



July 2, 2013

PM-602-0087

## Policy Memorandum

SUBJECT: Certification of Decisions to the Administrative Appeals Office (AAO)

### Purpose

This policy memorandum (PM) and accompanying revisions to the Adjudicator's Field Manual (AFM) guide officers on the proper use of the decision certification mechanism described in 8 CFR 103.4. This PM revises Subchapters 3.5, 10.7, 10.8, 10.14 and 10.18 of the AFM; AFM Update AD13-08.

### Scope

Unless specifically exempted herein, this PM applies to and binds all U.S. Citizenship and Immigration Services (USCIS) employees.

### Authority

8 CFR 103.4

### Background

The Department of Homeland Security (DHS) regulation at 8 CFR 103.4(a)(1) provides that the Director of USCIS or his delegate "may direct that any case or class of cases be certified to another Service official for decision." The regulation also provides for the certification of "decisions to the appropriate appellate authority . . . when the case involves an unusually complex or novel issue of law or fact."

#### *Certification for appellate review of initial decision:*

This PM only addresses certification of "decisions" for AAO appellate review, not the pre-decisional certification of a case or class of cases among adjudicating officials "for decision," nor certification of decisions to the Board of Immigration Appeals (BIA). The complexity-and-novelty standard in the second sentence of 8 CFR 103.4(a)(1) applies to post-decision certification for AAO appellate review. Pre-decisional certification, provided for in the first sentence of 8 CFR 103.4(a)(1), may be appropriate to ensure consistency, or for other reasons unrelated to case complexity or novelty. AFM subchapters 10.14 and 10.18 are revised to clarify the distinction between pre- and post-decisional certification.

*Appropriate appellate authority:*

USCIS decisions that fall under the jurisdiction of the BIA may be certified to the BIA. 8 CFR 1003.1(c).<sup>1</sup> Any other decision may be certified to the AAO, including decisions that do not convey appeal rights. 8 CFR 103.4(a)(4).

The regulations currently cite to a deleted provision – 8 CFR 103.1(f) – that enumerated the appellate jurisdiction of the AAO prior to the creation of DHS.<sup>2</sup> DHS intends to replace the jurisdiction list in a future rulemaking. In the interim, the benefit types that fall within the AAO’s jurisdiction are detailed at [www.USCIS.gov/AAO](http://www.USCIS.gov/AAO), and AFM subchapter 10.8(a)(1) is amended accordingly.

*Decision types that may be certified:*

A case may be certified for AAO appellate review only after an initial decision has been made. 8 CFR 103.4(a)(4). 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 a full opportunity to submit a comprehensive brief, the initial decision should carefully articulate the unusually complex or novel issue of law or fact to be reviewed by the appellate authority.

The AAO will remand a case certified without an initial decision. Any decision type – including approvals, denials, and revocations – may be certified for AAO review.

*Decisions involving unusually complex or novel issues of law or fact:*

This PM amends and supplements AFM subchapter 10.18 with a non-exhaustive list of legal or factual issues that may arise in a decision and warrant certification, to wit: issues of first impression; conflicting legal authority; issues of significant public interest; federal litigation; questions of foreign law; novel policy issues; and 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 to the AAO. 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 the 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.

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<sup>1</sup> As a statutory exception, DHS maintains sole jurisdiction over Adam Walsh Act risk determinations in family-based immigrant visa petition proceedings. Section 204(a)(1)(A)(viii) of the Immigration and Nationality Act (the Act). As such, certification of 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.

<sup>2</sup> See, e.g., 8 CFR 103.3(a)(1)(ii) and 103.4(b).

This PM amends AFM subchapters 10.8 and 10.18, generally describing appeal and certification procedures, to emphasize that certification to the AAO is limited to initial decisions that involve “unusually complex or novel issues of law or fact,” or when ordered by the AAO for procedural purposes (i.e., to preserve appellate review when a case is remanded for additional action). *See* 8 CFR 103.4(a). The AFM is also amended to clarify that the AAO may remand a certified decision if the decision or the transmittal memorandum does not articulate an unusually complex or novel issue.

AFM subchapter 10.14 currently permits certification in “directed decision” scenarios, when an officer and supervisor do not agree on a disposition or pertinent issue: “In unusual situations where a clarification of policy or regulations would be useful, the supervisory officer may agree to certify a decision . . . if the officer and supervisor are unable to reach agreement.” This PM revises subchapter 10.14 to clarify: (1) that the case may only be certified if there is a decision, presumably the supervisor’s directed decision, for appellate review; and, (2) that the directed decision should only be certified if it involves “an unusually complex or novel issue of law or fact.” By itself, an officer-supervisor disagreement does not necessarily establish complexity or novelty.

