New Processing Hardships To Be Faced By U.S. Immigrants

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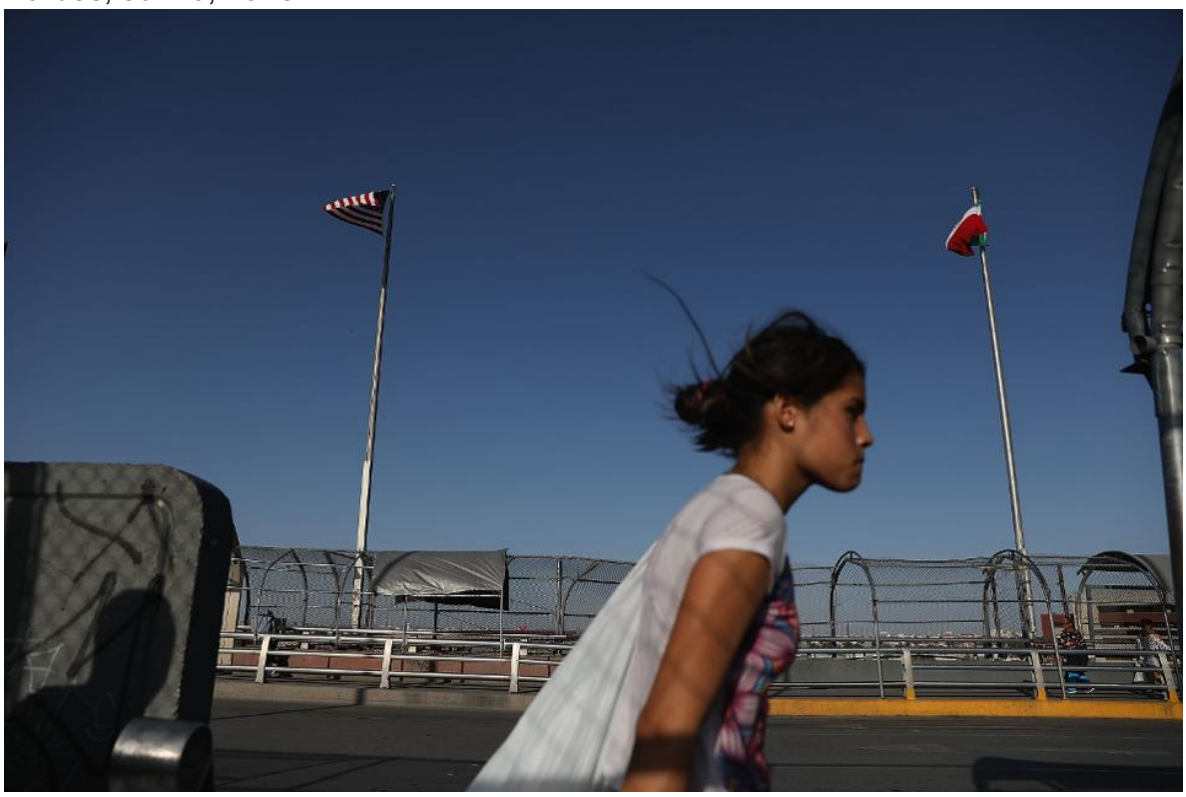

EL PASO, TX - JULY 23: A woman walks across the Paso Del Norte Port of Entry bridge which connects the U.S. and Mexico on July 23, 2018 in El Paso, Texas. A court-ordered July 26th deadline is approaching for the U.S. government to reunite as many as 2,551 migrant children ages 5 to 17 that had been separated from their families after they crossed into the U.S. from Mexico along the border. (Photo by Joe Raedle/Getty Images)

The purpose of an immigration policy should be to reward those who apply legally and penalize those who do not. By making the processing of legal applications too difficult to follow, however, the unintended consequences of changes could very well end up discouraging applicants to choose legal ways to immigrate. When it comes to legal immigration, nothing is more important than improving processing. By far, the most common complaint of applicants and clients about legal immigration matters is why does it take so long? Unfortunately, a new U.S. immigration policy will be counterproductive and therefore make it even more important for applicants to turn to professionals to file their immigration applications properly.

A New Rule

This summer U.S. Citizenship and Immigration Services (USCIS) announced a policy change that allows USCIS officers to deny any application, petition or request

without issuing a Request for Evidence (RFE) or Notice of Intent to Deny (NOID). (There is one small exception, namely, DACA applications.) In the view of many immigration attorneys, this seemingly insignificant procedural change actually reflects a substantial shift in U.S. policy and an acceleration of the current administration's restrictive measures dealing with immigrants.

Past Practices

Until now, adjudicators were only authorized to deny cases when there was “no possibility” that any additional documentation or information could rectify the issue. So, most often, officers made it a practice to issue a request for evidence or a notice of intent to deny when the evidence submitted at the time of filing did not sufficiently establish eligibility for the benefit sought. The wisdom was that these procedures afforded adjudicators the capacity to employ common sense in making decisions by quickly obtaining missing information with a request for evidence, or informing applicants with a notice of intent to deny, that unless they correct their errant submissions, they would be denied.

These procedures reduced the cost of immigration processing for the government by enabling officers to deal with matters as they came up and avoid re-filings and the duplication of reacquaintance reviews by officials due to inadequacies in original paperwork submissions. The result was that the system was not plugged up with meaningless procedurally-based court hearings and appeals.

The New Approach: Zero Tolerance To Deficiencies

However, the new RFE/NOID policy memo essentially introduces a “no second chance” policy now. It gives USCIS adjudicators authority to deny applications outright based on a lack of sufficient initial evidence, or when the evidence in the record does not establish eligibility. It is really a new 'zero tolerance' approach to deficiencies.

According to the USCIS, this policy, which is to go into effect on September 11th, 2018, is intended to discourage frivolous or substantially incomplete filings used as “placeholder” filings and encourage applicants, petitioners, and requestors to be more diligent in collecting and submitting the required evidence. As USCIS spokesperson Michael Bars emphasized, "Under the law, the burden of proof is on an applicant, petitioner, or requestor to establish eligibility -- not the other way around."

Discretion To Play A Huge Role Now

The new policy maintains that it is not intended to penalize filers for innocent mistakes or misunderstandings of evidentiary requirements. But this is something that lies in a subjective area, since, officers have full discretion to decide whether it was an “innocent mistake” or “lack of sufficient evidence.” Moreover, “insufficiency” criteria are arguable, a submitted application or petition may include the right

evidence, but not enough proper evidence from the point of view of the particular officer. The changes will particularly affect employment-based applicants and petitioners since this category of applications usually requires an extensive amount of evidence and additional information about the employer and the employee.

Notice To Appear Is The Danger

Some may argue that the policy changes dealing with RFEs and NOIDs are not that drastic because you can always reapply in case of a denial. But this is no longer an option for those applying for an extension of status in the U.S., due to a second memo recently published that empowers the USCIS to issue a notice to appear in removal proceedings in nearly all cases if an applicant is not lawfully present in the U.S. at the time an application or petition is denied. The American Immigration Lawyers Association says that the USCIS NTA guidance will place thousands of individuals into the court system who by any reasonable standard do not belong there. If you get it wrong when you apply and at the moment of denial are in the U.S. in unlawful status - guess what - your next step is a removal hearing.

Possible Strategies

Carl Shusterman, one of the top immigration attorneys in the U.S., in his recent article suggests several tactics for petitioners sponsoring employees and applicants to employ. His advice is to always over-document your submission, apply for extensions of stay six months before the status expires, consider using premium processing and keep renewing temporary status until your green card application is approved. These tactics are very helpful to use given the new policy developments.