration on immigration reform previously published by the Cato Institute in "Deregulating Legal Immigration: A Blueprint for Agency Action." Read the first and second installments here. A total of five installments will be published on a weekly basis. Please stay tuned for additional updates.*

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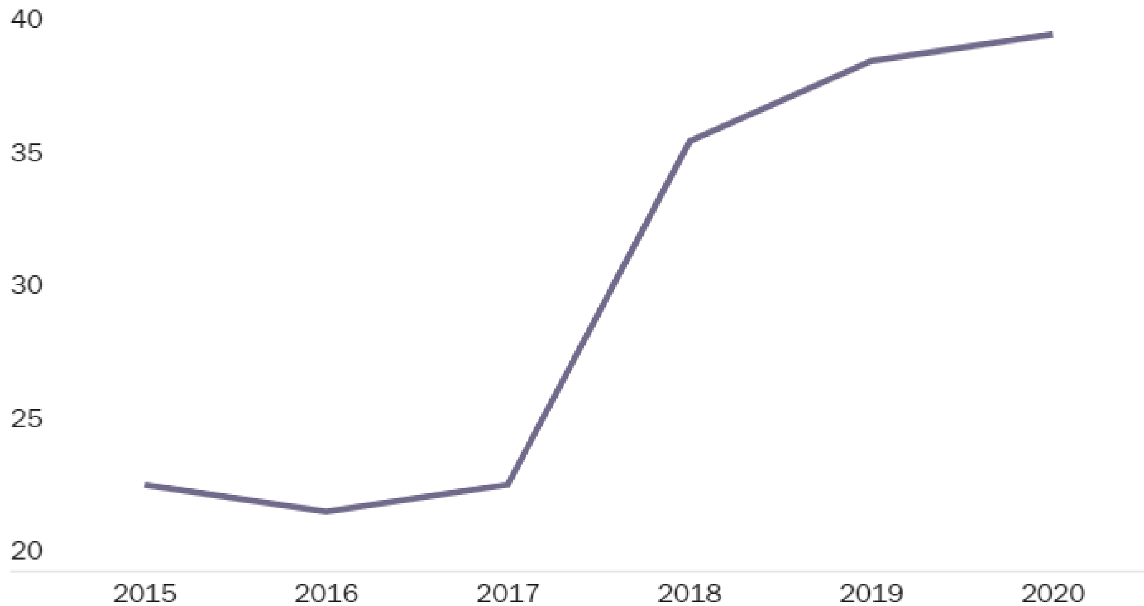
USCIS Policy Manual should reinforce an existing agency policy memorandum banning broad-brush requests for evidence (RFEs) and notices of intent to deny (NOIDs) and track RFEs and NOIDs by individual adjudicators.

During immigration adjudications, USCIS issues RFEs or NOIDs to give applicants an opportunity to correct deficiencies in their applications. RFEs are commonly issued for family-based applications and for employer-sponsored work visas like the H-2B for nonagricultural workers and the H-1B for workers in specialty occupations at U.S. companies. The share of work visa petitions with an RFE nearly doubled from 2015 to 2020 (Figure 8). Unnecessary RFEs or NOIDs can add additional work and costs for employers or lead to denials, which would thus prevent eligible individuals from obtaining or keeping the immigration benefits the law allows.



Source: U.S. Citizenship and Immigration Services, "Nonimmigrant Worker Petitions by Case Status and Request for Evidence (RFE)," August 18, 2020. 2020 as of Quarter 1.

***RFEs** 2015: 23%*
***RFEs** 2016: 22%*
***RFEs** 2017: 23%*
***RFEs** 2018: 36%*
***RFEs** 2019: 39%*
***RFEs** 2020: 40%*

A 2005 USCIS policy memorandum prohibits issuing RFEs "for a broad range of evidence when, after review of the record so far, only a small number of types of evidence is required" because it concludes broad-brush RFEs "overburden our customers, over-document the file, and waste examination resources through the review of unnecessary, duplicative, or irrelevant documents."[i] USCIS will often create "template" RFEs that generally describe issues that can come up, but the memorandum tells adjudicators not to "'dump' the entire template in [an] RFE; instead, the record must be examined for what is missing, and a limited, specific RFE should be sent."

Despite clear headquarters instructions, these requirements are uniformly ignored by USCIS adjudicators, and boilerplate RFEs are now routine. The USCIS Ombudsman has described how USCIS will issue RFEs for information already provided by the applicants,[ii] and one court noted that USCIS had "issued an RFE requesting nearly identical information as it did

when it last reviewed the petition.… Although not mirror images, the information requested is the same. [The employer and the H-1B beneficiary] have already provided this information in response to the defendants prior RFE."[iii]

To remedy this problem, USCIS should add a new chapter in its Policy Manual reaffirming the binding nature of the 2005 policy memorandum and requiring supervisory review when adjudicators issue all-encompassing, broad-brush, or template RFEs and NOIDs. It should also extend the memorandum to Notices of Intent to Revoke previously approved petitions. Moreover, it should expressly note all interim adjudications as to specific legal issues of eligibility for the immigration benefit sought to avoid wasting the time of the applicant or petitioner addressing already resolved issues. USCIS should also be required, by executive order or otherwise, to collect statistics on the ID code (but not the name) of adjudicators and begin to report the frequency of RFEs and NOIDs and the resulting outcome of the adjudication. In this way, renegade adjudicators who fail to comply with the requirement of the Administrative Procedure Act that agency decisions be reasonably explained can be identified.