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Immigration & Nationality Law News

Newsletter of the ABA's Section of International Law's Immigration and Naturalization Committee

Fall Issue 2018

Editorial Note

Dear Members,

Here is the Fall Issue 2018 of the Immigration and Nationality Law News, published by ABA's Immigration and Naturalization Committee. This Fall Issue will highlight the recent developments in the field of immigration law in the U.S., the UK, and Switzerland.

Specifically, this issue contains:

- *Chair's Note* by Margaret (Peggy) Kuehne Taylor;
- *United States Citizenship and Immigration Services Updates Policy Guidance for Certain RFE's and NOID's.* - By Mohammed Ali Syed;
- *UK immigration - Brexit and beyond* – By Jennifer Stevens;
- *Is Innovation the New Driver for the Movement of International Workforce? – How Blockchain has Influenced Immigration Practice* – By Stefan Mueller, Esq.

Our sincere gratitude to the contributors - your time and effort are greatly appreciated.

Regards,

Stefan Mueller
Editor

Co-Chair's Note

Dear Immigration Committee Colleagues,

Welcome to the Immigration Committee's 2018-2019 year and the first issue of the newsletter. It is undeniable that the world currently faces immigration-related issues that are both numerous and complex, as you – experts in different facets of the immigration law field – know better than anyone else. Our professional involvement and committee membership present each of us with a unique opportunity to address these issues.

Our committee is already mounting an amazing response to the demands of the phenomenal immigration law environment and it is still early in the fiscal year. To list a few of our responses -- we have committee members who: are contributing to the field's scholarship with written contributions to this newsletter, SIL's Year-In-Review publication, and academic law review articles; are formulating policy statements with the larger ABA; are organizing and presenting at SIL's regional meetings and preparing for the annual Spring meeting; and are putting together a multi-topic committee speaker series.

Mo and I encourage you to engage in any or all of these projects or to start a new project, as your time permits. We are confident that doing so will provide an avenue for meeting professional challenges; for providing service to the immigration law community; and for cultivating rewarding professional relationships.

Please know that Mo and I value the committee's rich repository of expertise and commitment. We thank you for all you do and look forward to serving and collaborating with you during this coming year.

Best,

Margaret (Peggy) Kuehne Taylor
Co-Chair

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Call for Submissions

Members can submit articles, practice pointers, professional news and other items that they might think would interest our member base. If any member has just received an award, has been nominated for an award, moved firms, changed roles in the firm, or is speaking at an event, publishing an article, engaging in a volunteer project, or anything else noteworthy please let us know. Please note that all contributions on substantive law and practice pointers should focus on immigration law and practice.

Up until the leadership announces new roles in the committee, please continue to send your contributions to st.mueller@wengervieli.ch.

United States Citizenship and Immigration Services Updates Policy Guidance for Certain RFE's and NOID's

By Mohammad Ali Syed

The U.S. Citizenship and Immigration Service (USCIS) issued a new policy memorandum that went into effect September 11, 2018.[1] Adjudicators will be granted power to authorize statutory denials when necessary without issuing a Request for Evidence (RFE) or Notice of Intent to Deny (NOID) first. This will apply to all applications, petitions and requests. Deferred Action for Childhood Arrivals (DACA) adjudications will be the only exception. Previously, a RFE or NOID would be issued if evidence submitted during the time of filing was not enough to prove eligibility. Only if there was "no possibility" of an approval would a denial then be issued. However, now adjudicators will have the authority to deny a case on "failure to establish eligibility based on lack of required evidence," without first sending a RFE or NOID. Some examples provided by the USCIS of filings that may be denied under this new policy are as follows:

- Waiver applications that are submitted without enough supporting evidence.
- Cases where the required official document or other form of evidence has not been submitted at the time of filing, such as the failing to provide the required Affidavit of Support when filing an Application to Register Permanent Residence.

