Administration's 'Culture of No' undermines immigrant workers, employers

In the past two years, the Trump administration has issued a series of policy memoranda that are quietly changing the landscape of employment-based immigration, and not for the better. Seemingly every time employers adjust their practices and create new strategies, the U.S. Department of Homeland Security (DHS) publishes another news release describing another obstacle in the adjudication of immigration petitions filed by U.S. employers on behalf of their foreign workers.

Buy American Hire American

There is no doubt that the theme of the current administration is to put America first. Focusing attention on the business community, Trump's Buy American and Hire American executive order[1] directs the immigration agencies to "rigorously enforce and administer the laws governing entry into the United States of workers from abroad;" to "propose new rules and issue new guidance… to protect the interests of United States workers in the administration of our immigration system;" and to "suggest reforms to help ensure that H-1B visas are awarded to the most-skilled or highest-paid petition beneficiaries." In practice, these mandates have resulted in the federal immigration agencies seeking to delay, deny, and otherwise complicate the employment of foreign nationals looking to live and work legally in the United States, as described below.

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Upticks in Requests for Evidence (RFE) pertaining to H-1B specialty occupations

In March 2017—the day before employers filed 199,000 H-1B petitions subject to the annual H-1B cap—U.S. Citizenship and Immigration Services (USCIS), the *adjudicatory* (and not, until recently, *enforcement*) arm of DHS released a memorandum entitled "Rescission of December 22, 2000 'Guidance Memo on H-1B Computer Related Positions,"[2] reversing a long-standing interpretation of H-1B petitions for computer-related occupations. The memo rescinds guidance acknowledging that certain computer-related occupations qualified for H-1B classification because they were considered *specialty occupations.* As a result, many positions previously held to be specialty occupations were no longer classified as such. This change in interpretation was drastic, and because it was issued so close to the annual filing deadline, employers had insufficient time to amend or address this change in their petitions.

Following the issuance of this memo, USCIS felt emboldened to challenge other specialty occupations, including such solid categories as engineers and physicians. The number of RFEs issued in 2017 H-1B lottery cases grew by 44 percent, and denials increased by approximately 10 percent.

Eliminating deference to prior determinations

Further complicating the pendency of a temporary visa holder's status in the United States, USCIS issued another memo in October 2017 ("Rescission of Guidance Regarding Deference to Prior Determinations of Eligibility in the Adjudication of Petitions for Extension of Nonimmigrant Status").[3] This memo directs the agency to no longer grant deference to its own past decisions. This means that a foreign worker who is already in the United States on an H-1B visa, for example, cannot count on an approval of an extension, even if the terms and conditions of the employment in the initial petition and extension petition are identical.

With this change, predictability in successive immigration filings no longer exists.

Contracts and itineraries requirements for H-1B petitions involving third-party worksites

In February 2018, USCIS issued a policy memo[4] that makes it more difficult for employers to place H-1B employees at third-party sites. The memo requires such employers to provide additional detailed information about the terms and length of employment, the vendor(s) involved with the employment, and the employer's relationships with its end clients. Specifically, employers who anticipate third-party placements will be asked to provide contracts with end-clients (as well as all other companies involved in the assignment, including contractors and sub-contractors); itineraries that include exact dates of each service or engagement; the contact information of vendors and end clients, location of the placement(s), as well as the duration of the placement(s); and detailed documentation of work assignments. Further, such employers filing H-1B extension petitions must not only document future third-party assignments, but will also need to document that the foreign worker's previous placements met H-1B requirements throughout the previous employment period.

In-person interviews for adjustment of status

The administration's restrictionist perspective is not limited to temporary workers. In August 2017, the Trump

administration directed USCIS to conduct mandatory, in-person interviews[5] for all employment-based permanent resident applicants. Historically, USCIS waived the interview for employment-based applicants to marshal resources for higher-risk cases, especially since the employment-based process is a multi-year process that includes a number of built-in mechanisms to address many of the issues that in-person interviews are meant to address. This is why the in-person interviews for employment-based immigration cases are redundant and unnecessary.

Nevertheless, now that every employment-based applicant must be interviewed, USCIS has tens of thousands of interviews to add to its already delayed docket.

