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# THE EMPIRE STRIKES BACK - USCIS RESCINDS DEFERENCE TO PRIOR APPROVALS IN EXTENSION REQUESTS

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The Trump administration is deriving great pleasure in causing pain to people who wish to lawfully come to the United States and remain here lawfully. It has caused H-1B carnage as more H-1B visa petitions are being denied than ever before on legally baseless grounds.

Continuing to rub salt in the wound, the USCIS issued a Policy Memorandum dated October 23, 2017 that rescinds its prior guidance of deferring to prior approvals when adjudicating extension requests involving the same parties and underlying facts as the initial determination. Despite the deference policy, there were broad exceptions under which it would not apply if it was 1) determined that there was a material error with regard to the previous petition approval; (2) a substantial change in circumstances has taken place; or (3) there was new material information that adversely impacts the petitioner's or beneficiary's eligibility.

The new Policy Memorandum in rescinding the prior policy instructs adjudicators with respect to extension requests to thoroughly review the petition and supporting evidence to determine eligibility for the benefit sought. The Policy Memorandum further reminds that the burden of proof in establishing eligibility is, at all times, on the petitioner under INA § 291 and criticizes the former deference policy for "appear to place the burden on USCIS to obtain and review a separate record of proceeding to assess whether the underlying facts in the current proceeding have, in fact, remained the same." The Policy Memorandum also vaguely notes that " was also impractical and costly to properly implement, especially when adjudicating premium processing requests."

The Policy Memorandum also rescinds a similar deference policy that was set forth in the USCIS L-1B Policy Guidance of 2015 with respect to L-1B extensions. Under that policy too, adjudicators were reminded to defer to prior L-1B adjudications, unless the exceptions applied. This aspect of the L-1B Guidance is no longer applicable. The Policy Memorandum does not affect the deference given to prior favorable adjudications in the EB-5 program, as described in the EB-5 Policy Memorandum of 2013.

On the one hand, the Policy Memorandum rescinding deference does not change much as the USCIS was in any event not giving deference to prior approvals. The exceptions in deferring to prior approvals were broad. It was routine for an adjudicator to invoke that there may have been a material error in approving the prior petition, or there was a substantial change in circumstances, or that there was new material information that substantially impacted eligibility. It has always been the practice of most petitioners filing extension petitions, and the attorneys who represent them, to not take for granted that the USCIS adjudicator would give deference to the prior approval. Therefore, it has always been a best practice to provide substantial supporting information and evidence at the time of filing an extension as if it was being filed for the first time.

Still, on the other hand, the Policy Memorandum will incentivize adjudicators to issue unnecessary Requests for Evidence (RFE) that will not just cause uncertainty to petitioning employers but will cause havoc in the lives of foreign nationals. Many of these RFEs will likely be preludes to denials of extension requests on behalf of foreign nationals who have been living in the United States for many years, and were used to getting approvals on extension requests. The USCIS has been reading out entire occupations from the H-1B law that would have otherwise been easily approvable. The USCIS relies on the description of the occupation in the Occupational Outlook Handbook (OOH) to justify its denials. For example, with respect to Computer Systems Analysts, the OOH states that a “bachelor’s degree in a computer or information science field is common, although not always a requirement. Some firms hire analysts with business or liberal arts degrees who know how to write computer programs.” The USCIS has often used this as a justification to deny an H-1B petition filed on behalf of a Computer Systems Analyst, and now that the deference policy no longer exits, will be used even if the USCIS had previously approved the H-1B petition on behalf of the Computer Systems Analyst.

There are foreign nationals who have been patiently waiting for permanent residency for several years due to backlogs in the employment second and third preferences. They may be applying for yet another H-1B extension beyond the sixth year (and in many instances, this may either be their 10th or 12th year in H-1B status), and they risk the prospect of the USCIS suddenly pulling out the rug from under their feet. In prior years, many entrepreneurs received H-1B or O-1A/1B approvals through their own startups based on guidance in what used to be a very informative Entrepreneur Pathways Portal. To this author's dismay, that portal has been replaced with basic plain vanilla information about different visas. Gone out of existence is the thoughtful guidance for entrepreneurs on how they can legitimately use H-1B, L-1 or O visas. Since an adjudicator need not pay deference to the earlier approval, and since the guidance on entrepreneurs no longer exists, extensions requests of a startup on behalf of its founder may also be subject to additional scrutiny and thus greater peril.

It is no coincidence that the Policy Memorandum was issued shortly after Francis Cissna was confirmed as USCIS Director on October 8, 2017. Although Mr. Cissna is highly experienced, having worked in various capacities within the DHS from 2005 until 2017, he was also detailed by the DHS to the Senate Judiciary Committee, specifically to the office of Chairman Chuck Grassley, R-Iowa, where he spent two years, from 2015 to 2017. It was during this time that Grassley wrote critical letters to the agency on immigration issues, many of which were authored by Mr. Cissna. Mr. Cissna also assisted the Trump presidential campaign on immigration issues. Trump's stance against both legal and undocumented immigration as taking away American jobs is well known. This is now being translated into action on behalf of the president by people like Mr. Cissna and Steve Miller. The anti-immigrant movement, like the evil Galactic Empire in the Star War movie series, has struck back hard. The Policy Memorandum rescinding deference resembles one of those devastating attacks against good people ordered by Darth Vader on behalf of the Empire.