*Non-precedent decisions resulting from certification:*

Although the AAO carefully considers certifications as candidates for the precedent decision process, the resulting AAO decision is most frequently issued as a non-precedent decision. This PM amends the AFM to clarify that a non-precedent appellate decision resulting from a certification resolves only that individual case.<sup>3</sup>

A non-precedent decision applies existing law and policy to a unique factual record in an individual case. The decision is binding on the parties to the case but does not create or modify agency guidance or practice. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions. Thus, officers may not use non-precedent decisions as a basis for applying new or alternative interpretations of law or policy. A USCIS officer may not rely upon, nor cite to, a non-precedent decision as guidance or legal authority. A USCIS officer may, however, read a non-precedent decision for instructional value regarding the issue(s) in that same case. *See* “Precedent and Non-Precedent Decisions of the Administrative Appeals Office (AAO),” PM-602-0086 (July 2, 2013).

*AAO Remands:*

The AAO also relies on the certification process<sup>3</sup> for procedural purposes related to remands.

On certification, the AAO may remand a case that lacks an initial decision or fails to articulate an unusually novel or complex issue of law or fact. After 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 affected party the full period to file an appeal (if permitted) or motion. Alternatively, if the officer does not

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<sup>3</sup> The AAO will consider requests, elevated through the chain of command, to re-issue a non-precedent decision as a precedent pursuant to 8 CFR 103.3(c).

certify the new decision but determines that the case is approvable, he or she may approve the case in accordance with standard procedures.

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.

*Certification Transmittal Memorandum:*

To facilitate tracking of certified decisions and identification of the complexity or novelty that warrants certification, officers must complete a "[Certification Transmittal Memorandum](#)" (CTM) and include a copy with the certified decision and Record of Proceeding (ROP). The completed CTM should be included on the non-record side of the ROP and also e-mailed (within three days of file transfer) to [USCIS.AAO.Certifications@uscis.dhs.gov](mailto:USCIS.AAO.Certifications@uscis.dhs.gov).

*Miscellaneous Technical Corrections:*

This PM also amends the AFM to correct or clarify certain technical matters related to the appeal and certification process. These changes include:

- In AFM Chapter 3.5(c), amending the description of the AAO's mission, including a description of appropriate actions and dispositions.
- In AFM Chapter 10.7, Note 2, adding three days to the appeal period for the mailing of decisions. 8 CFR 103.8(b).
- In AFM Chapter 10.8, noting that all appeals must be forwarded to the AAO, with two specific exceptions for appeals treated as a motion for favorable action and late appeals that meet the requirements for a motion. 8 CFR 103.3(a)(2)(iii) and (a)(2)(v)(B)(2).
- In multiple AFM chapters, updating references to the BIA's regulations.

**Policy**

USCIS officers will follow the policy stated in the AFM, as amended by this PM, when certifying decisions to the AAO pursuant to 8 CFR 103.4.

**Implementation**

The AFM is amended as follows:

- ☞ 1. Subchapter 3.5(c) is amended to read as follows:

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3.5(c) Administrative Appeals Office

The Administrative Appeals Office (AAO) adjudicates appeals under authority delegated to USCIS by the Secretary of the Department of Homeland Security (DHS). See DHS Delegation Number 0150.1 (effective March 1, 2003); see *also* 8 CFR 2.1 (2003). The AAO conducts appellate review of certain immigration benefit adjudications in a manner that is timely, impartial, and consistent with applicable law and policy. In addition, the AAO issues precedent decisions to provide clear and uniform guidance to officers and the public on the proper interpretation and administration of applicable law and policy.

The AAO maintains appellate jurisdiction over more than 45 different immigration case types. The AAO's jurisdiction includes the matters described at obsolete 8 CFR 103.1(f)(3)(iii) (as in effect on February 28, 2003), with two changes – (1) petitions for approval of schools and the appeals of denials of such petitions are the responsibility of Immigration and Customs Enforcement; and, (2) T and U nonimmigrant petitions and the related adjustment of status applications may be appealed to the AAO.

DHS intends to publish the AAO's appellate jurisdiction in a future rulemaking. In the interim, the AAO's jurisdiction is listed by both subject matter and form number at <http://www.USCIS.gov/AAO>. For comparison purposes, the Board of Immigration Appeals' appellate jurisdiction is listed at 8 CFR 1003.1(b).

In deciding an appeal, the AAO may enter an order sustaining the appeal (approving the case), dismissing the appeal (denying the case), summarily dismissing the appeal, rejecting the appeal, remanding the case to the originating officer for further action, or taking any other action consistent with its authority under the Act and regulations as appropriate and necessary for the disposition of the case. On certification, the AAO may affirm the decision of the director, withdraw the decision of the director, or remand the case for further action. If the AAO remands a case for additional action, such as a request for additional evidence and a new decision, the case remains pending until the originating office completes the ordered action. An officer may not disregard an AAO order that is properly entered on appeal or certification.

☞ 2. Subchapter 10.7, Preparing Denial Orders, is amended to read as follows:

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## **NOTE 2**

The final denial and final revocation notice must reflect the correct number of days in which the petitioner or self-petitioner has to appeal the decision when it is appealable to the AAO. For standard denials, a petitioner or self-petitioner has 30 calendar days to appeal the decision, 33 calendar days if the USCIS decision was served by mail. For revocations of petitions pursuant to 8 CFR 205.2 (i.e., revocations on notice), a petitioner or self-petitioner has 15 days to appeal the decision, 18 calendar days if the USCIS decision was served by mail. If the last day of the appeal period falls on a Saturday, Sunday, or a legal holiday, the period shall run until the end of the next day which is not a Saturday, Sunday, or a legal holiday.