[1] https://www.uscis.gov/news/news-releases/uscis-updates-policy-guidance-certain-requests-evidence-and-notices-intent-deny.

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The USCIS has drafted this policy in hopes to deter people from submitting "frivolous or meritless claims that slow down processing for everyone." However, this new guidance now allows for the full discretion of the immigration officer, making the risk for potential denials a real concern.

Review of Key Points from the CIS Ombudsman Teleconference highlighting the USCIS' Policy Change on RFE's and NOIDs

In order to clear up uncertainty and set expectations around the new policy a teleconference was organized with the CIS Ombudsman. Immigration lawyers were able to ask questions and get answers relevant to many of their clients. The call was organized by the American Immigration Lawyers Association. Highlights of The Citizenship and Immigration Services (CIS) Ombudsman Teleconference on September 6, 2018 are provided below. The participants of the teleconference included members of the Department of Homeland Security (DHS), USCIS, and the Office of the CIS Ombudsman.[2]

What is this new policy?

This USCIS Policy update to the issuance of RFE's and NOIDS "restores full discretion to adjudicators to issue denials without first issuing a RFE or NOID on statutory bases." It allows for USCIS officers to deny an application if the initial evidence was not submitted or does not establish eligibility.

This new memo rescinds the previous June 2013 policy memo, which had instructed adjudicators to first issue an RFE if initial evidence was missing or insufficient (unless there was "no possibility" that additional evidence could help).

Along with this new policy, the USCIS has posted new checklists on their website as an operational tool to guide the public on what initial evidence is required for a particular immigration matter. This new checklist must be taken into consideration along with all statutes, regulations, form instructions, etc.

When will this policy take effect?

This new policy took effect on September 11, 2018 and will apply to only applications received by the USCIS on or after September 12, 2018. For any case filed prior to September 12, 2018, it will be reviewed under the prior 2013 policy guidance.

Why has this new policy been issued?

The USCIS claims that the intent of this policy is to discourage "placeholder" or incomplete filings. Under the June 2013 memo, RFE rates in some categories reached as high as 40%. The USCIS felt that this high rate of RFE's issued was a burden on time and resources and that a balance of priorities was needed.

The USCIS does not intend for this new policy to punish applicants and petitioners who have made minor mistakes or misunderstood the evidence required. Rather, it has been put in place to discourage incomplete filings.

What does this policy NOT impact?

This new policy will not impact Refugee and Asylum filings or DACA-related applications. These filings are exempt from this memo.

[2] https://www.aila.org/infonet/cis-ombudsman-teleconference-rfes-noids.

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This policy will not change the current process for appeals or impact current appeal or motion rights. If an application is denied in error, such as lack of a document that was actually submitted during the initial filing, stakeholders may file an appeal. The options and process for an appeal remains the same.

More About the Process

Adjudicators will treat all applications with the same respect, whether the person is filing alone or with an attorney. If the filing contains the initial evidence, then the adjudicator will review that evidence. If clarification is needed, then an RFE may be issued. The USCIS will track all RFE's that are issued for initial evidence.

What one needs to submit has not changed. Attorneys should refer to the new checklists, form instructions, regulations etc. to identify what documentation and evidence will be needed when filing. For innocent mistakes (such as missing the page for a publication in an EB1 petition), the USCIS will ask for that information if needed. Officers are being trained not to penalize for small errors, so in the case that you may be missing a few minor items, you may still receive an RFE.

Each USCIS office has their own process for handling cases. Some require supervisory review before a denial is issued, however some offices do not require this. There are currently no specific guidelines regarding supervisory review.

Note: USCIS has confirmed that medical examinations are not part of the initial evidence required, and do not need to be submitted at the time of filing for the I-485 adjustment of status application.

What is a Statutory Denial?

A statutory denial is when there is no legal basis for the request.

What is a "Placeholder" Filing?

