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Attitude adjustment: U.S. politics affecting Canadians crossing the border

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As NAFTA negotiations near the one-year mark and Canada and the U.S. continue to push their own trade agendas, the friendly historic relationship between Canada and the U.S. appears frighteningly fragile at the moment. Many Canadians are taking a "prepare for the worst" approach to heading across the border, and some — but not all — of this caution is merited.

With the political and cultural attitude shift of the last year and a half, business lawyers should be considering immigration as an important part of any strategic growth planning and be aware of the risks their clients are facing, even if the client is entering the U.S. only intermittently.

Policies and practices are unpredictable

T oday's immigration landscape is riddled with landmines; we're never quite sure when the next Request for Additional Evidence (RFE) or Notice of Intent to Deny (NOID) will be coming, or what kind of issue — large or small — will illicit an explosive response from the U.S. Citizenship and Immigration Services (USCIS). We are seeing this across nearly all case types, whether filed with the USCIS, with Customs and Border Protection at the ports of entry, and even with the Department of State.

A case strategy that worked just last week for one client will not necessarily result in a positive response on this week's mirror case, as arbitrary interpretations of long-held policies and application of the law that goes beyond the scope of the statute are on the rise.

Clients are the ones most feeling the burn, as they struggle to understand why they are being told they no longer qualify for status they may have held for long periods of time or repeatedly. We are seeing this consistently across multiple status categories, such as for L-1B specialized knowledge workers and for H-1B specialty occupation workers.

Lawyers are wise to caution clients to expect the unexpected until further notice, and communication and full disclosure of possible outcomes is more important than ever. While no one wants to be a fear monger or scare away a client, providing a gentle reminder of all possible outcomes is important to responsibly managing client expectations.

Nothing is getting easier

In today's "America First" U.S. immigration environment, absolutely nothing is getting easier for foreigners wishing

to enter the U.S., or for the lawyers representing them. For example, previous USCIS policy — published in a policy memo issued June 3, 2013 — stated that "an RFE is not to be avoided," and that an outright approval or denial may only be appropriate "when the evidence already submitted establishes eligibility or ineligibility in all respects for the particular benefit or service."

The only case where it was appropriate to deny a case outright, the memo said, was where there was "no possibility" that a deficiency could be solved through additional evidence. This is consistent with the standard of proof that applies to most applications, petitions and requests under U.S. immigration law, which is that intending beneficiaries must demonstrate eligibility by a "preponderance of the evidence" — meaning that it is more likely than not that each of the required elements of the case has been met.

However, on July 13, 2018, a new memo was published rescinding the July 3, 2013, policy memo, instead empowering adjudicators with the discretion to adjudicate cases based solely on the record of documents and evidence submitted.

In a world where applications, petitions and requests for immigration benefits can run hundreds of pages (with required evidence attached), this policy shift may very well penalize filers for innocent mistakes, omissions or misunderstandings of evidentiary requirements — although the new memo specifically states that this is not the agency's intention. This policy is also complicated by other recent policy shifts, which together put even legal immigrants and nonimmigrants in the U.S. in jeopardy of administrative removal from the U.S. and of suffering attendant long-term consequences, should an innocent violation of status occur.

Political jargon is not law

Portentous warnings aside, foreign nationals should not "abandon hope, all ye who enter" the U.S. — particularly as a result of any political posturing or commentary communicated with joyful abandon by the marauding media. While both the Canadian and American political leaders are trading barbs in what seems to be an ever-escalating war of words, immigration law itself has remained largely unchanged for the time being, particularly for businesses looking to come to the U.S.

While employers may find a greater need than ever to seek counsel to assist with their matters, experienced immigration lawyers are familiar with the waxing and waning of political tensions and rhetoric, and most are taking this opportunity to really demonstrate why the practice of immigration law requires creativity, courage and a strategic mindset.

Although Canadians are certainly facing more significant challenges when entering the U.S., the perception of peril is often worse than the actual act of obtaining entry or a visa. Businesses should be apprised of the risks, in order to understand when to seek help — and carry on business as usual unless otherwise advised.