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The USCIS "NTA" and "RFE" Memos: Continue Doing Business But Tread Carefully

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Beginning shortly before President Trump issued his Buy American Hire American executive order in April 2017, United States Citizenship and Immigration Services (USCIS), the agency within the Department of Homeland Security responsible for adjudicating applications and petitions for immigration benefits, began issuing a series of memoranda and directives with the objective of "toughening up" process and procedure and narrowing the parameters of eligibility for business immigration benefits. Clearly, there is an agenda to reduce the volume of applicants for admission and to operate from a presumption that only those who will benefit the United States should be admitted. Users of benefits are no longer stakeholders and customers, but rather supplicants.

This has, of course, been extremely unsettling since any major shift in the operation of a bureaucracy generates some disorder, uncertainty and, on occasion, unfair results. However, with careful planning and adaptation to the new reality, sophisticated users can survive and accommodate their ongoing business plans to this new reality.

The two most recent memoranda issued on July 5 and July 13 have been especially unsettling as they dramatically increase the enforcement focus of USCIS, perhaps making it as much an enforcement agency as ICE and CBP.

However, here as well, we can plan so that, in most cases petitioners, beneficiaries, and applicants avoid the pitfalls and dangers and manage their way through the system.

July 5 Memo – NTAs – "Notices to Appear"

The July 5 memorandum, among other things, authorized and directed USCIS to issue Notices to Appear (NTA), the first step in a removal [deportation] proceeding for any individual who, as a result of being denied a benefit, falls out of status. As an example, if a petition was filed to extend H-1 classification for an individual and as a result of the denial of that extension application, the individual is out of status, the mandate to USCIS would be to start a removal proceeding. In the past it was left to ICE or other agencies to make a determination whether to initiate removal proceedings against anyone. As a practical matter, it rarely happened that an individual who fell out of status found herself in such proceedings, even if she was one of the small minority who did not depart the United States promptly after receiving such a decision.

How this will be implemented has not been addressed, but it is fair to assume that upon receiving such a denial, an individual would be given the opportunity to depart the United States in compliance with the decision, but it is not absolutely clear and it is certainly not clear how much of an opportunity will be provided.

July 13 Memo – Denial of Petitions Without "RFE" or "NOID"

The second memorandum increases the possibility that more applicants would find themselves in removal proceedings as USCIS adjudicators now are empowered to deny more readily an application or a petition without first issuing a Request for Evidence (RFE) or a Notice of Intent to Deny (NOID). Under the policy in place prior to the effective date of the July 13 memorandum (which is September 11, 2018), adjudicators were instructed to issue RFEs and not deny a case unless there was no possibility that the deficiency could be cured by submission of additional evidence.

Under this revised policy, "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."

Although the memorandum advises that the policy is "intended to discourage frivolous or substantially incomplete filings used as placeholder filings" and "is not intended to penalize filers for innocent mistakes or misunderstandings of evidentiary requirements", the public is not necessarily reassured.

Here as well, the uncertainty as to how this would be implemented, how broadly it would be interpreted, and how carefully will adjudicators be supervised with regard to implementation have created panic in some circles.

Necessary Strategic Planning

The most obvious advice is do things right and do them right the first time around. And then, prepare for when things go wrong. Specifically:

1. **File as early as possible.** Wherever possible, file early so that you can anticipate and deal with any contingency, especially applications for extension of stay which generally can be filed as much as six months prior to the actual expiration date of the current status.

2. **Premium processing whenever possible.** Quick feedback allows for more planning and strategy options should a Request for Evidence, a Notice of Intent to Deny, or a denial be issued.

3. **Prepare an alternative strategy.** Even the best of petitions and applications must be submitted with the understanding that there is a real possibility that the application will be denied, however meritorious it is, and an alternative strategy **–** even a heartbreaking one such as the need to promptly depart the United States **–** must be in place and be understood as a possible reality even if, statistically, this may happen rarely or only occasionally.

4. **Establish parameters for the employer/employee relationship.** There must be a clear understanding of what the employer is willing to do to support a petition and what the employer will or will not do if an application or petition is denied and what resources might be available to the beneficiary or what resources may not be. It must be anticipated that the interest of the employer and the employee may, at some point in the process, diverge.

5. **Petitions must specifically address the regulatory requirements as to initial evidence establishing eligibility.** This is necessary to make it difficult, if not impossible, for an adjudicator to conclude that a denial without the issuance of a Request for Evidence or Notice of Intent to Deny, is inappropriate.

6. **Prepare or identify resources that would be made available to engage in removal proceedings in the immigration court.**

Conclusion – Planning and Preparation

The July 5 and July 13 memoranda do not change substantive eligibility for benefits. They make the consequences of failure, innocent or otherwise, more severe. Careful planning and preparation should allow the petitioner to continue receiving deserved immigration benefits.

Looking Ahead

We do not know yet how these new policies will be implemented on the ground and how harsh the consequences will be. It is time to recite that awful cliché that "the devil is in the details". As we learn more as to how, specifically, these policies will be implemented, we will have the basis to plan properly and avoid disruptions to the workforce.