

RFE/NOID INTENSIVE



Speakers:

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PLAN OF ATTACK

- * Outline the RFE/NOID
- * Notarize/Driver's License
- * Dates – consistency





RFE/NOID Intensive

Employment-Based RFEs
Current Trends and How to Solve Them

Current Trends in H-1B RFEs



- ▶ Employer/employee relationship
 - Who has the right to control the work of the beneficiary?
 - IT Consulting firms have a much higher rate of RFEs asking for Statement of Work (SOW) or Master Service Agreements (MSA) even when the beneficiary will be supervised by the petitioner's own onsite manager
 - End Client letter is a requirement with CSC

- ▶ Specialty Occupation
 - The overall question of whether a position is a specialty occupation is under review at USCIS HQ
 - Market Research Analysts are positions currently eliciting RFEs from USCIS
 - Use an evaluation service to create a report comparing the proffered position's responsibilities/tasks to those described in OOH
 - Go through as many of the four criteria as possible
 - Remember if a license is required, it is a specialty occupation (i.e. health care professionals, teachers, etc.)

Current Trends in H-1B RFEs Con't

- ▶ Maintenance of Status
 - Will nunc pro tunc help?
- ▶ Beneficiary qualifies for AC21 extension
 - 2 ways to qualify for H-1B extension

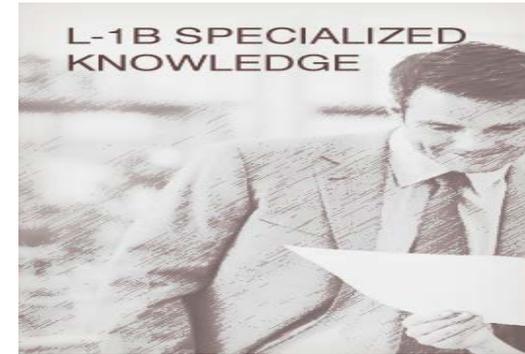


Current Trends in L-1A RFEs

- ▶ **Functional Manager**
 - Remember, okay if no hire/fire authority
 - Pick either manager, functional manager, or executive and outline how beneficiary/position meets the definition. Do not mix/match.
- ▶ **Crossborder Management**
 - Increasingly common as a multinational management trend – distributed management



Current Trends in L-1B RFEs



- ▶ Specialized knowledge
 - Key is to show how the beneficiary's knowledge is rare in a way that is important to the employer. Provide the following:
 - copies of training materials and manuals
 - certificates of related training received
 - very detailed description of duties with a breakdown of each duty and the percentage time to be spent on each duty
 - product or service brochures
 - company white papers relating to the proprietary technology, technical papers, and diagrams

Current Trends in L-1B RFEs Con't

- ▶ 3rd Party Placements: Factors to consider:
 - Ultimate supervision
 - right to control
 - provide the tools or instrumentalities
 - hire, pay and have the exclusive right to terminate
 - evaluate work-product, performance reviews
 - claim the beneficiary for tax purposes
 - provide standard company benefits



Current Trends in I-140 RFEs

- ▶ Multi-national Manager
 - Ability to Pay
 - Managerial
- ▶ EB2 and EB3
 - Educational Equivalency
- ▶ Extraordinary Ability/Outstanding Researcher
 - Co-authored patents – not counted by USCIS as an original contribution



Current Trends in I-485 RFEs

- ▶ Maintaining NIV status
- ▶ Unauthorized work
- ▶ Employment offer letter six months after EA approved
- ▶ Failure to complete Membership/Affiliation question may trigger RFE





RFE/NOID Intensive

Family-Based & Citizenship RFEs, Unusual RFEs and Response Strategies



The Confused or Misguided RFE:

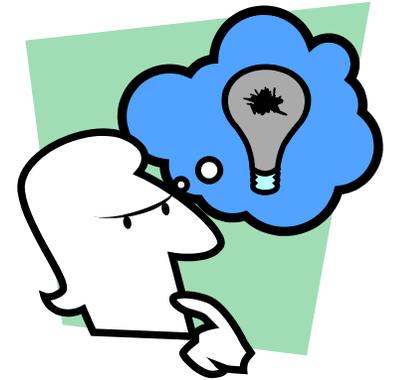
- ▶ Issued by a new officer or someone who hasn't seen your case type or argument before.

