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New USCIS Guidance Makes Immigration Denials Easier

By **Kat Greene**

Law360 (July 13, 2018, 11:04 PM EDT) -- The U.S. Citizenship and Immigration Services adjudicators looking over applications for immigration benefits will soon have broader discretion to deny them outright, according to a memo issued Friday describing a policy shift that immigration attorneys called "extremely punitive" and "devastating to employers."

The agency said that any USCIS employees looking over applications, petitions or requests may issue statutory denials of filings where the petitioner has no legal basis for the benefit sought, or submits a request under a program that was terminated, and that the adjudicators no longer have to send a Request for Evidence or Notice of Intent to Deny before rejecting the bid.

Those filings from the USCIS, referred to as RFEs and NOIDs, have previously warned applicants that something was amiss with their bids, giving them an opportunity to better explain themselves to the agency. But under the new policy, which kicks in on Sept. 11, USCIS workers can simply deny the bid "when appropriate" and at their discretion, according to the memo.

"If all required initial evidence is not submitted with the benefit request, USCIS in its discretion may deny the benefit request for failure to establish eligibility based on lack of required initial evidence," the agency said in the memo.

On its face, the memo doesn't seem like a major change in policy, but several immigration attorneys told Law360 on Friday that it could have major impacts for people seeking to come to the U.S., including for H-1B visas for skilled foreign workers.

Susan Cohen, founder and chair of the immigration practice at Mintz Levin Cohn Ferris Glovsky and Popeo PC, noted that, combined with a **July 5 memo** from the agency increasing the situations in which the USCIS can issue notices to appear, the policy means more foreign nationals will be placed in removal proceedings. It also decreases due process, because applicants won't have a chance to contest potentially unjustified reasons for denials, she said.

"This is extremely punitive and could have dire consequences for foreign nationals," Cohen said. "This is part of a concerted effort to create an environment in the U.S. that is hostile to immigrants."

The July 5 memo **would vastly expand** the agency's enforcement capabilities, broadening the kinds of immigration cases that are subject to removal proceedings, which are initiated with a notice to appear. An NTA places a noncitizen before an immigration judge and commences removal proceedings.

Applicants for employment-based visas are not immune. Once issued an NTA, they might face monthslong immigration court proceedings before obtaining relief, requiring business immigration attorneys to either take up litigation or partner with litigators.

Anastasia Tonello, managing partner at Laura Devine Attorneys, called Friday's policy change part of a "one-two punch" with the earlier memo, and an attack on legal immigration.

She pointed out that, after the agency sends an RFE and receives a response, the approval rate is high. And she estimated that around half of the RFEs she receives have asked for evidence that was already provided in the initial application, but the adjudicator accidentally missed.

But now, adjudicators are empowered to deny a bid at first glance, without applicants getting a chance to correct errors introduced by the agency itself.

“The consequences could be really devastating to employers because of the uncertainty,” she said, noting that H-1B petitions, which operate on a lottery system and in which applicants are hoping to work in specialized professions at U.S. companies, are particularly sensitive.

“This is really meant to disrupt the legal process” for coming to the U.S., she said.

Last summer, immigration attorneys reported that they were **seeing increased scrutiny** on H-1B petitions, with extra attention paid to those that offer entry-level wages. Those concerns were later justified by data released by the USCIS in September, when the agency said requests for evidence on those cases **rose 45 percent** from a year earlier.

Elizabeth Stern, partner at Mayer Brown LLP, said that part of the danger of the policy announced Friday is that it comes from the perspective that most applicants are trying to abuse the system.

“It’s amazing what you see when you’re looking for abuse,” she said, adding that if the agency is viewing applicants as cheaters rather than understanding their value, it becomes problematic.

The policy could be very dangerous if the adjudicators at USCIS, who are sorting through mountains of paperwork on each case, make mistakes in those reviews, Stern said.

The memo does, however, lay out a very clear directive, she said: petitioners must be very careful to demonstrate to the USCIS clearly and cleanly that they’ve met the necessary conditions for approval of their applications, petitions and requests.

But she said she didn’t see the memo as describing a major change.

“While this change sounds quite intimidating and could of course be used very aggressively by the agency, we actually think it’s a codification … or the moralization of a shift the agency has already made to avoid having to think of things from the filer’s perspective," she said. “The policy memo isn’t a significant pivot, but how it’s used could be a significant pivot."

--Additional reporting by Nicole Narea and Suzanne Monyak. Editing by Pamela Wilkinson.
