Mobility: immigration alert

July 2018

USCIS Updates Immigration Policy Guidance

Executive summary

On July 13, 2018, the U.S. Citizenship and Immigration Services (USCIS) issued a new Policy Memorandum PM-602-0163 (USCIS PM), updating guidance for USCIS adjudicators regarding the discretion to deny an application, petition or request without first issuing a Request for Evidence (RFE) or Notice of Intent to Deny (NOID) if initial evidence is not submitted or if the evidence in the record does not clearly establish eligibility.

Previously, USCIS addressed policies for the issuance of RFEs and NOIDs in a June 3, 2013,Policy Memo, stating that RFEs should be issued "when the facts and the law warrant," and that an adjudicator should issue an RFE unless there was "no possibility" that the deficiency could be cured by submission of additional evidence.

The new USCIS PM supersedes the previous 2013 guidance and takes effect on September 11, 2018. The USCIS PM "is intended to discourage frivolous or substantially incomplete findings used as 'placeholder' filings and encourage applicants, petitioners, and requesters to be more diligent in collection and submitting required evidence."

Previously, on June 28, 2018, USCIS also issued a Policy Memorandum PM-602-0050.1 (USCIS PM 1), updating guidance for the referral of cases and issuance of Notices to Appear (NTAs) for removal proceedings in cases involving inadmissible and deportable aliens.

Under current law, USCIS, along with U.S. Immigration and Customs Enforcement (ICE) and U.S. Customs and Border Protection (CBP) have authority to issue Form I-862, Notice to Appear to commence removal proceedings. USCIS PM 1 states that "USCIS must ensure that its issuance of NTAs fits within and supports DHS's [Department of Homeland Security's] overall removal priorities – promoting national security, public safety, and the integrity of the immigration system."

Summary

The USCIS PM restores to the adjudicator full discretion to deny applications, petitions and requests without first issuing an RFE or a NOID, if initial evidence is not submitted or if the evidence in the record does not clearly establish eligibility.

Additionally, USCIS PM 1 lists categories of aliens who can be placed into removal proceedings through issuance of an NTA. While the categories are limited, one category under which an NTA may be issued is for individuals who are "Not Lawfully Present in the U.S." or "Subject to Other Grounds of Removability." Reading the two memos together, USCIS could be allowed to issue a case denial without first issuing an RFE or NOID, and if the individual no longer is maintaining lawful status at the time of denial, USCIS may now issue an NTA to place the individual in removal proceedings.

Key provisions of USCIS PM and USCIS PM 1 are as follows:

- In deciding whether to issue a RFE or NOID or simply deny a petition, USCIS is instructed to review whether all required initial evidence was submitted with the benefit request. If it has not been, USCIS may deny the benefit without issuance of an RFE or NOID for failure to establish eligibility based on lack of required initial evidence. Such policy has been implemented to reduce "placeholder" filings.

- USCIS PM provides that, where an RFE response opens up a new line of inquiry, a follow-up RFE may be issued. However, one single RFE requesting all additional evidence is recommended.

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- USCIS PSM 1 clarifies how USCIS would place into removal proceedings anyone no longer "Lawfully Present in the U.S." which may occur after issuance of an unfavorable decision on an application, petition or benefit requested.

- Such a scenario could occur if an individual has applied for an extension of their work-authorized visa status and their underlying status has expired before the decision is made on their case. Where the case is denied, they could be placed into removal proceedings.

Impact and next steps

USCIS PM will take effect on September 11, 2018. Should USCIS issue a denial on an H-1B, L-1, H-4, L-2, or I-485 (Application to Register Permanent Residence), and the individual does not have any additional status, after September 11, 2018, USCIS may issue an NTA along with the denial, requesting the individual appear in court for a removal hearing.

To reduce the risk of an NTA, an individual should always maintain valid status in the US. For example, extensions should be filed six months prior to the date an individual's status will expire to maximize the chance of an approval being issued prior to the expiration date of their underlying status. Additionally, even if an Application to Register Permanent Residence has been filed, employers should maintain employee's non-immigrant work visas whenever possible. Both of these strategies will minimize risk in the event that an application is denied as an individual will not be out of status and will not be open to the risk of receiving an NTA.

USCIS PM 1 does not provide guidance on whether an NTA can be overcome by a pending Motion to Reopen/Reconsider/Appeal or what happens if an individual fails to appear after an NTA because they have departed the US. We encourage you to stay connected to your EY Law LLP legal advisor for additional information on your foreign national population as policy guidance and application can change.

How we can help

These policy changes can have an impact on US workers. We encourage you to contact one of our US immigration professionals to discuss in greater detail the effects of these new provisions.

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