- ▶ Examples:
 - RFE stating that an after-acquired spouse is not 245(i) protected when they clearly are
 - NOID on a Schedule A group II case applying PERM standards and EB-2 exceptional ability standards instead of 20 CFR exceptional ability

Strategies for Responding:

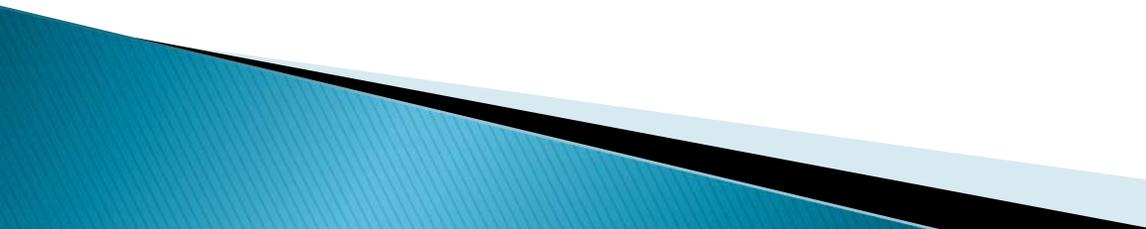
- ▶ Respond respectfully – you're more likely to get a positive response if you're polite than rude.
- ▶ Take the role of educating the officer where there is confusion or inexperience. Explain the requirements and then explain why your client qualifies.
- ▶ Use short names for confusing terms so they can be differentiated
 - Example: 8 CFR 204.5(k) exceptional ability vs. 20 CFR 656.10 exceptional ability. Call one “8 CFR exceptional ability” and the other “20 CFR exceptional ability” to separate the terms.

The I-Disagree-With-Your-Interpretation- and-Unless-You've-Got-An-Ace-in-the- Hole- I'm-Denying-this-Case



- ▶ Usually involves a negative/distrustful tone.
- ▶ Notes past denials or issues with the Government as evidence that the person is not eligible/does not merit favorable exercise of discretion.
- ▶ May allege that your client is misrepresenting something, purposely not disclosing something material, or that your client knows he's not eligible and is trying to pull a fast one on the Government.
- ▶ Asks for more evidence when it's likely that there is no more available.

Examples:

- ▶ N-600 RFE or Passport Office request for Proof of Parent's Presence
 - ▶ NOID on an I-130 stating that the person was married before and the previous I-130 was denied for lack of evidence, so this marriage must be fraudulent.
 - ▶ RFE in discretionary cases alleging ineligibility due to fraud or lack of good moral character
 - ▶ Notice of Intent to Rescind LPR status bringing up past immigration violations
 - ▶ L-1A managerial capacity RFE For new office L or small company
 - ▶ H-1B RFE stating that an unusual job isn't a specialty occupation
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Keep the Tone Professional and Respectful

- ▶ Even if you feel like you're going to lose, it's your job to make the best effort for your client. Make the argument the best way you can at least to preserve the point for appeal.
- ▶ Let the adjudicator have his/her way: What if what they say is true? Argue that the person still qualifies anyway.





Be creative...

- ▶ If you don't have what the RFE requests, use what you do have to prove the point
- ▶ If possible, use someone who's more knowledgeable than the adjudicator in the field in question (ex. Expert in the field, professor, etc.)
- ▶ If you made a mistake somewhere in your initial filing, clarify the situation and make sure the government knows it was your mistake and not your client's fault.
- ▶ Don't purposely draw attention to items that aren't helpful to the case

If Nothing Else...

A few Last Ditch Strategies to Make Your Case
(even if it's a really difficult case!)

