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IMMIGRATION OFFICIALS TIGHTEN GREEN CARD RULES FOR NONIMMIGRANTS ALREADY IN THE US: WHAT EMPLOYERS SHOULD DO NOW

Insights
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Immigration Officials Tighten Green Card Rules for Nonimmigrants Already in the US: What Employers Should Do Now

Federal immigration officials just released a memo on Friday with a potentially huge impact on employers and their foreign national employees using temporary work visas. The new USCIS policy memo appears to reframe how those employees can pursue permanent residence, potentially making the process more uncertain and more expensive. Under the new guidance, most nonimmigrants who want to apply for a Green Card may need to temporarily depart the US and go through the State Department's consular processing abroad rather than seek to adjust their status from within the country. USCIS is taking the position that this has always been the prevailing policy, and the memo simply serves to remind officers that they have the discretion to determine if an applicant's adjustment of status is "in the best interest of the United States." But the guidance creates confusion, most notably with respect to the H-1B and L-1 nonimmigrant categories, which were specifically designed by Congress to permit "dual intent" and allow them to maintain nonimmigrant status while pursuing permanent residence. We expect this directive to spark litigation as employers and their foreign national workers navigate the new process for pending and future adjustment of status cases. Here's what we know so far, seven key impacts for employers to track, and your five-step action plan as we await additional clarity.

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What Happened?

US Citizenship and Immigration Services (USCIS) announced on May 22 that it is ending what it views as routine adjustment of status (AOS) as a path to Green Cards for nonimmigrants. From now on, according to USCIS's press release announcing the new policy, foreign nationals who are in the US temporarily and want to pursue a Green Card will need to return to their home country to apply except in "extraordinary circumstances."

The policy memo directs immigration officers to evaluate adjustment of status requests on a case-by-case basis considering "the totality of the circumstances," and weighing "all positive and negative factors" in each case. The policy is meant to reduce unlawful immigration by those who remain in the US after their in-country adjustments are denied, or who use their temporary entries "as the first step in the Green Card process." USCIS says that this can free up limited USCIS resources to focus on visas for violent crime and human trafficking victims, naturalization applications, and other priorities, according to the announcement.

"Nonimmigrants, like students, temporary workers, or people on tourist visas, come to the US for a short time and for a specific purpose," the agency said. "Our system is designed for them to leave when their visit is over."

Officers were instructed "to consider all relevant factors and information in the totality of the circumstances in exercising that discretion" such as:

- violations of immigration laws or the conditions of any immigration status held;
- current or previous instances of fraud or false testimony in dealings with USCIS or any government agency;
- whether an individual's application for admission or parole violated the laws, regulations, and policies in place at the time; and
- any conduct after admission as a nonimmigrant or parolee that is inconsistent with the purpose or inconsistent with representations made to consular or DHS officers during the application process.

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Despite the memo's directive to examine all negative and positive factors in all cases, it remains true under USCIS policy and precedent case law that adjustment of status is appropriate where no negative or adverse factors are present. The memo points to this law in a footnote.

Confusion for "Dual Intent" Visas

The new policy memo leaves many questions unanswered for employers, particularly those with foreign national workers on H-1B and L-1 nonimmigrant visas. These are known as "dual intent" visas, which means the workers are allowed to seek a Green Card while residing and working in the US on temporary status.

Moreover, as to H-1B visas, USCIS stated to news organizations over the weekend that some H-1B holders may be among those whose "economic benefit" to the United States merits adjustment of status. Logically, this notion should apply to some L-1s and other business-related classifications – though only H-1Bs, L-1s, and their dependents have explicit statutory and regulatory allowances to adjust status while remaining in status.

The memo acknowledges dual-intent nonimmigrant categories as an exception: "USCIS reminds its officers that applying for adjustment of status is not inconsistent with simultaneously maintaining nonimmigrant status in a category with dual intent."

But the memo immediately states in a footnote that holding one of those dual intent visas "is not sufficient, on its own, to warrant a favorable exercise of discretion." Officers are still instructed to weigh all factors.

We expect to see litigation stemming from this aspect of the memo because the footnote appears to penalize applicants for following a process specifically authorized by Congress. And these employment-based cases may ultimately be treated differently by the administration, notwithstanding any formal challenge.

After the policy memo was released on Friday, USCIS officials have already indicated that H-1B workers may continue to have a viable pathway to adjustment of status within the United States. Specifically, a USCIS spokesperson has indicated that applicants in the US who will provide an "economic benefit" or serve the "national interest" would be

allowed to pursue adjustment of status, although the agency provided no clarification as to how those terms might be interpreted.

The memo is presented as a reminder of longstanding immigration law, but in practice, it marks a significant shift from decades of routine AOS practices for employment-based immigration. For employers, that means more uncertainty and higher costs.

