



## MID-JANUARY 2017 IMMIGRATION UPDATE

*Posted on January 18, 2017 by Cyrus Mehta*

### Heading:

1. **Reading Tea Leaves: Requests From DHS Office By Trump Transition Team, Policy Statement, Cabinet Nominees Offer Hints** – President-elect Donald Trump's transition team has requested various documents and information from the Department of Homeland Security (DHS) that, along with a statement of policies on his website, may provide hints of what Mr. Trump might prioritize once he becomes President.
2. **USCIS Releases New Policy Guidance on Physicians of National or International Renown** – USCIS released a new policy memorandum that designates as precedent *Matter of T-O-S-U*, a 2015 decision of the Administrative Appeals Office (AAO). The decision explains that physicians of national or international renown who are graduates of medical schools in foreign states are exempt from the USMLE requirement in the H-1B context.
3. **DHS Proposes Changes to EB-5 Program, Regional Center Program** - The Department of Homeland Security (DHS) has published a notice of proposed rulemaking on the general EB-5 program and an advance notice of proposed rulemaking on the EB-5 regional center program.
4. **Georgia Board of Regents Appeals Decision Allowing In-State Tuition for DACA Recipients** – The Board of Regents for Georgia's state colleges and universities has filed an appeal of a Fulton County superior court judge's decision allowing DACA recipients to pay in-state tuition.
5. **USCIS Extends, Redesignates TPS for Yemen** - USCIS has extended the designation of the Republic of Yemen for TPS for 18 months, through September 3, 2018, and has redesignated Yemen for TPS for 18 months, through the same date. The initial registration period for new applicants under the redesignation runs through July 3, 2017. For individuals who

have already been granted TPS under Yemen's designation, the 60-day re-registration period runs through March 6, 2017

## **Details:**

### **1. Reading Tea Leaves: Requests From DHS Office By Trump Transition Team, Policy Statement, Cabinet Nominees Offer Hints**

President-elect Donald Trump's transition team has requested various documents and information from the Department of Homeland Security (DHS) that, along with a statement of policies on his website and statements made by his Cabinet nominees, may provide hints of which immigration issues Mr. Trump may prioritize once he becomes President.

Document requests by transition team. The Trump team met with DHS officials on December 5, 2016, and requested agency records on border barriers, assets available for border wall and barrier construction, and the agency's capabilities to expand detention. The Trump team also asked for information on an aerial surveillance program President Obama downsized that authorizes the Army National Guard to monitor the southern border. The team also reportedly asked whether biographical information on immigrants has been altered out of concern for civil liberties, and asked for copies of all executive orders and directives sent to immigration agents since Obama became president in 2009.

In response to the Trump team's queries about building a border wall, DHS estimated that a northern border fence would cost \$3.3 billion to cover 452 miles, and a southern border fence would cost \$11.37 billion to add 413 miles of fencing.

Policy statements. Mr. Trump's statement of policies related to immigration as published on his website includes building "an impenetrable physical wall on the southern border" beginning on "day one," which he said repeatedly during his presidential campaign that "Mexico will pay for." More recently, the transition team reportedly told Congressional Republicans that he'd prefer to pay for the wall via appropriations of U.S. taxpayer dollars and asserted that Mexico would reimburse the United States later. Mexican President Enrique Peña Nieto had said that during his meeting with Mr. Trump in August 2016, he "made it clear that Mexico will not pay for the wall."

Among other things, the Trump statement also includes prioritizing jobs,

wages, and security of Americans; establishing "new immigration controls to boost wages and to ensure that open jobs are offered to American workers first"; selecting immigrants based on "their likelihood of success in the U.S. and their ability to be financially self-sufficient"; vetting applicants to ensure that they support "America's values, institutions and people," and temporarily suspending immigration from "regions that export terrorism and where safe vetting cannot presently be ensured"; detaining anyone who crosses the border without authorization until they are removed; ending sanctuary cities; immediately terminating "President Obama's two illegal executive amnesties"; tripling the number of U.S. Immigration and Customs Enforcement agents; fully implementing a biometric entry-exit visa tracking system at all land, air, and sea ports; "off the jobs and benefits magnet; and reforming legal immigration.