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☞ 3. Subchapter 10.8(a)(1) is amended to read as follows:

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## **10.8 Preparing the Appellate Case Record.**

(a) Administrative Appeals Office (AAO) Cases.

(1) General.

An officer 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, an officer may be required to forward the record to the AAO if the affected party files a late motion.

Certain unfavorable decisions may be appealed to the AAO. The AAO maintains appellate jurisdiction over more than 45 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 the DHS. Currently, the benefit types within the AAO’s jurisdiction are enumerated at [www.USCIS.gov/AAO](http://www.USCIS.gov/AAO).

In addition to the appeal process, a director may choose to certify a decision to the AAO for appellate review if the case involves an unusually complex or novel issue of law or fact. A case 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) under section 245(a) of the Act.

A case may not be certified to the AAO, however, if the Board of Immigration Appeals (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 AFM subchapter 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 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.

Upon receipt of an appeal in a case over which the AAO has jurisdiction, the officer must review two critical issues.

First, the officer must determine if the appeal was timely filed. See AFM Chapter 10.7, Note 2. If the appeal was not timely filed, and the appeal meets the technical

requirements for a motion to reopen (new evidence) or a motion to reconsider (demonstrates an incorrect application of law or policy), the officer first must treat the late appeal as a motion and grant the motion, and then enter a new decision on the merits of the case, whether favorable or adverse. 8 CFR 103.3(a)(2)(v)(B)(2). If the reviewing officer determines that the appeal was untimely filed, but does not meet the requirements for a motion, the appeal and related record must be forwarded to the AAO for review as a late appeal; the reviewing officer should not issue a decision on the appeal (Form I-290B).

Second, if the appeal was timely filed, the officer must review the complete case to determine whether the arguments or evidence presented on appeal warrant favorable action. If so, the district or center may treat the appeal as a motion to reopen or motion to reconsider and approve the case. If the arguments fail to overcome the basis of the denial, the appeal and related record must be promptly forwarded to the AAO; no new decision is required.

#### **NOTE**

The AAO maintains jurisdiction over all appeals, even when it is untimely filed, not filed by the affected party, or filed on a decision that does not carry appeal rights. With only two exceptions, as outlined in the text above, all appeals must be forwarded *promptly* to the AAO. See 8 CFR 103.3(a)(2)(iv).

The AAO will generally reject a late-filed appeal and not return it for review as a motion to reopen or reconsider. This practice avoids delayed decisions, eliminates unnecessary file movement between the field and AAO, and improves customer service. On rare occasions, however, if the petitioner or applicant directly submits new evidence or argument to the AAO, the AAO may return the untimely filed appeal to allow the officer a full opportunity to review all of the supporting documents.

#### (2) 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.

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☞ 4. Subchapter 10.14 is amended by adding a new, final paragraph to read as follows:

#### **10.14 Directed Decisions.**

If a directed decision involves unusually complex or novel issues of law or fact, the supervisory officer may certify the directed decision to the Administrative Appeals Office (AAO) or the Board of Immigration Appeals (BIA). A case may be certified to the AAO or the BIA for appellate review “only after an initial decision is made.” 8 CFR 103.4(a)(4) and 1003.7. The initial decision should clearly state the unusually complex or novel issue of law or fact, if applicable, to be reviewed by the appellate authority. By itself, a disagreement between officer and supervisor does not necessarily establish unusual complexity or novelty. For more details on the certification process, see AFM Chapter 10.18.

☞ 5. Subchapter 10.18 is amended to read as follows:

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#### **10.18 Certification of Decisions.**

##### **(a) General.**

In general, “certification” is an administrative procedure by which an officer asks an appellate authority or adjudicating official to review a question of law or fact arising in a pending case. The DHS regulations allow for the certification of immigration cases in two scenarios:

##### **(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.

To facilitate tracking of certified decisions and identification of the complexity or novelty that warrants certification, officers must complete and include a “[Certification Transmittal Memorandum](#)” (CTM) with the certified decision and Record of Proceeding. See National SOP, Certifications, Appendix. The completed CTM should be included on the non-record side of the administrative record and also e-mailed to [USCIS.AO.Certifications@uscis.dhs.gov](mailto:USCIS.AO.Certifications@uscis.dhs.gov). Copies of the CTM may be requested directly from the AAO.

☞ 6. The AFM Transmittal Memoranda table is updated as follows:

AD13-08 7/2/2013	Subchapters 3.5, 10.7, 10.8, 10.14 and 10.18	Guide USCIS officers on the proper use of the decision certification mechanism described in 8 CFR 103.4.
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### Use

This PM is intended solely for the guidance of USCIS personnel in the performance of their official duties. It is not intended to, does not, and may not be relied upon to create any right or benefit, substantive or procedural, enforceable at law or by any individual or other party in removal proceedings, in litigation with the United States, or in any other form or manner.

### Contact Information

Questions or suggestions regarding this PM should be addressed through appropriate directorate channels to the AAO.