

Cos. Face Unpredictability As Extension Deference Ends

By **Allissa Wickham**

Law360, New York (October 26, 2017, 10:14 PM EDT) -- With U.S. Citizenship and Immigration Services' move to rescind a policy that requires officers to give deference to past decisions when it comes to status extension requests, attorneys are predicting more uncertainty, evidence demands and possible denials for companies seeking to retain foreign workers.

On Monday, USCIS **rolled back** guidance that required officers to give deference to previous decisions when it comes to requests for extensions of nonimmigrant visa status. Previously, adjudicators had been told generally to defer to past eligibility findings, when they were dealing with extensions regarding the same parties or facts as the original requests.

Now, however, USCIS is explicitly telling officers to use the same amount of scrutiny for initial and extension requests, and indicated the new guidance applies to a variety of worker visa categories.

In light of the new memo, immigration attorneys are bracing for more so-called "requests for evidence" on extension requests, which will add to the increase in RFEs that firms are already seeing for H-1B and L-1 visa applications.

"Absolutely, we'll see more RFEs on extension requests stemming from this memo. No question at all," said Susan Cohen of Mintz Levin Cohn Ferris Glovsky and Popeo PC. "And there will probably be an increase in the denials as well."

Mitchell Wexler of Fragomen, Del Rey, Bernsen & Loewy LLP agreed that more worker visa extension requests may be denied as a result of the memo, pointing to the increase in evidence demands as a factor.

"I don't see a significant percentage ultimately being denied. But there will be more denials just by virtue of the fact of an RFE being issued," Wexler said. "There's not going to be a 100% approval rate."

Attorneys also voiced concerns over uncertainty that could be stirred up for companies, with the memo potentially introducing more unpredictability for employers when it comes to retaining foreign workers.

"If now, we have situations where companies have invested in certain employees, and now have no guarantee that after two or three years, they're going to be able to continue to employ and rely on that foreign talent, I think that, to me, is a really concerning thing from just a business perspective," said Sujata Ajmera of Strasburger & Price LLP.

The new move will introduce a "significant element of uncertainty" for employers, argued Wexler, who pointed out that if they have L-1 or H-1B visa workers on important projects, they may not know if that person will be around at a key stage of the workflow.

"I think just the unfortunate result is more of these projects are going to be outsourced, where there's no uncertainty," he said.

It's also possible the policy shift could push more companies into premium processing their petitions, if they're not doing so already, in an effort to avoid possible case delays due to RFEs. That would add an extra expense to that process, as such expedited processing costs \$1,225.

Overall, the new policy guidance fits in with the Trump administration's "hire American" push, with the new USCIS Director, L. Francis Cissna, saying in the statement announcing the policy that the "updated guidance provides clear direction to help advance policies that protect the interests of U.S. workers."

The guidance is one of a series of things the administration has done to increase scrutiny of foreign workers without having to issue a regulation or wait for Congress to pass a law.

Other recent moves include **in-person interviews** with certain immigrants in the U.S. seeking permanent residency, and a sudden influx of **requests for evidence for H-1B petitions**. Becki L. Young of Hammond Young Immigration Law LLC noted that the administration is essentially "attacking" the H-1B visa "through the adjudicative process."

"They're basically changing the rules as we go along, and so I think this is just another symptom of that whole phenomenon," Young said of the latest policy memo on extension scrutiny.

And indeed, this memo may even be geared toward H-1B visas, according to Cyrus Mehta of Cyrus D. Mehta & Partners PLLC, who pointed to the current number of H-1B denials and challenges.

"I think this memo's actually directed towards H extensions, because they disfavor Hs under the [administration's] new thinking," Mehta said.

The policy update was also the first to be issued since Cissna was confirmed to lead the agency, and attorneys expect that it won't be the last.

"I think these little discretionary shifts, that are arguably within the agency's right ... I think we're going to continue to see it. And I think the purpose of it is to make things a lot harder. Make things more difficult. Make things more burdensome," Ajmera said, adding that "maybe the idea is that employers won't pursue these visas."

--Additional reporting by Steven Trader. Editing by Pamela Wilkinson and Breda Lund.