UNITED STATES

NEW USCIS POLICY ON EXTENSIONS OF STATUS

November 7, 2017

EXECUTIVE SUMMARY

On Oct. 23, U.S. Citizenship and Immigration Services rescinded a longstanding policy on the burden of proof for petitions to extend nonimmigrant status, and issued new guidance that affects how USCIS officers will adjudicate extension petitions. Under the new policy, when deciding whether to grant an extension of a nonimmigrant petition, adjudicators will no longer give deference to the prior visa approval. The policy memorandum took effect immediately and affects pending extension petitions.

Who is affected by the new policy?

The policy applies to all nonimmigrant visa holders applying for extensions with USCIS, and thus primarily affects employment categories, such as H-1B and L-1 extensions. The policy memorandum is only binding on USCIS adjudicators and does not affect extension petitions filed at U.S. Consulates abroad (with the Department of State) or at U.S. ports of entry (with U.S. Customs and Border Protection).

What was the previous policy?

Under the prior policy in effect since 2004[1], when adjudicating extension petitions involving the same parties and same underlying facts, USCIS officers were instructed to give deference to the prior finding of eligibility in the initial petition. In other words, officers gave credence to a previous USCIS approval and did not re-adjudicate (i.e. reconsider) whether the individual met initial eligibility requirements. For example, H-1B employees whose employer and employment terms remained the same as when the original petition was approved would not need to show that the extension petition met the H-1B eligibility requirements (such as educational requirements and "specialty occupation" criteria) when applying to renew their status. The L variant of the policy also led to the upholding of prior approvals in L-1 extension petitions.

What is the new policy?

Under the new policy, USCIS adjudicators will consider an extension petition on its own merits, without giving deference to the approval of the initial petition. The memorandum instructs USCIS adjudicators to conduct a thorough review of each extension petition and the supporting evidence to determine eligibility, and states that their fact-finding "should not be constrained by any

[1] The April 23, 2004, USCIS guidance, titled "The Significance of a Prior CIS Approval of a Nonimmigrant Petition in the Context of a Subsequent Determination Regarding Eligibility for Extension of Petition Validity," instructed its officers, when adjudicating petition extensions involving the same parties and underlying facts as the initial petition, to defer to prior determinations of eligibility, except in certain limited circumstances (such as an error in the previous petition approval, a substantial change in circumstances, or new adverse information). A separate USCIS policy memorandum issued August 17, 2015, titled "L-1B Adjudications Policy" directed USCIS adjudicators, in the context of L-1B petition extensions, to give deference to the prior determinations of eligibility by USCIS, except in certain, limited circumstances.

prior petition approval, but instead, should be based on the merits of each case." The memorandum clarifies that the burden of proof is on the petitioner at all times and does not shift to the government, even in extension petitions involving the same parties and facts as the initial petition.

What is the reason for the change in policy?

The new policy is consistent with President Donald Trump's "Buy American, Hire American" directive to tighten processing of immigration benefits across numerous federal agencies. The stated reason for the policy change is to be more consistent with the agency's current priorities and to protect the interests of U.S. workers. The memorandum also states that the previous policy limited the ability of adjudicators to conduct a thorough review of the facts of each case and may have led to officers not discovering errors in prior decisions. The agency also believes that the previous policy of deference improperly shifted the burden of proof to USCIS to determine whether the underlying facts in extension petitions had changed, and said that the policy was costly and impractical to implement.

Does the policy memorandum add new eligibility criteria for H-1B or L-1 extension applications?

No. The visa eligibility requirements and standard proof have not changed. The new policy also does not purport to require new documents to be submitted in support of extension petitions. However, it clearly authorizes USCIS officers to request any additional documentation they deem necessary to resolve any doubts about the H-1B qualifications. It will likely result in many companies submitting more documentation and evidence with extension petition filings than they previously would have under the deference policy.

What should companies and employees expect as a result of this change?

Companies and employees should prepare for additional scrutiny of petitions and longer adjudication timeframes. Over the past year, USCIS Requests for Evidence (RFE's) on H-1B and L-1 petitions have already increased dramatically, and extension requests now may also receive an increase in RFE's. Addressing these requests for evidence will take additional time, and could cause USCIS to slow its processing. In particular, businesses and employees should factor in the longer timelines when planning travel schedules, especially when employees are planning to travel outside the U.S. beyond the expiration of their initial petition. To help employers anticipate these potential delays, BAL will seek to identify which cases may be more susceptible to challenge prior to submitting an extension request.

Will USCIS deny more extension petitions?

The agency is already reviewing visa petitions more carefully than it has in the past, and BAL expects USCIS to bring the same level of attention and scrutiny to extension applications. For some companies, this change in policy will not affect outcomes for extension petitions. But other companies, particularly in the IT consulting industry—which the government has signaled its intention to target—will almost certainly experience an increase in RFE's and may see increased denials.

BAL will continue to ensure that every petition it files meets all legal requirements and that petitioners and employees meet eligibility criteria. BAL does expect that under the new policy, USCIS may ask for additional documents or evidence in support of eligibility criteria that are not normally required. BAL will work with employers and employees to respond to any additional requests.