

US stays policy to deport 'out-of-status' foreigners

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MUMBAI: Implementation of a recent policy that would have resulted in initiation of deportation proceedings against foreign nationals who are out of status when their immigration applications (such as for H-1B extensions) are denied has been delayed.

The deadline for creation of the operational guidelines to issue notices to appear (NTA), which would kickstart the deportation process, was July 28. Issuance of the operational guidance is pending, therefore implementation of the policy is postponed until the operational guidance is issued, said a terse notice released on July 30 by the US Citizenship and Immigration Services (USCIS), the US government's immigration agency.

USCIS is silent on how soon the operational guidance will be finalised. "Unfortunately, our guess is that this is likely to be more of a temporary pause rather than a significant delay in the implementation of the proposed policy," David Nachman, New Jersey-based managing attorney at NPZ Law Group, told TOI.

Berry Appleman & Leiden, a global law firm, said in its news alert that the delayed implementation will give business entities and foreign employees some additional time to prepare. Sources within the agency have indicated officers are likely to be directed to grant a 30- or 45-day grace period before issuing NTAs to allow foreign nationals time to appeal or leave US before the notice is issued, added the alert.

Operational guidance, when issued, will make the impact of the policy change clearer, said immigration experts. Speaking to TOI, Rajiv Khanna, managing attorney at Immigration.com, termed it as ill-conceived. Traditionally, on being denied an H-1B extension, the employee concerned could immediately return to India without NTA hassles. His employers could apply for a fresh H-1B in the next season. The revised policy, implementation of which is temporarily on the backburner, means many would have to deal with deportation proceedings, he explained.

TOI in its edition on July 14 had pointed out the challenges the new policy would create. H-1B is a popular work visa for Indians and a majority of applications are for continued employment. As against 67,000-odd H-1B visas for initial employment issued to Indians during the fiscal ended September 30, 2017, a little over 2 lakh were extensions.

An H-1B holder can live and work in the US for up to 240 days while the application for visa extension is pending, provided it was filed before the original H-1B visa tenure expired. As USCIS takes considerable time to process the extension applications, in many cases the employees' stay in US is solely dependent on the 240-day authorisation. In such cases, if extension is denied, the individual would be out of status or unlawfully present as on the date of denial. USCIS could, under the new policy, issue a notice to appear before an immigration court and commence deportation proceedings. This meant the individual had to stay on in the US, as a failure to appear for the proceedings carries a five-year bar on re-entry. A backlog of 7 lakh cases before immigration courts would add to the woes.

As implementation of the new policy is imminent sooner rather than later, Khanna advocates early filing of extension applications. USCIS takes more than six months to adjudicate an H-1B application, and in many cases it is inevitable that the previous H-1B status will expire while the application is pending. So, for extensions, applications can be filed up to six months before the expiry of the existing tenure. Second premium processing must be opted for, which is more expensive but entails a shorter processing timeline.