U.S. immigration: Policies creating logical inconsistencies - Part 2

By Elizabeth M. Klarin

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As we stated in our previous article on the increasing impact of U.S. immigration policy shifts, we now have policy - which was never meant to trump law, no pun intended - being used as a weapon to circumvent reason.

Take, for example, the case where a petitioner wishes to extend the period for which a nonimmigrant employee was admitted. In certain classes of nonimmigrants meeting defined conditions, the law authorizes employees to continue working for the same employer for up to 240 days or until U. S. Citizenship and Immigration Services (USCIS) makes a decision on the pending petition -Whichever is sooner.

This "240 Day Rule" kicks in after the initial nonimmigrant status of the beneficiary expires, allowing the individual to continue to work in the U.S.
(for the same employer) for up to 240 days or until the petition is adjudicated . But the way the law is written, it does *not* specifically state that the individual's status in the U.S. is also presumed to be valid, until such time as the case is decided. U.S. Citizenship and Immigration Services - and related Department of Homeland Security (DHS) agencies such as Immigration and Customs Enforcement (ICE) and Customs and Border Protection (CBP) - have taken the policy stance that a foreign national beneficiary in this situation is "out of status" until proven otherwise by adjudication of the pending petition, and therefore removable from the U.S.

I saw the result of this logical inconsistency based on a flawed policy recently, when one of my clients - a world-renowned cybersecurity expert who is in the U.S. legally as an acknowledged "extraordinary ability" nonimmigrant - was trying to fly to Texas to take an exam that would have resulted in his being acknowledged as one of the top 2,000 cybersecurity experts in the world in his area of expertise.

Despite having all the evidence of his qualification for the 240 Day Rule with him, and presenting this to government authorities, CBP detained him at the U.S. airport when he tried to catch his domestic flight. He was then passed off to ICE, detained in a federal detention facility and issued a notice to appear for a deportation hearing before an immigration judge.

Barring the intervention of his team of lawyers and posting a bond of thousands of dollars, he would have been required to stay in detention for weeks or even months until he was able to go before an immigration judge, who could then decide how he or she wanted to apply the DHS policy to his case. He easily could have been removed from the U.S. and suffered all the consequences of that action to his career and his family, simply because of a policy interpretation that says that although he is authorized by law to *work* in the U.S., he is not concurrently authorized by law to *be* in the U.S. Riddle me that, folks.

Change on horizon?

The most dangerous thing about policy dictating the outcome of immigration issues like this is that there are limited legal constructs to challenge policy-based decisions, and those in a position to do so are hesitant to go down the path of suing the government. The time and expense that go into fighting immigration decisions - and the reality of the chance that a judge is likely to rule against them - are strong deterrents to those in a position to fight policy decisions.

Until we see major immigration reform at the legislative level, signed into law by a U.S. president, the status of and benefits available to foreign nationals legally in the U.S. are likely to continue to be at risk due to arbitrary and capricious policy changes.

This is the second of a two-part series. Read part one: U.S. immigration: Increasing impact of policy shifts.

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