The prior deference policy was good policy as it was in harmony with regulations that clearly instruct that in extension H-1B, O-1, L-1 and P petitions, petitioners need not submit the same supporting evidence as they did when filing the new petition.

8 CFR § 214.2(h)(14), with respect to H-1B extensions, provides:

> (14) Extension of visa petition validity. The petitioner shall file a request for a petition extension on Form I-129 to extend the validity of the original petition under section 101(a)(15)(H) of the Act. Supporting evidence is not required unless requested by the director. A request for a petition extension may be filed only if the validity of the original petition has not expired.

The same language indicating that supporting evidence is not required exists with respect to L visa extensions at 8 CFR 214.2(l)(14)(i); O extensions at 8 CFR 214.2(o)(11) and P extensions at 8 CFR 214.2(p)(13).

The Policy Memorandum acknowledges the existence of these regulations, and tries to clumsily skirt around them by instructing adjudicators as follows:

> However, although these regulatory provisions govern what is required to be submitted at the time of filing the petition extension, they do not limit, and, in fact, reiterate, USCIS' authority to request additional evidence. While adjudicators should be aware of these regulatory provisions, they should not feel constrained in requesting additional documentation in the course of adjudicating a petition extension, consistent with existing USCIS policy regarding requests for evidence, notices of intent to deny, and the adjudication of petitions for nonimmigrant benefits.

There is clearly tension between the Policy Memorandum and the regulations that do not require supporting evidence when filing extension petitions through the same employer. If a petitioner does not need to file any initial evidence, and the adjudicator is giving no deference to prior adjudications, how will adjudicators know what to do? Will they simply request an RFE in every case? Is that really consistent with a regulation explicitly stating that you do not need to file any evidence unless requested? This could provide a legal basis to challenge the Policy Memorandum in federal court as violating the regulations that explicitly do not require supporting evidence. The regulations have more legal force than the Policy Memorandum, which appears to be rescinding the regulations. If petitioners who file routine extensions are faced with a blizzard of RFEs that ultimately lead to denials, they should challenge the Policy Memorandum in federal court.

The Policy Memorandum also states that it is consistent with the "agency's current priorities and also advances policies that protect the interests of U.S. workers." These priorities did not exist when the initial petition was approved.

Like all the other restrictive polices implemented under the Trump administration, the rescission of the deference policy is to further Trump's Buy American Hire American (BAHA) Executive Order. The BAHA Executive Order was also not in existence when Congress created the H-B, L, E, O or P visa provisions in the Immigration and Nationality Act. According to the legislative history for the 1970 Act, the L-1 visa was intended to "help eliminate problems now faced by American companies having offices abroad in transferring key personnel freely within the organization." H.R. Rep. No. 91-851 (1970), reprinted in 1970 U.S.C.C.A.N. 2750, 2754, 1970 WL 5815 (Leg. Hist.). There is also no indication in the plain text of INA 101(a)(15)(L) that the purpose of the L visa was to "create higher wages and employment rates for workers in the United States, and to protect their economic interests." If Congress desired that objective in the L visa program, it would have stated so more explicitly. Indeed, Congress did speak about protecting US workers in INA 101(a)(15)(H)(ii)(b) requiring an H-2B worker to perform temporary services or labor only "if unemployed persons capable of performing such service or labor cannot be found in this country." Even with respect to H-1B visas, Congress specifically required employers to make attestations with relating to wages with the Department of Labor, but they were not required to conduct recruitment of US workers unless they were H-1B dependent employers who did not have exempt workers. Therefore, if Congress desired the same purpose as enshrined in the BAHA Executive Order for the L, the H-1B (at least for non-dependent employers who do not have exempt employees), O or P visa, as it did for the H-2B visa, it would have said so. It is inconsistent not just with the regulations, but with the provisions in the INA to rescind deference because the USCIS wishes to adjudicate extension petitions consistent with BAHA.

This provides a further basis to challenge the Policy Memorandum in federal court, in addition to contradicting the above stated regulations, if it leads to denials of extension requests that were previously readily approved. The new Policy Memorandum appears to insist on deference to BAHA over a prior approval under the INA, which stems from Trump's America First campaign slogan. BAHA deserves no deference as it is nativism in another name and has also been linked to Anti-Semitism in America's not too distant past. Adjudicators must faithfully implement the plain meaning of the provisions in the INA without regard to Trump's America First doctrine, which views immigrants as job stealers rather than recognizes their amazing contributions

to the US. Immigration lawyers, like the Jedi Knights who ultimately prevail over Darth Vader and his evil empire, must be prepared to challenge adverse decisions stemming from the Policy Memorandum in order to restore fairness and balance in our immigration system.