Cabinet nominee statements. Mr. Trump's Cabinet nominees' statements and actions have sometimes but not always matched immigration-related statements Mr. Trump has made. John Kelly, a retired Marine Corps general and Mr. Trump's nominee to head the Department of Homeland Security, said that securing the U.S. border with Mexico would be his top priority but that building a wall would not be enough. "A physical barrier in and of itself will not do the job. It has to be really a layered defense." He suggested measures such as increased patrols and surveillance along the border, drones, improving alerts of DHS officials when visas expire, and partnerships with other countries to prevent drug trafficking and unauthorized travel to the United States. Gen. Kelly said that deporting Deferred Action for Childhood Arrivals (DACA) recipients would "probably not be at the top of the list" of his priorities. Regarding Mr. Trump's proposal to register Muslims, he said, "I don't agree with registering people based on ethnic or religion or anything like that."

Like Mr. Trump, Sen. Jeff Sessions (R-Ala.), tapped to serve as Attorney General, has been a proponent of border security measures including physical barriers like fences. At the Republican National Convention, Sen. Sessions said, "Donald Trump will build the wall." On the other hand, Sen. Sessions testified in his confirmation hearing that he did not support Mr. Trump's proposed Muslim immigration ban: "I do not support the idea that Muslims as a religious group should be denied entry to the United States." However, he seemed to allow some wiggle room in specific situations: "Many people do have religious views that are inimical to the public safety of the United States." He also said, however, that he would not favor a registry of Muslims in the United States.

Trump's statement of policies related to immigration is at <https://www.donaldjtrump.com/policies/immigration/>.

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## 2. **USCIS Releases New Policy Guidance on Physicians of National or International Renown**

U.S. Citizenship and Immigration Services (USCIS) released a new policy memorandum on January 4, 2017, that designates as precedent *Matter of T-O-S-U-*, a 2015 decision of the Administrative Appeals Office (AAO). The decision explains that physicians of national or international renown who are graduates of medical schools in foreign states are exempt from the U.S. Medical Licensing Examination (USMLE) requirement in the H-1B context.

In the new policy memo, USCIS noted that *Matter of T-O-S-U-* clarifies that a "physician of national or international renown" is a doctor of medicine or osteopathy "who is widely acclaimed and highly honored in the field of medicine within one or more countries, so long as the achievements leading to national renown are comparable to that which would result in national renown in the United States." USCIS noted that the decision also suggests, but does not mandate, what types of evidence may be persuasive in establishing eligibility for this exemption.

The AAO originally decided *Matter of T-O-S-U-* on February 20, 2015, as a nonprecedent case. The petitioner had filed a petition to classify the beneficiary, an "Assistant Professor—Clinical Physician," as an H-1B temporary nonimmigrant worker. The California Service Center (CSC) denied the petition, concluding that the evidence did not demonstrate that the beneficiary was exempt from the USMLE requirement as a "physician of national or international renown in the field of medicine." The AAO withdrew the CSC's decision and approved the petition, noting that regulations specifically provide a licensing examination exception for physicians of national or international renown in the field of medicine.

The AAO said that to satisfy this exemption, the petitioner must demonstrate that the beneficiary: (1) is a physician; (2) is a graduate of a medical school in a foreign country; and (3) is of national or international renown in the field of medicine.

To establish "renown" for purposes of adjudicating exemption claims, the AAO

said that "national or international renown" could be restated as "widely acclaimed and highly honored within one or more countries." But the AAO noted that this cannot be interpreted to permit standards that may allow physicians from certain countries where renown in the field of medicine is more readily achieved—considering factors such as population size and available medical resources—to more easily qualify than those from countries where renown in the field of medicine is more difficult to achieve. Considering that physicians meeting the requirements for this exemption can provide patient care in the United States without passing the USMLE or establishing competency in English, the AAO said the standard for national renown "should be set at a level that requires achievements necessary to garner national renown in the United States and thus, applied consistently, would obviate potentially adverse effects on U.S. patients." The AAO said it "reserve without answering the question of whether international renown must also be at a level comparable to that which would result in national renown in the United States."