A placeholder filing is when the goal of filing the application is for interim benefit. One example of this is a bridge application for an Employment Authorization Document (EAD) while waiting to file an application for another type of work authorization. The "bridge" petition is not the issue; however, the issue is the lack of documentation in the submitted filing just to "get in line."

Mohammad Ali Syed *a business and family immigration attorney who helps his clients to succeed in entering and thriving in the United States of America. Mohammad Ali Syed has founded his own law firm The Syed Law Firm PLLC in 2011 and now works at The Syed Law Firm and at RIAA Barker Gillette. Mohammad Ali Syed can be reached at msyed@syedfirm.com.*

UK immigration - Brexit and beyond

By Jennifer Stevens

With Brexit only four months away are we any clearer on the path ahead for EU nationals and the UK's immigration system? There is still a great deal of uncertainty but some small developments have been made over the past few months.

While the draft Withdrawal Agreement, published in March 2018, is preluded with 'nothing is agreed until everything is agreed', it does provide the most comprehensive plan to date for what EU citizens and their employers should expect

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immediately post-Brexit. Key features of the agreement include:

- the transition period following Brexit has been agreed to be between 30 March 2019 and 31 December 2020;
- the cut-off date for the end of free movement has effectively moved to the end of the transition period. This means that EU nationals moving to the UK and UK nationals moving to the EU27 can do so on the basis of free movement rights until 31 December 2020 and may remain after that date under the terms of the Withdrawal Agreement. Similarly, employers would continue to have access to an EU migrant workforce until at least that date;
- EU citizens wishing to remain in the UK after 31 December 2020 must apply for a status document—the deadline for doing so will be no earlier than 30 June 2021;
- family members of EU nationals whose family relationship predates the end of the transition period will be able to join the EU national on EU law terms (less restrictive than UK law); and
- EU arrivals coming to the UK after the end of the transition period are expected to be subject to a new (yet to be determined) immigration system.

The focus has of course been on EU nationals and how Brexit will impact them. We now know the UK Government's position is that EU nationals will not be treated favourably over non EU nationals at the end of the transitional period, so it appears that there will not be specific UK immigration categories for EU nationals. This means that they will need to fit under the UK's Immigration Rules.

The UK Government commissioned The Migration Advisory Committee (MAC), which is an independent public body that advises the government on migration issues, to report on the current and likely future patterns of EEA migration and the impacts of that migration. The MAC recently published its report. The report is expected to guide the thinking behind the White Paper on the post-Brexit immigration system, which the Government has announced will follow shortly.

Despite calls from business to create a special system for EU nationals, among its recommendations the MAC suggests a single immigration system for EU and non-EU nationals after the end of the transition period.

A particular downside for business will be the increased cost of bringing EU nationals within the Tier 2 employer sponsored system. The MAC recommends that employers should be required to meet the minimum salary levels under Tier 2, as well as pay the additional charges such as the Immigration Skills Charge (ISC) for any newly employed EU nationals after the transition period, as well as the additional charges such as the Immigration Health Surcharge and Home Office application filing fees. The ISC is currently £5,000 for medium and large sponsors for a 5-year sponsorship (in addition to other costs such). This is likely to disproportionately affect small and medium businesses.

The report also recommends that there should be no specific provision for lower-skilled migrants to enter the UK and that Sector-Based schemes should be avoided with the exception of creating a Seasonal Agricultural Workers scheme, which has already been announced.

There are some positive suggested changes however. The MAC also makes the following welcome recommendations:

- abolishing the annual Tier 2 (General) cap - which was continuously met for eight

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months between December 2017 and July 2018;

- abolishing the Resident Labour Market Test (RLMT) or substantially expanding the exemptions to it, for example by lowering the salary-based exemption from its current level of £159,600 to below £50,000. This would vastly expand the pool of a readily available workforce, as well as cut down delays related to having to re-run genuine advertising to comply with the sponsorship-specific RLMT technical requirements for advertising;
- extending the Tier 2 (General) category to include medium-skilled workers at level RQF3 (bringing this down from the current level RQF6 for highly skilled workers). However the MAC advocates retaining the current minimum salary threshold applicable to the present higher skill level scheme - which would mean that many lower level occupations would be unable to access the scheme in any event;
- using the Tier 5 (Youth Mobility Scheme) as a 'backstop' in the event that more migration is required to service the UK economy. This may be done by extending the scheme to nationals of countries with which the UK signs trade deals in the future.

