



**October 23, 2017**

**PM-602-0151**

## Policy Memorandum

**SUBJECT:** Rescission of Guidance Regarding Deference to Prior Determinations of Eligibility in the Adjudication of Petitions for Extension of Nonimmigrant Status

### **Purpose**

This policy memorandum (PM) supersedes and rescinds the April 23, 2004 memorandum titled “The Significance of a Prior CIS Approval of a Nonimmigrant Petition in the Context of a Subsequent Determination Regarding Eligibility for Extension of Petition Validity” and section VII of the August 17, 2015 policy memorandum titled “L-1B Adjudications Policy.”

### **Scope**

This PM applies to, and is binding on, all U.S. Citizenship and Immigration Services (USCIS) employees. The updated guidance is effective immediately.

### **Authority**

- Section 291 of the Immigration and Nationality Act (INA), Title 8, United States Code, section 1361.
- Title 8 Code of Federal Regulations (CFR), sections 103.2(b)(1) and 214.1(c)(5).

### **Policy**

On April 23, 2004, USCIS issued a memorandum titled “The Significance of a Prior CIS Approval of a Nonimmigrant Petition in the Context of a Subsequent Determination Regarding Eligibility for Extension of Petition Validity.” This memorandum directed adjudicators, when adjudicating petition extensions involving the same parties and underlying facts as the initial

petition, to defer to prior determinations of eligibility, except in certain, limited circumstances.<sup>1</sup> On August 17, 2015, USCIS issued a policy memorandum titled “L-1B Adjudications Policy” which directed USCIS adjudicators, in the context of L-1B petition extensions, to give deference to the prior determinations of eligibility by USCIS, except in certain, limited circumstances.<sup>2</sup>

For the reasons detailed below, USCIS is rescinding the policy of requiring officers to defer to prior determinations in petitions for extension of nonimmigrant status as articulated in the above memoranda. USCIS is also providing updated guidance that is both more consistent with the agency’s current priorities and also advances policies that protect the interests of U.S. workers.

In adjudicating petitions for immigration benefits, including nonimmigrant petition extensions, adjudicators must, in all cases, thoroughly review the petition and supporting evidence to determine eligibility for the benefit sought.<sup>3</sup> The burden of proof in establishing eligibility is, at all times, on the petitioner.<sup>4</sup> The fundamental issue with the April 23, 2004 memorandum is that it appeared 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. Not only did this improperly shift the burden of proof to the agency contrary to INA § 291, but it was also impractical and costly to properly implement, especially when adjudicating premium processing requests.

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<sup>1</sup> The April 23, 2004 memo provided in part:

In matters relating to an extension of nonimmigrant petition validity involving the same parties (petitioner and beneficiary) and the same underlying facts, a prior determination by an adjudicator that the alien is eligible for the particular nonimmigrant classification sought should be given deference. A case where a prior approval of the petition need not be given deference includes where: (1) it is 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 is new material information that adversely impacts the petitioner’s or beneficiary’s eligibility. [Footnote omitted]

<sup>2</sup> The August 17, 2015 memo provided in part:

In matters relating to an extension of L-1B status involving the same parties (i.e., the same petitioner and beneficiary employee) and the same underlying facts, USCIS officers should give deference to the prior determination by USCIS approving L-1B classification. In such cases, USCIS officers should re-examine a finding of L-1B eligibility only where it is determined that: (1) there was a material error with regard to the previous approval for L-1B classification; (2) there has been a substantial change in circumstances since that approval; or (3) there is new material information that adversely impacts the petitioner’s or beneficiary’s eligibility. [Footnotes omitted]

<sup>3</sup> Adjudicator’s Field Manual, Chapter 10.3(a).

<sup>4</sup> INA § 291.

Accordingly, this memorandum makes it clear that the burden of proof remains on the petitioner, even where an extension of nonimmigrant status is sought.<sup>5</sup> While the April 23, 2004 memorandum explicitly acknowledged that USCIS has the authority to review prior adjudicative decisions and deny certain requests for extensions of status, the memorandum unduly limited adjudicators' inherent fact-finding authority in certain cases.<sup>6</sup>

An adjudicator's fact-finding authority, as was the case prior to April 23, 2004, should not be constrained by any prior petition approval, but instead, should be based on the merits of each case. In this regard, USCIS acknowledges that the regulations in certain instances do not require supporting documents to be submitted as initial evidence when an employer files a petition extension without change on behalf of the same alien.<sup>7</sup> 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.

Further, because it was viewed as a default position upon beginning review of a filing, the deference policy may, in some cases, have had the effect of limiting the ability of adjudicators to conduct a thorough review of the facts and assessment of eligibility in each case. In addition, that policy likely had the unintended consequence of officers not discovering material errors in prior adjudications. While adjudicators may, of course, reach the same conclusion as in a prior decision, they are not compelled to do so as a default starting point.

In accordance with the foregoing, the above-referenced April 23, 2004 memorandum and section VII of the August 17, 2015 memorandum articulating a default policy of deference are therefore rescinded.

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<sup>5</sup> See 8 CFR § 103.2(b)(1) ("An applicant or petitioner must establish that he or she is eligible for the requested benefit at the time of filing the benefit request and must continue to be eligible through adjudication); 8 CFR § 214.1(c)(5) ("Where an applicant or petitioner demonstrates eligibility for a requested extension, it may be granted at the discretion of the Service.")

<sup>6</sup> The following guidance from the April 23, 2004 memo is preserved and hereby incorporated:

[US]CIS has the authority to question prior determinations. Adjudicators are not bound to approve subsequent petitions or applications seeking immigration benefits where eligibility has not been demonstrated, merely because of a prior approval which may have been erroneous. *Matter of Church Scientology Intl*, 19 I&N Dec. 593, 597 (Commissioner 1988). Each matter must be decided according to the evidence of record on a case-by-case basis. See 8 CFR § 103.8(d) [(2011)].

<sup>7</sup> See, e.g., 8 CFR §§ 214.2(h)(14), (l)(14)(i), (o)(11), and (p)(13).

### **Use**

This memorandum is intended solely for the training and guidance of USCIS personnel in performing their duties relative to the adjudication of applications and petitions. It is not intended to, does not, and may not be relied upon to create any right or benefit, substantive or procedural, enforceable at law or by any individual or other party in removal proceedings, in litigation with the United States, or in any other form or manner.

### **Contact Information**

If USCIS officers have questions or suggestions regarding this PM, they should direct them through their appropriate chains of command to the Office of Policy and Strategy.