U.S. Department of Homeland Security
20 Mass Ave, NW
Washington, DC 20536

U.S. Citizenship and Immigration Services

HQOPRD 72/11.3

Interoffice Memorandum

To: Service Center Directors
Regional Directors

From: William R. Yates
Associate Director for Operations

Date: APR 23 2004

Re: 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.

Purpose

This memorandum provides guidance on the process by which an adjudicator, during adjudication of a subsequent request for petition extension, may question another adjudicator's prior approval of the nonimmigrant petition where there is no material change in the underlying facts.

Authority

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 International*, 19 I&N Dec. 593, 597 (Comm. 1988). Each matter must be decided according to the evidence of record on a case-by-case basis. *See* 8 CFR § 103.8(d). However, because a recent review of CIS practices has shown that in certain instances, adjudicators have been questioning prior determinations where there is no material change in the underlying facts as a matter of routine, the below policy is being set forth.

Policy

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.[1] Material error, changed circumstances, or new material information must be clearly articulated in the resulting request for evidence or decision denying the benefit sought, as appropriate.

It is important to note, this memorandum does not in any way restrict or impact an adjudicator's ability to deny, in the exercise of his or her discretion, the beneficiary's simultaneous request to extend his or her stay in the United States in the same classification. *See* 8 CFR § 214.1(c)(5). In other words, even where an applicant or petitioner continues to demonstrate eligibility for the nonimmigrant classification, an adjudicator may determine that sufficient reason exists (such as inadmissibility factors or failure to maintain status) to warrant requiring the beneficiary to apply for a new visa at a U.S. consulate abroad prior to being allowed to continue in the same classification. This "split" decision process may result in approval of the petition for the same classification where the petitioner and the beneficiary relationship has not changed, and simultaneous discretionary denial of the beneficiary's extension of stay request.

Adjudicators continue to have full discretion to revoke approval of a petition in cases where fraud or misrepresentation is found. Likewise, the basis of any regulatory ground of revocation remains in effect.

Explanation of Terms

A *material error* involves the misapplication of an objective statutory or regulatory requirement to the facts at hand. An example of the misapplication of the pertinent law or regulation is, but is not limited to, an H-1B petition approval where the beneficiary's degree is not appropriate for the proffered occupation. Generally, adjudicators should not question prior adjudicators' determinations that are subjective, such as the prior adjudicator's evaluation of the beneficiary's education, specialized training, and/or progressively responsible experience in a degree equivalency determination.

A *substantial change in circumstances* involves any material change to either the petitioner's or the beneficiary's eligibility for the nonimmigrant classification sought. Specific examples include, but are not limited to, the following:

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[1] This memorandum does not cover petitions, or extensions of petition validity, or any other non-immigrant cases, where the initial approval is granted to allow the petitioner and/or beneficiary to effectuate a tentative or prospective business plan or otherwise prospectively satisfy the requirements for the nonimmigrant classification. Nonimmigrant cases of this type include the treaty investor classification, which may require a petitioner to be actively in the process of investing a substantial amount of capital in a *bona fide* enterprise, and the L-1 "new office" extension petitions. The regulation at 8 CFR § 214.2(l)(3)(v)(C) allows an L-1 "new office" one year from the date of the initial approval to support an executive or managerial position. There is no provision in CIS regulations that allows for an extension of this one-year period. If the petitioner's business is not sufficiently operational after one year, the petitioner is ineligible by regulation for an extension of the visa's validity.

- In the L classification, a change in the corporate relationship requires a new determination that the foreign and US entities continue to meet the definition of a qualifying relationship. *See* 8 CFR § 214.2(l)(1)(ii)(G);

- In the L classification, a change in the nature of the beneficiary's employment, such as a change in the beneficiary's job duties, a change from a specialized knowledge to a managerial or executive position, or a change in the organizational structure of the petitioning company, requires a new determination that the beneficiary continues to be employed in a qualifying managerial, executive, or specialized knowledge capacity.

- In the H classification involving a beneficiary's temporary licensure, a new review is necessary to ensure that the beneficiary has either obtained a permanent license in the state of intended employment or continues to hold a temporary license valid in the same state for the period of the requested extension. *See* 8 CFR § 214.2(h)(4)(v)(E);

- In the H classification, a move of the beneficiary's employer outside of the United States requires a new determination to see whether the petitioner meets the definition of "United States employer" at 8 CFR § 214.2(h)(4)(ii), or whether the petitioner is an agent and, therefore, has met the documentary requirements at 8 CFR § 214.2(h)(2)(F); and,

- In the P classification, entertainment groups in which 75% of the members have not been performing entertainment services for the group for a minimum of one year are ineligible for such classification.

New material information means any fact not available to the previous adjudicator that would impact the petitioner's or beneficiary's eligibility for the nonimmigrant classification sought. Examples of new material information include, but are not limited to, information that affects national security or public safety, garnered from security checks conducted on beneficiaries and petitioners.

Review by Deputy Center Director

As stated above, a material error, a substantial change in circumstances, or new material information must be clearly articulated in a request for evidence or decision denying the benefit. The Deputy Center Director (or designated Acting Deputy Center Director in situations where the Deputy Center Director is absent) should review and clear in writing, prior to the issuance of an RFE or final decision, any case involving an extension of stay of petition validity in a nonimmigrant classification where the parties and facts involved have not changed, but where the current adjudicating officer determines nonetheless that it is necessary to issue an RFE or deny the application for extension of petition validity.

These cases shall be referred through the center's supervisory channel to the Deputy Center Director for review. Evaluation of this practice may be conducted after 90 days from the date of this memorandum.

Notice

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