

PUBLICATION

USCIS to Place More Scrutiny on I-129 Extensions: What Can Employers Expect?

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U.S. Citizenship and Immigration Services (USCIS) recently announced under updated policy guidance that it is instructing their immigration officers to apply the same level of scrutiny to both initial petitions and petitions for extension of status. Such guidance now applies to all nonimmigrant classifications that require a Form I-129 submission to USCIS. Under previous policy and guidance, USCIS officers had been instructed to give deference to prior determinations in petitions for extensions of nonimmigrant status when the underlying facts of the previous petition remain unchanged.

USCIS has now rescinded the policy of requiring officers to defer to previous petitions and stated that the burden of proof remains on the employer at all times to establish that the beneficiary continues to qualify for their nonimmigrant status and employment in the U.S. USCIS also stated that it was impractical and costly to place the burden on officers to review previous petitions and assess if the underlying facts of that petition continued to remain the same. The updated policy guidance clarifies that adjudicators may ultimately reach the same conclusion as in a prior decision, but they are not compelled to do so as a default.

This updated policy is also in-line with the Trump Administration's Buy American, Hire American initiatives which seek to create higher wages and employment rates for U.S. workers and to protect their economic interests by rigorously enforcing and administering immigration laws. USCIS has been implementing a combination of rulemaking, policy memoranda, and operational changes to implement the Buy American and Hire American Executive Order. USCIS has routinely stated that they are also creating and carrying out these initiatives to protect the economic interests of U.S. workers and to prevent fraud and abuse within the immigration system.

Under the updated guidance, we can expect heightened unpredictability in case review and the adjudication process. Employers should be prepared for the possibility of lengthy delays in case processing times and for additional Requests for Evidence. Ultimately, every employer needs to clearly articulate their employees' basis for eligibility for the status sought and provide substantial documentary evidence supporting the petition. USCIS officers will be thoroughly reviewing the petition and supporting evidence provided, and we can no longer expect that the extension petition will be approved simply because the initial petition was granted.

Ultimately, employers must engage in careful and strategic planning when preparing a submission to USCIS. Employers should expect strict scrutiny review in any petition filed. These changes to immigration policy may have the ability to limit foreign nationals' ability to work in the U.S. and may have long-lasting impacts to an employer's international business. Baker Donelson's immigration attorneys provide our clients with the most up-to-date legal guidance and strategic advice on preparing the strongest petitions to protect foreign national talent.