The AAO provided the following "non-exhaustive list" of evidence that, depending on the qualitative nature of the evidence, may establish eligibility for the exemption:

- Documentation of the beneficiary's receipt of nationally or internationally recognized prizes or awards in the field of medicine;
- Evidence of the beneficiary's authorship of scientific or scholarly articles in the field of medicine published in professional journals, major trade publications, or other major media;
- Published material about the beneficiary's work in the medical field that appears in professional journals, major trade publications, or other major media (which includes the title, date, and author of such material);
- Evidence that the beneficiary has been employed in a critical, leading, or essential capacity for organizations or establishments that have distinguished reputations in the field of medicine;
- Evidence of the beneficiary serving as a speaker or panelist at medical conferences;
- Evidence of the beneficiary's participation as a judge of the work of others in the medical field;
- Documentation of the beneficiary's membership in medical associations, which require significant achievements of their members, as judged by recognized experts in the field of medicine;

- Evidence that the beneficiary has received recognition for his/her achievements or contributions from recognized authorities in the field of medicine; and
- Any other evidence demonstrating the beneficiary's achievements, contributions, and/or acclaim in the medical field.

The USCIS policy memo, which includes the original decision in *Matter of T-O-S-U-*, is at

<https://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/2017/2017-1-4-Matter-of-T-O-S-U.pdf>. The USCIS made the decision a precedent on January 4, 2017.

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### 3. **DHS Proposes Changes to EB-5 Program, Regional Center Program**

The Department of Homeland Security (DHS) has published a notice of proposed rulemaking on the EB-5 program in the Federal Register on January 13, 2017, and an advance notice of proposed rulemaking on the regional center program on January 11, 2017. Following are highlights of the notices:

#### ***Proposed Rule on EB-5 Program***

Priority date retention. DHS proposes to authorize certain EB-5 petitioners to retain the priority date of an approved EB-5 immigrant petition for use in connection with any subsequent EB-5 immigrant petition. Petitioners with approved immigrant petitions might need to file new petitions due to circumstances beyond their control (for example, DHS might have terminated a regional center associated with the original petition) or might choose to do so for other reasons (for example, a petitioner may seek to materially change aspects of his or her qualifying investment). DHS proposes to generally allow EB-5 petitioners to retain the priority dates of previously approved petitions to avoid further delays on immigrant visa processing associated with the loss of priority dates. DHS said it believes that priority date retention "may become increasingly important due to the strong possibility that the EB-5 visa category will remain oversubscribed for the foreseeable future."

Increases in the investment amounts. DHS is proposing to increase the minimum investment amounts for all new EB-5 petitioners. DHS said the increase "would ensure that program requirements reflect the present-day

dollar value of the investment amounts established by Congress in 1990." Specifically, DHS proposes initially to increase the standard minimum investment amount, which also applies to high employment areas, from \$1 million to \$1.8 million to adjust for inflation. For those investors seeking to invest in a new commercial enterprise that principally will be doing business in a targeted employment area (TEA), DHS proposes to increase the minimum investment amount from \$500,000 to \$1.35 million. In addition, DHS proposes to make regular adjustments based on the Consumer Price Index for urban consumers (CPI-U) in the standard minimum investment amount, and conform adjustments to the TEA minimum investment amount, every 5 years, beginning 5 years from the effective date of the rule.

TEA designations. DHS proposes to "reform the TEA designation process to ensure consistency in TEA adjudications and ensure that designations more closely adhere to Congressional intent." First, DHS proposes to allow any city or town with high unemployment and a population of 20,000 or more to qualify as a TEA. Currently, TEA designations are not available at the city or town level, unless a state designates the city or town as a TEA and provides evidence of such designation to a prospective EB-5 investor for submission with the Form I-526, Immigrant Petition by Alien Entrepreneur. Second, DHS proposes to eliminate the ability of a state to designate certain geographic and political subdivisions as high-unemployment areas. Instead, DHS would make such designations directly, using standards described in the proposed rule. DHS said it believes these changes would "help address inconsistencies between and within states in designating high unemployment areas, and better ensure that the reduced investment threshold is reserved for areas experiencing significantly high levels of unemployment."

Removal of conditions. DHS proposes to clarify that derivative family members must file their own petitions to remove conditions on their permanent residence when they are not included in a petition to remove conditions filed by the principal investor. In addition, DHS proposes "to improve the adjudication process for removing conditions by providing flexibility in interview locations and to update the regulation to conform to the current process for issuing permanent resident cards."

