

# Business Work Visas, Two Developments that Affect Employers

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**PRACTICES** Labor and Employment, Immigration

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The current Administration continues to be active in the area of immigration law and policy, and has promulgated several Executive Orders (“EO”), mostly directed to immigration enforcement and national and public security. The exception is the April 2017 Buy American, Hire American Executive Order, which extends to and impacts professional work visas.

Pursuant to this EO, the Department of Homeland Security (“DHS”) has now begun to issue memoranda and policy directives that impact employers filing visa petitions (like the H-1B and the L-1) for foreign specialized workers, professionals, managers, and executives. Sponsoring employers should consider the following:

1. In October 2017, the DHS issued a Policy Memorandum (“PM”) that rescinded a 2004 memo calling for deference in the adjudication of petitions for the *extension* of non-immigrant status. The new PM notes that USCIS is “also providing updated guidance that is more consistent with the agency’s current priorities and also advances policies that protect the interests of U.S. workers.” Officers are now instructed to “*thoroughly* review the [extension] petition and supporting evidence to determine eligibility” rather than defer to the initial determination and approval of a visa petition. The new PM is expected to result in delays and uncertainty in the processing of H-1B and L-1 extensions.
2. The USCIS has recently reported that Requests for Evidence (“RFE”) on H-1B petitions have increased by nearly fifty percent through the first three quarters of 2017 compared to the same period in 2016. The USCIS will issue an RFE when it is unsatisfied with the adequacy of the evidence submitted with a visa petition. The RFE directs sponsoring employers to provide additional documentation to prove eligibility for the visa classification sought. It may also signal the possible deniability of the petition. This change has mostly impacted petitions for professionals earning lower or entry level wages. Although the H-1B program has not been substantively altered through legislation or regulatory changes, the *Buy American, Hire American* EO has provided an impetus for an adjustment of adjudicatory methods and standards by the USCIS.

**The Take-Away:** Employers filing L-1 and H-1B petitions should expect to see increased delays and heightened scrutiny in the adjudication process. To avoid delays, employers should consider premium processing (expedited) when filing extension petitions. Additionally, more careful consideration should be given to documents evidencing the eligibility for the visa status. For extension petitions, evidence should be updated, and employers should not rely solely on their initial filing’s support documents for an approval.