PRACTICE POINTER: Filing Form I-290B When Multiple Interrelated Forms Are Denied

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When USCIS denies multiple forms that are all connected to the same primary benefit petition, attorneys must determine how to complete the notice of motion or appeal on Form I-290B. This situation often arises in the context of U nonimmigrant status petitions, where a principal petitioner typically files the Form I-918, I-192, and I-765 (c)(14) and may also file Form I-918A on behalf of one or more derivatives. In addition, derivatives may have their own Form I-192 and I-765. The denial of either the principal's I-918 or I-192 will set off a chain reaction of denials for the principal's remaining forms and all of the derivative's forms. Each of these denials is generally based exclusively on the denial of the principal's I-918 or I-192. In this practice pointer, we will address how many Form I-290Bs to file in this scenario, whether derivatives need to file their own Form I-290B, and pitfalls in completing the Form I-290B.

1. What if only the I-192 or I-918 is denied on the merits?

Oftentimes, USCIS will deny either the I-192 or I-918 on the merits and will deny the remaining forms solely based on the denial of the first form. For example, if the I-918 is denied on the merits, USCIS will deny the I-192 and I-765 based on the I-918 denial without making a separate assessment of the merits of those applications. Likewise, if the principal's I-192 is denied on the merits, USCIS will deny the I-918 and I-765 based solely on the I-192 denial.

In these scenarios, ASISTA recommends filing one Form I-290B on the form that was denied on the merits because (a) historically, USCIS has reopened the ancillary forms (those that were not denied on the merits) *sua sponte* upon granting the Form I-290B; and (b) only the appeal or motion on the merits-based denial has an independent legal basis for filing.

a) USCIS's Historical Practice

Numerous practitioners nationwide have reported that Vermont Service Center (VSC) and Nebraska Service Center (NSC) routinely reopen any ancillary forms *sua sponte* upon the grant of a motion or appeal. As long as USCIS continues this practice, filing additional I-290Bs for

ancillary denials should not be necessary. However, USCIS has not formalized this practice in any publicly available document and there is no guarantee that this practice will continue.

If you only file the I-290B on the form that was denied on the merits, we recommend stating in your cover letter for the I-290B that you are requesting the *sua sponte* reopening of all ancillary forms if the I-290B is granted. You should specify the form numbers that you wish to have reopened *sua sponte*.

For example, if you file a Motion to Reopen on an I-918 that was denied on the merits, then you should indicate in your cover letter that you request the *sua sponte* reopening of the I-192, I-765, and any I-918As should the I-918 be granted. While the principal petitioner technically cannot request reopening of the derivative's I-192, USCIS has historically reopened that as well.

b) No Independent Basis for Filing Form I-290B for Ancillary Denial

There are three bases for filing a Form I-290B:

- Appeal: Does not require showing new facts or evidence or legal error in underlying denial. AAO provides *de novo* review. AAO Practice Manual, Ch. 3.4;
- Motion to Reconsider: Requires showing that the prior decision was incorrect based on law or DHS policy under the record as it existed at the time of the denial. 8 CFR 103.5(a)(3); and
- Motion to Reopen: Requires showing new facts. 8 CFR 103.5(a)(2).

The choice of which type of I-290B to file depends on whether an appeal is even available for the underlying form and the reason for denial. *See, e.g.*, 8 CFR 212.17(b)(3) ("There is no appeal of a decision to deny a waiver."). However, in the case of a form that was only denied because of the denial of another form, USCIS cannot approve the ancillary form while the merits-based denial remains in place even if the petitioner files separate Form I-290B on each denial.

i. Appeal

In the U visa context, the denial of either the I-918 or I-918A may be appealed to the Administrative Appeals Office (AAO). 8 CFR 214.14(c)(5)(ii). While there is no need to show new facts or evidence or legal error when filing an appeal, the AAO cannot sustain an appeal of the I-918 or I-918A where the I-192 remains denied on the merits because the petitioner remains inadmissible. In cases where the petitioner does file separate I-290Bs on the merits-based denial of the I-192 and the ancillary denial of the I-918, the AAO will dismiss the appeal of the I-918 unless the I-192 has been granted. *See, e.g.*, In re: 6179147, (AAO Apr. 15, 2020).

A significant exception arises where the I-918 was only denied due to the I-192 denial but the petitioner is contesting USCIS's finding of inadmissibility. In that case, it would be proper to file an appeal of the I-918 because the AAO has jurisdiction to determine whether the petitioner is actually inadmissible for the indicated grounds. *See, e.g.*, In re: 6340548, (AAO June 3, 2020).

However, the AAO will not review the discretionary aspects of the I-192 denial if the petitioner remains inadmissible, so the petitioner may need to file simultaneously an I-290B motion to reopen or reconsider the discretionary denial of the I-192.

ii. Motion to Reconsider:

Any of the U visa forms may be the subject of a motion to reconsider. However, the petitioner must demonstrate a misapplication of law or policy. Where an ancillary form is only denied due to the merits-based denial of another form, there is no error in the denial of the ancillary form, and thus, no independent basis for a motion to reconsider.

For example, if the I-918 is denied on the merits, then USCIS must deny the I-192 because there is no underlying request for admission for which to grant the waiver of inadmissibility. The denial of the I-192, therefore, is correct.

iii. Motion to Reopen

A petitioner may satisfy the "new facts" requirement for a motion to reopen an ancillary denial by providing evidence that they have filed a motion or appeal of the primary denial. However, USCIS still cannot grant the motion to reopen the ancillary form if the merits-based denial remains in place.

For example, if the I-192 is denied on discretion and the I-918 is denied solely due to the I-192 denial, the petitioner may file separate Motions to Reopen the I-918 and I-192. However, if USCIS declines to reopen the I-192, then the I-918 will necessarily also remain denied because the petitioner remains inadmissible.

There is also an argument that filing a separate I-290B on at least the status-granting benefit (in the case of U visas, the Form I-918) would be more effective for avoiding the issuance of a Notice to Appear (NTA) under USCIS's Notice to Appear policy. While USCIS has stated that it generally will not issue an NTA unless and until the I-290B for the I-918, I-914, I-360, or I-485 has been denied, the agency has never stated publicly that it will wait to issue an NTA until after the I-290B for the I-192 has been denied. However, ASISTA has not received confirmed reports that anyone who only filed the Form I-290B on a I-192 was placed in removal proceedings pursuant to the NTA policy while the I-290B remained pending.

In short, there are multiple options for petitioners when it comes to filing I-290Bs on ancillary applications. We recommend discussing the risks and benefits of each option with your client.

2. What if a derivative's application is denied solely based on the principal's denial?

If a principal's I-918 is denied for any reason, any I-918As for qualifying family members will also be denied. There is no publicly available guidance from USCIS regarding whether a derivative whose benefit application was denied solely because of the principal's denial needs

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