So what will happen if there is a no deal Brexit? It is anticipated that there will still be a transitional period but this is uncertain. However, while writing this article I understand the EU and the UK have agreed the draft text of the final withdrawal agreement therefore a no deal Brexit does appear less likely. The prime minister will now seek ministerial backing for the agreement. The transitional period is one of the contentious issues so watch this space.

Jennifer Stevens *is a Partner at Laura Devine Attorneys in New York. Jennifer Stevens is a UK qualified solicitor and a registered Foreign Legal Consultant with extensive experience advising on a range of UK immigration applications. Jennifer Stevens can be reached at jennifer.stevens@lauradevine.com.*

Is Innovation the New Driver for the Movement of International Workforce? – How Blockchain has Influenced Immigration Practice

By Stefan Mueller, Esq.

In recent history, many countries around the world have adopted much more restrictive policies with regard to immigration of foreign nationals resulting in a restriction of a free access to specialists across the globe. However, such specialists are needed to develop new ideas and technologies, to improve goods and services, or to increase the efficiency of an existing production – they are needed for innovation. Innovation on the other hand is an essential driver of economic growth of the countries around the world. Therefore, the free access to specialists and thus the free access to innovation should be in the best interest of a country. Nevertheless, recent legislation has put up significant barriers and thus restricted the free access to specialists and, as a result, to innovation.

Blockchain

Amid tendencies to restrict immigration and a move towards an economic nationalism and thus a more nationalistic innovation and as a clear counterbalance to these tendencies blockchain, as the underlying technology of Bitcoin, has risen to prominence and been drawing significant focus from many financial institutions in the industry. Since its inception, the industry has been awash

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with the buzz around blockchain and its potential on the financial industry. In short, blockchain is a shared record of all transactions and related information for a particular entity. This shared record – a distributed database – is visible and accessible by all parties with permission to the record. A blockchain comprises an ever-increasing set of transaction data blocks, creating a complete history of transactions.

Because of its unique features, blockchain technology has the potential to be revolutionary, bringing increased speed, trust through transparency and significantly reduced costs in the financial industry and beyond. As businesses and even public sector bodies realize the potential of blockchain-based systems, the demand for expertise to create pilot projects and launch products has grown swiftly across industries.

Blockchain Specialists as Experts?

Experts in using, developing and working with blockchain technology are usually individuals with a broad technical expertise but less of a traditional educational background usually expected for specialists. Blockchain specialists are usually of a particularly young age with no or only limited educational background at universities. They usually focus on their expertise in blockchain at a very young age and thus prioritize the development of blockchain over a traditional education at university.

However, under traditional immigration legislation, immigration is usually restricted to executive personnel, specialists and other qualified individuals with expertise in a certain field of work. These individuals usually have in common that they have concluded studies at a university and collected significant work experience.

As traditional immigration legislation requires applicants to have a substantial educational background, blockchain specialists do not usually qualify as executive personnel, specialists or other qualified individuals due to their lack of work experience and educational background. As a result, strictly applying traditional immigration legislation would preclude the hiring of blockchain specialists. Effectively, this would result in a significant restriction of the free access to such specialists and thus restrict the innovation in that field and, conclusively, economic growth of a country, especially considering the potential of blockchain in the financial industry and beyond.

Yet, the development of new technologies has led to the growth of the world's demand in talented specialists having deep understanding of new spheres. Given that not all countries and regions can boast having a sufficient number of such talents on their local employment markets, they need to find some other solutions, for example, allowing the immigration of specialists irrespective of the requirements set forth by the traditional immigration legislation.

