Mobility: immigration alert

April 2021

United States

USCIS updates guidance on extensions

Executive summary
On 27 April 2021, United States Citizenship and Immigration Services (USCIS) issued policy guidance instructing its adjudicators to give deference to previously approved petitions. In other words, and for example, when adjudicating requests for extension, such as H-1B, L-1, O-1, E-3, and other visa categories, a previously adjudicated application will be given increased weight by USCIS officials.

This change reflects a return to USCIS's prior long-standing guidance as originally issued in 2004 and should be viewed favorably by sponsoring organizations and foreign national workers alike.

Background and analysis
In 2004, USCIS issued guidance directing its officers to defer to prior determinations of eligibility when adjudicating petition extensions given that it contained the same parties and facts as the initial petition. That previous guidance was set forth in a memo named *The Significance of a Prior CIS Approval of a Nonimmigrant Petition in the Context of a Subsequent Determination Regarding Eligibility for Extension of Petition Validity* and also in a later memo known as the *L-1B Adjudications Policy* issued in August 2015.

On 13 October 2017, the USCIS issued a Policy Memorandum rescinding the 2004 guidance. This meant that officers could no longer defer to previous approvals in the adjudication of Petitions to extend non-immigrant categories, including H-1B, L-1, O-1, E-3, and other non-immigrant categories. It almost certainly led to increased requests for evidence from USCIS adjudicators and increased the costs and complexity of seeking an extension of a previously approved immigration benefit.

On 27 April 2021, and as indicated above, the USCIS reinstated policy guidance on the question of deference.

What this means
In 2004, when the initial policy guidance was released, USCIS adjudicators were directed to defer to prior determinations when adjudicating petition extensions involving the same parties and the same underlying facts as the initial petition, except in certain limited circumstances, including where there:

- Was a material error with regards to the previous petition approval
- Was a substantial change in circumstances has taken place, or
- Is new material information that impacts the petitioner's or beneficiary's eligibility

This resulted in a reduced evidentiary burden on petitioners; i.e. prior USCIS adjudications would generally not be questioned under the 2004 guidance.

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Upon the rescission of the 2004 guidance by the Trump administration in 2017, petitions seeking an extension of a previously approved immigration application faced increased scrutiny by USCIS adjudicators. This required petitioners to provide as much (and in some cases, more) evidence and information at the time of filing an extension as though it were the first application. The 2017 policy rescission, amongst other things:

- Led to an increase in the issuance of requests for evidence (RFE) requiring information that had been previously provided
- Required applicants and petitioners to provide large quantities of evidence and information
- Led to inconsistencies in adjudication
- Increased the time and costs for petitioners and foreign nationals alike to again demonstrate what had already been approved by USCIS

The April 2021 policy guidance as issued further affirms that USCIS considers previous eligibility determinations on petitions or applications made by other U.S. government agencies.

The news that the USCIS is reverting to the previous 2004 guidance is positive news as petitioners and foreign national applicants alike will not, on an extension, again be required to demonstrate the same level of eligibility for a previously issued benefit. We are hopeful that this policy change will result in seeing greater consistency and transparency in the adjudication extension application.

We will continue to monitor and review future developments. For additional information, or if you wish to discuss this further, please contact your EY Law LLP professional.

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