Accrual of Unlawful Presence and F, J, and M Nonimmigrants Memo

In May 2018, USCIS released a policy memo[6] that substantially changes the rules pertaining to unlawful presence for foreign students (F and M visa status holders), and exchange visitors (J visa status holders). To understand the new rule, which went into effect on August 8, 2018, it is helpful to distinguish between a *status violation* and *unlawful presence*. The most important distinction between the two is that unlawful presence can result in a three-year or ten-year bar to admissibility, whereas a status violation does not. Typically, F, J, and M nonimmigrants are admitted until an undetermined date, represented on their entry record as "D/S" (which stands for Duration of Status). The existing rule states that those admitted for "D/S" only begin to accrue unlawful presence if there is a formal finding by either an immigration judge or by the Board of Immigration Appeals (BIA). The new memo changes this rule. Under the new memo, F, J, and M nonimmigrants begin to accrue unlawful presence on the earliest of any of the following:

- the day after they no longer pursue a course of study or the authorized activity, or the day after they engage in an unauthorized activity;
- the day after completing the course of study or program (including any authorized practical training plus any authorized grace period);
- the day following the expiration date listed on the entry record (for individuals admitted in F, J, or M status to a specific date); or
- the day after being ordered excluded, deported, or removed.

One of the main concerns with this new policy is that a student can begin to accrue unlawful presence without intending to and without realizing it. For example, if a student is authorized to work 20 hours per week and accidentally works 21 hours, then that student begins to accrue unlawful presence. Another example would include an individual working pursuant to Optional Practical Training (OPT) where the USCIS later determines that the position is not sufficiently related to the student's degree, even if the university from which the student graduates has already made that determination. This policy makes foreign students more vulnerable to permanent removability and ineligibility for changing their status to a different category.

Request for Evidence and Notice of Intent to Deny (NOID) policy

In a July 13, 2018 memo,[7] USCIS instructed its adjudicators to deny certain applications, petitions or requests without first issuing an RFE or Notice of Intent to Deny (NOID). The RFE and NOID offer the petitioner a chance to respond to any shortcomings in a case that is filed with USCIS but not readily approvable. This memo rescinded 2013 guidance that instructed USCIS officers to issue RFEs and NOIDs to allow employers to provide additional information necessary to approve a case. The new memo now grants USCIS adjudicators full discretion to immediately deny cases without affording the employer petition or foreign employee to submit further evidence. This new policy, which went into effect in September 2018, is expected to result in an increase in denials of otherwise approvable petitions.

Updated guidance for the referral of cases and issuance of Notices to Appear

Perhaps the most dramatic of the recent policy changes is the Notice to Appear (NTA) policy, issued on June 28, 2018 ("Updated Guidance for the Referral of Cases and Issuance of Notices to Appear (NTAs) in Cases Involving Inadmissible and Deportable Aliens Policy").[8] An NTA is a notice document given to an alien that instructs them that charges are being made against them by DHS and they must appear before an immigration judge. This policy requires the USCIS to issue an NTA in a wide variety of cases where a denial is issued, even if the denial is completely unjustified or inconsistent with immigration law. At the time of publication of this article, the USCIS has stated that it will use an incremental approach to implementing this policy, causing practitioners to believe that it is just a matter of time before the policy is applied to employment-based petitions and applications.

Summary

Collectively, the current administration's changes in policy guidance and adjudication have created an atmosphere of fear and uncertainty for U.S. employers and the foreign workers they wish to hire. These actions undermine the ability of U.S. employers to attract and retain the best and brightest by removing any predictability or reliability in the immigration process. These policies are part of a larger system that will create a new class of undocumented immigrants: individuals who have maintained lawful status since their entry but now, solely based on shifts in policy or procedure, run the risk of losing that status forever. ▲

Notes

[1] *https://www.whitehouse.gov/presidential-actions/presidential-executive-order-buy-american-hire-american/*

[2] *https://www.uscis.gov/sites/default/files/files/nativedocuments/PM-6002-0142-H-1BComputerRelatedPositionsRecission.pdf*

[3] *https://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/2017/2017-10-23Rescission-of-Deference-PM6020151.pdf*

[4] *https://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/2018/2018-02-22-PM-602-0157-Contracts-and-Itineraries-Requirements-for-H-1B.pdf*

[5] *https://www.uscis.gov/news/news-releases/uscis-to-expand-in-person-interview-requirements-for-certain-permanent-residency-applicants*

[6] *https://www.uscis.gov/sites/default/files/USCIS/Outreach/Draft Memorandum for Comment/AccrualofUnlawfulPresenceFJMNonimmigrantsMEMO_v2.pdf*

[7] *https://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/AFM_10_Standards_for_RFEs_and_NOIDs_FINAL2.pdf*

[8] *https://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/2018/2018-06-28-PM-602-0050.1-Guidance-for-Referral-of-Cases-and-Issuance-of-NTA.pdf*