Written comments should be submitted by April 11, 2017. The proposed rule is at <https://www.gpo.gov/fdsys/pkg/FR-2017-01-13/pdf/2017-00447.pdf>.



### ***Advance Notice of Proposed Rule on EB-5 Regional Center Program***

DHS said it is considering regulatory changes to the EB-5 immigrant investor regional center program and invites comments, data, and information. DHS seeks comments on: (1) the process for initially designating entities as regional centers; (2) a potential requirement for regional centers to use an "exemplar" filing process, explained in detail in the advance notice; (3) "continued participation" requirements for maintaining regional center designation; and (4) the process for terminating regional center designation.

DHS said that it has some information on these topics but seeks additional information that can help the agency "make operational and security updates to the Regional Center Program while minimizing the impact of such changes on regional center operations and EB-5 investors." DHS said it is particularly interested in data that would inform a quantitative and qualitative assessment of the costs and benefits of the potential changes described in the advance notice. DHS is also interested in receiving more information on how to identify the small entity status of EB-5 stakeholder entities, such as regional centers and new commercial enterprises. DHS specifically requests information on revenue or employment data sources on regional centers and new commercial enterprises.

Written comments should be submitted by April 11, 2017. The notice is at <https://www.gpo.gov/fdsys/pkg/FR-2017-01-11/pdf/2017-00441.pdf>.

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#### **4. Georgia Board of Regents Appeals Decision Allowing In-State Tuition for DACA Recipients**

The Board of Regents for Georgia's state colleges and universities has filed an appeal of a December 30, 2016, Fulton County superior court judge's decision allowing Deferred Action for Childhood Arrivals (DACA) recipients to pay in-state tuition. The Board of Regents had required DACA recipients to pay out-of-state tuition, which is higher, because they didn't meet a requirement of "lawful presence" for in-state tuition. The judge found, however, that their lawful presence was "federally established."

It is unclear what will happen to DACA after the change in administration. Meanwhile, State Sen. Josh McKoon (R-Columbus) reportedly plans to introduce legislation shortly to limit in-state tuition to those with legal status in the United



States, not just lawful presence. And DACA students are already banned under "Policy 4.1.6" from admission at the University of Georgia, Georgia Institute of Technology, and Georgia College & State University.

Charles H. Kuck represented the 10 DACA plaintiffs. For more on this case, including links to related articles, see *ABIL Member/Firm News*, below.

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## **5. USCIS Extends, Redesignates TPS for Yemen**

U.S. Citizenship and Immigration Services (USCIS) has extended the designation of the Republic of Yemen for temporary protected status (TPS) for 18 months, through September 3, 2018, and has redesignated Yemen for TPS for 18 months, through the same date. The 180-day initial registration period for new applicants under the Yemen TPS redesignation began on January 4, 2017, and runs through July 3, 2017. For individuals who have already been granted TPS under Yemen's designation, the 60-day re-registration period began on January 4, 2017, and runs through March 6, 2017.

The extension allows TPS beneficiaries to retain TPS through September 3, 2018, so long as they continue to meet the eligibility requirements for TPS. The redesignation of Yemen expands eligibility for TPS to include individuals who have been continuously residing in the United States since January 4, 2017. Previously, only individuals who had been continuously residing in the United States since September 3, 2015, were eligible for TPS under Yemen's designation. The redesignation will extend TPS protection to eligible individuals who have arrived in the United States after the eligibility cutoff dates established by Yemen's previous designation for TPS in September 2015.

The redesignation is based on determinations that (1) there continues to be an ongoing armed conflict in Yemen and, due to such conflict, requiring the return of Yemeni nationals to Yemen would pose a serious threat to their personal safety, and (2) there are extraordinary and temporary conditions in Yemen that prevent Yemeni nationals from returning to Yemen in safety, and it is not contrary to the national interest of the United States to permit Yemeni nationals to remain temporarily in the United States.

USCIS published a notice on January 4, 2017, announcing the extension and redesignation and detailing procedures for those applying for renewal of TPS or for initial registration. The notice is at

<https://www.gpo.gov/fdsys/pkg/FR-2017-01-04/html/2016-31003.htm>.

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