Immigration of Blockchain Specialists

Setting an official precedent, Hong Kong has taken a decision to update the country's immigration policy with a view to attract highly demanded specialists. In August 2018, the Government of the Hong Kong Special Administrative Region released a Talent List that includes eleven professions such as marine engineers, naval architects, or creative industries professionals. Furthermore, Hong Kong is also particularly interested in attracting professionals in Fintech and innovation technology experts in artificial intelligence, robotics, distributed ledger technologies among others. By opening up their immigration policy, Hong Kong hopes to attract specialized individuals from all around the world in order to support the development of Hong Kong as a high-value added and diversified economy, leading Hong Kong's economy into the future.

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Is the model adopted by the Government of the Hong Kong Special Administrative Region an example to be followed by other countries across the globe in order to boost their economies?

In Switzerland, immigration law traditionally only admits specialists, executive personnel and other qualified individuals, much as legislation from other jurisdiction do. Theoretically, Swiss immigration law would not allow for the immigration of blockchain specialists unless they qualify under the more traditional immigration rules, i.e. having significant educational background and extensive work experience.

Nevertheless, there have been significant movements in Switzerland to support the attraction and immigration of blockchain specialists to boost the innovation and thus economic growth in Switzerland. Switzerland had been a pioneer in attracting blockchain and cryptocurrency companies and particularly in the city of Zug, which has been dubbed the "Crypto Valley" because of the headquarters of many blockchain and cryptocurrency companies. Yet, over the past couple of months, Singapore, Hong Kong, Malta and Liechtenstein have risen and established themselves as blockchain and cryptocurrencies hubs as well threatening the unique position of Switzerland in attracting blockchain and cryptocurrency specialists. How better to advance as a hub for blockchain and cryptocurrency companies other than facilitating the immigration of specialists ensuring that the blockchain and cryptocurrency companies can access the workforce they need in order to develop their products and services. As a result, in Switzerland, even with restrictive immigration legislation, certain practice has been developed by the local immigration authorities to recognize the need for blockchain and cryptocurrency specialists and to admit them to Switzerland without strictly abiding by the traditional immigration legislation. Despite a young age, a lack of traditional educational background and a lack of traditional work experience, some immigration authorities, especially in the "Crypto Valley" Zug, accept that their expertise in relation to blockchain and cryptocurrency is sufficient to prove that they can be deemed specialists in accordance with the immigration legislation. However, in most cases, even nowadays, immigration authorities are not familiar with blockchain technology and thus cannot make an educated assessment of a blockchain specialist's expertise and, as a result, of such lack of knowledge, may be more inclined to refuse an application for a residence and work permit.

Conclusively, while adopting a new immigration policy towards blockchain and cryptocurrency specialists as Hong Kong did in August 2018 would be the preferable development of the immigration policy of Switzerland, it might be sufficient to educate immigration authorities of blockchain technologies and their impact on innovation and economic growth in order to effect a change in practice which in the end might be easier to achieve than a change in legislation. It, however, remains indisputable that current immigration policies not only in Switzerland but in many other countries come short of recognizing the potential of blockchain technologies on their national economic growth and thus fail to adapt to a future and to admit blockchain specialists, which might just be crucial to economic growth and to determine which country will come out on top

Stefan Mueller, Esq. *is a Senior Associate at Wenger & Vieli Ltd. Attorneys at Law, with its headquarters in Zurich and Zug, Switzerland. Stefan Mueller is a Swiss and New York qualified attorney focusing on immigration and employment law issues and advising clients on a range of Swiss immigration applications. He can be reached at st.mueller@wengervieli.ch.*

***Disclaimer**: The views expressed in this publication are solely the views of the authors and not necessarily of the ABA Section of International Law Immigration & Naturalization Committee. The contents of this publication are intended for informational purposes only and neither constitute legal advice nor act as a substitute for professional, legal advice from a qualified attorney.*