7 Potential Impacts on Employers

1. Workforce gaps and business disruption. If USCIS starts denying adjustment applications and redirecting workers to consular processing, your sponsored employees would need to leave the US to complete their Green Card applications at a US consulate in their home country. That means potential gaps in employment, disruption to ongoing projects, and no guarantee of when the employee may return.

2. Dual intent confusion. H-1B and L-1 visas were designed by Congress to allow workers to pursue a Green Card while maintaining their nonimmigrant status. The memo acknowledges this, but then it states that holding one of those statuses is not enough on its own. As mentioned above, we expect this issue to be challenged in court.

3. Maintenance of nonimmigrant status. In the past, applicants for AOS could allow their underlying nonimmigrant status to lapse while awaiting adjudication of their green card application, relying instead on the pending AOS, related EAD, and Advance Parole for continued presence, work authorization, and travel. However, for employees in dual intent classifications such as H-1B and L-1, employers have been allowed to continue maintaining the employee's underlying nonimmigrant status even after issuance of an EAD. While some employers previously allowed H-1B or L-1 status to lapse after AOS filing in order to reduce cost and administrative burden, the new USCIS policy memorandum – and increased uncertainty surrounding AOS adjudications – may make it prudent to continue maintaining underlying H-1B or L-1 status until the green card process is fully completed and AOS is approved. Importantly, nothing in the new policy appears to alter or rescind AC21 protections for H-1B workers, which continue to permit qualifying employees to obtain H-1B extensions beyond the normal six-year limit while awaiting immigrant visa availability or completion of the green card process.

4. Loss of work and travel protections. When nonimmigrant status cannot be maintained for an AOS applicant, work and travel may become compromised. As noted above, when a Green Card application is pending, workers can obtain an Employment Authorization Document and Advance Parole, allowing them to keep working and travel internationally while the Green Card is processing. If applications are denied or workers are discouraged from filing, those protections will disappear. Workers whose H-1B or other nonimmigrant status has expired and who were relying on that work authorization could face immediate status problems.

5. Recruiting and retention risk. The Green Card process is one of the most effective tools employers use to retain global talent. If the in-country adjustment path becomes unreliable, foreign national workers may decide to work in other countries with more predictable immigration systems when deciding where to relocate. This would impact your ability to keep the workers you already employ and to attract new ones.

6. Higher costs and more complex filings. Employers may find themselves pursuing both adjustment of status and consular processing simultaneously, which doubles the legal work and expense. Based on the memo, employers and foreign national workers may want to build their case, which may mean documenting positive factors, explaining why adjustment is warranted, and producing more evidence. This means your HR and legal teams may need to spend considerably more time on each individual filing.

7. Consular backlogs could make a slow process slower. State Department posts abroad have their own backlogs, and appointment availability varies significantly by country. If large numbers of employment-based cases shift to consular processing, a system that is already strained could slow down further and extend wait times for everyone in the pipeline.

Your 5-Step Action Plan

1. Take stock of who's affected. Make a list of all sponsored employees who have filed or are about to file an I-485 Green Card application. For each one, work with immigration counsel to identify any issues that could hurt their chances under this stricter standard. To minimize the impact of a possible I-485 denial, employers should encourage their

foreign national employees to maintain their underlying work visas, such as H-1Bs and L-1s, to use for work and travel rather than allowing them to work on EADs and travel on Advance Parole. Employers should file petitions to reinstate H-1Bs for employees who may have traveled and re-entered using their Advance Paroles.

2. Make the case for why each employee should stay. Don't simply file the paperwork. Work with immigration counsel to put together a clear picture of why each employee should be approved, including how long they've been with your company, what they contribute, and what it would mean for your business if they had to leave.

3. Consider all your options. For employees who are still early in the process, it may be safer to plan for consular processing abroad from the start rather than filing domestically and risking a denial under the new guidance. Employers should also consider entering their TN, E-3 and F-1 visa holders into the H-1B work visa lottery next March.

4. Plan ahead for workforce shortages. Employees may have to leave temporarily to complete their Green Card process at a consulate abroad. Create a plan to manage their absence through remote work, adjusted project timelines, or temporary coverage.

5. Watch for more guidance. USCIS said it may issue additional guidance on specific visa categories. More changes or clarity could be coming, particularly for employment-based categories. Make sure you are subscribed to Fisher Phillips' Insight System to get the most up-to-date information.

Conclusion

We will continue to monitor developments from immigration officials and provide updates as warranted. Make sure you are subscribed to Fisher Phillips' Insight System to get the most up-to-date information directly to your inbox. If you have any questions, please contact your Fisher Phillips attorney, the authors of this Insight, or any attorney in our Immigration Practice Group.