How Will the USCIS's Recent Policy Changes Impact Your Employees?

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Under the current administration, the immigration field has experienced many changes in policy that have impacted foreign nationals. While work visas are still a viable option for businesses, it is important to understand the current legal landscape and policy trends. This article is aimed at providing an update and suggested best practices regarding several recent policy changes that may directly affect your workforce.

Premium Processing Suspended for Certain H-1B Petitions

On August 28, 2018, the U.S. Citizenship and Immigration Services ("USCIS") announced the suspension of premium processing for certain H-1B visa petitions until February 19, 2019. The USCIS normally provides a premium processing option for employers, where employers pay an additional fee, which results in expedited petition processing. Within 15 days of the receipt of the application, the USCIS adjudicates the petition and issues either an approval, denial, or a request for additional evidence. Many employers utilize the premium processing service, as the relatively fast turn-around provides certainty to businesses and workers. During this period when premium processing has been suspended for certain H-1B petitions, we anticipate that USCIS may take several months to process impacted cases. In addition, please note that the USCIS also announced an increase of the premium processing fee from $1,225 to $1,410, effective October 1, 2018.

The Service has confirmed that it will continue to allow premium processing for H-1B cap-exempt employers, which includes colleges and universities, certain non-profit entities affiliated with institutions of higher education, and qualifying government research institutions. In addition, premium processing will remain an option for all employers with respect to obtaining H-1B visa extensions when there is no change in the worker's proposed employment. In addition, USCIS will continue to provide premium processing for other work visa categories, such as L-1A and L-1B intracompany transferees, TN NAFTA professionals, and O-1 individuals with extraordinary ability.

Practically speaking, the suspension of premium processing for certain H-1B visa petitions will impact employers' strategy regarding petitions for new employees and for changes in proposed employment for current employees. One option is to "port" workers in accordance with the American Competitiveness in the 21st Century Act ("AC21"). This law allows individuals with H-1B visa status to "port" employment to new H-1B roles while petitions for new H-1B visa status are pending. This porting rule applies after the employer has received the USCIS issued Receipt Notice on the new H-1B petition, and only if the individual was lawfully admitted to the U.S., the employer properly filed the H-1B petition prior to the expiration of the worker's authorized stay, and the beneficiary has not previously been employed without authorization. Employers should carefully consider the nature of the H-1B petition, timing considerations, and the potential impact of a denial, before determining whether porting is

appropriate. These considerations are particularly important given the USCIS's new rule, discussed below, regarding adjudication standards for petitions.

NTA Policy for Recipients of Certain Visa Petition Denials

On June 28, 2018, USCIS also announced that it will begin issuing a Notice to Appear ("NTA") to certain foreign nationals who receive denials of visa petitions, if the USCIS determines that the individual is removable. An NTA effectively places the person in immigration removal proceedings. Once an individual is issued an NTA, he or she is legally obligated to remain in the U.S. pending removal proceedings. The good news is that on September 27, 2018, the USCIS released updated policy guidance stating that, "[w]e will not implement the June 2018 NTA Policy Memo with respect to employment-based petitions and humanitarian applications and petitions at this time. Existing guidance for these case types will remain in effect." However, USCIS has stated that as of October 1, 2018, the USCIS may begin issuing NTAs on denied status-impacting applications, such as I-485 Applications to Register Permanent Status or Adjust Status (which is the last stage of the "green card" process) and I-539 Applications to Extend/Change Nonimmigrant Status. It will be important to monitor this USCIS change in policy.

Adjudication Policy Change Regarding Requests for Evidence

In addition, on July 13, 2018, the USCIS issued a Policy Memorandum rescinding its 2013 guidance regarding the issuance of Requests for Evidence ("RFE"s) and Notices of Intent to Deny ("NOID"s). Effective September 11, 2018, the new Policy Memorandum directs USCIS officers to use their discretion to deny an application, petition, or request filed with USCIS *without first issuing an RFE or NOID*, if the officer concludes that insufficient evidence accompanied the filing of the application or if the officer determines that the evidence submitted fails to establish the applicant's eligibility for the benefit requested. This policy has resulted in much concern about whether the new policy will be used to summarily deny petitions that have merit. The USCIS has stated that it is training officers regarding the meaning of the policy, and that employers should not expect a significant change in adjudications. However, employers must certainly be diligent and ensure the petitions contain the required evidence.

The new policy memorandum also states that where evidence establishing eligibility is not readily available to an immigration officer with the initial filing, adjudicators may use their discretion before issuing an RFE "to validate assertions or corroborate evidence and information by consulting USCIS or other governmental files, systems, and databases, or by obtaining publicly available information. 8 USC 1357(b)." This provision further empowers immigration adjudicators to independently verify the accuracy of information submitted by an applicant in government files, systems, and databases. Employers should therefore be particularly careful to update company information in Dun & Bradstreet Reports and the affiliated Validation Instrument for Business Enterprises ("VIBE"), as USCIS officers sometimes consult VIBE as sources for verification of employer data.

Conclusion

While the USCIS continues to approve employment-based work visas and green cards, it is critical that businesses and their attorneys craft a carefully planned immigration strategy for each case. In addition, it is important to develop back-up plans, should the USCIS issue an adverse decision. Further, it is recommended that employers submit visa extensions as early as possible with strong supporting documentation. Finally, communication with all key stakeholders is important, as managing expectations in the current immigration environment is imperative.

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