



## MID-SEPTEMBER 2017 IMMIGRATION UPDATE

*Posted on September 19, 2017 by Cyrus Mehta*

### Headlines:

1. [President Orders End of DACA in Six Months, With Mixed Signals About Future for 'Dreamers'; Two Lawsuits Challenge Program's Termination](#) – President Trump has ordered the end of Deferred Action for Childhood Arrivals, an Obama administration program that allowed certain people who came to the United States as children to continue to live, go to school, and work in the country, known as "Dreamers." The order takes effect in six months and affects nearly 800,000 people. At least two lawsuits challenge the legality of ending the program.
2. [President Signs Legislation Extending Several Programs Under Disaster Relief Act](#) – Among other things, the legislation extends the Religious Worker, Conrad State 30, EB-5, and E-Verify programs until December 8, 2017.
3. [ICE Temporarily Suspends Unspecified Enforcement Actions in Wake of Hurricanes; DHS States That Immigration Status Will Not Be a Factor During Rescues](#) – The Department of Homeland Security said that "DHS will not conduct non-criminal immigration enforcement operations in the affected area."
4. [Ninth Circuit Rules Grandparents, Cousins, Others Exempted From Travel Ban; Supreme Court Intervenes](#) – A three-judge panel of the U.S. Court of Appeals for the Ninth Circuit ruled on September 7, 2017, that certain relatives from Iran, Libya, Somalia, Sudan, Syria, and Yemen banned by the Trump administration from entering the United States should be admitted while the ban is under legal review, contrary to the administration's interpretation of a June Supreme Court ruling. The Ninth Circuit panel also rejected the Trump administration's ban on refugees formally accepted by resettlement agencies. The Supreme Court blocked

the refugee part of the Ninth Circuit's ruling.

5. [\*\*EB-1, EB-3 Categories Show Progress in Visa Bulletin for October\*\*](#) – Several developments in employment-based categories were announced in the Department of State's Visa Bulletin for the month of October 2017.
6. [\*\*Registration for Diversity Visa Program for FY 2019 Begins in October\*\*](#) – Registration for the Diversity Visa Program for fiscal year 2019 (DV-2019) will begin at noon ET on October 3, 2017, and end at noon ET on November 7, 2017. For FY 2019, 50,000 diversity visas will be available.
7. [\*\*State Dept. Changes Standard for Assessing 'Residence Abroad' for F-1 Nonimmigrant Students\*\*](#) – The Department of State recently changed language regarding the way in which F-1 student visas are adjudicated with respect to "residence abroad."
8. [\*\*State Dept. Issues New 90-Day Rule for Misrepresentation\*\*](#) – The Department of State recently updated the Foreign Affairs Manual with a new 90-day rule on misrepresentation.
9. **Firm In The News...**

#### **Details:**

#### **1 President Orders End of DACA in Six Months, With Mixed Signals About Future for 'Dreamers'; Two Lawsuits Challenge Program's Termination**

On September 5, 2017, President Donald Trump ordered the end of Deferred Action for Childhood Arrivals (DACA), an Obama administration program that allowed certain people who came to the United States as children to continue to live, go to school, and work in the country, known as "Dreamers." He said that his administration's position is that DACA was not statutorily authorized and therefore was an unconstitutional exercise of discretion by the executive branch. The order takes effect in six months. The rescission affects nearly 800,000 DACA recipients.

Based on "guidance from Attorney General Sessions and the likely result of potentially imminent litigation," the Department of Homeland Security's Acting Secretary Elaine Duke issued a memorandum on September 5 formally rescinding the Obama administration's June 15, 2012, memorandum that created DACA. Ms. Duke explained, "As a result of recent litigation, we were faced with two options: wind the program down in an orderly fashion that protects beneficiaries in the near-term while working with Congress to pass

legislation, or allow the judiciary to potentially shut the program down completely and immediately. We chose the least disruptive option." Ms. Duke said that "no current beneficiaries will be impacted before March 5, 2018, nearly six months from now, so Congress can have time to deliver on appropriate legislative solutions. However, I want to be clear that no new initial requests or associated applications filed after will be acted on."

President Trump's statement about current beneficiaries not being affected for 6 months was slightly less absolute; he said that current DACA recipients "generally" will not be affected: "DHS's enforcement priorities remain in place. However, absent a law enforcement interest—which is largely the standard that has been in place since the inception of the program—the Department will generally not take actions to remove active DACA recipients." He said that renewal applications for DACA employment authorization documents (EADs) properly filed and accepted by October 5, 2017, for people whose current EADs expire between September 5, 2017, and March 5, 2018, will be processed. He also said that all pending applications for advance parole by DACA recipients "will be closed and associated fees will be refunded." In a related tweet on September 7, 2017, President Trump said, "Congress now has 6 months to legalize DACA (something the Obama Administration was unable to do). If they can't, I will revisit this issue!"

On September 6, 2017, the attorneys general of more than a dozen states and the District of Columbia sued the government to stop the DACA program's rescission. The lawsuit argues that the repeal of President Obama's DACA order violates the Administrative Procedure Act, is motivated by discrimination against Mexicans, and violates due process. The University of California filed a similar suit on September 8, 2017, against the Trump administration for violating the rights of the university and its students by rescinding DACA on "nothing more than unreasoned executive whim."

The White House statement is at

<https://www.whitehouse.gov/the-press-office/2017/09/05/president-donald-j-trump-restores-responsibility-and-rule-law>. The DHS statement is at

<https://www.dhs.gov/news/2017/09/05/rescission-deferred-action-childhood-arivals-daca>. A related USCIS statement is at <https://www.uscis.gov/daca2017>.

Attorney General Sessions' letter to Acting Secretary Duke is at

<https://www.dhs.gov/publication/letter-attorney-general-sessions-acting-secretary-duke-rescission-daca>. Acting Secretary Duke's memorandum is at

<https://www.dhs.gov/news/2017/09/05/memorandum-rescission-daca>.

Frequently asked questions are at

<https://www.dhs.gov/news/2017/09/05/frequently-asked-questions-rescission-deferred-action-childhood-arrivals-daca>. The complaint by the various state

attorneys general is at

[https://ag.ny.gov/sites/default/files/new\\_york\\_et\\_al.\\_v.\\_trump\\_et\\_al\\_-\\_17cv5228.pdf](https://ag.ny.gov/sites/default/files/new_york_et_al._v._trump_et_al_-_17cv5228.pdf). The University of California's complaint is at

<http://universityofcalifornia.edu/sites/default/files/UC-DACA-Complaint.pdf>.

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## **2. President Signs Legislation Extending Several Programs Under Disaster Relief Act**

The U.S. Senate and House of Representatives recently passed the "Disaster Relief Appropriations Act, 2017" as part of an appropriations bill to increase the debt limit, fund the government through a continuing resolution, and provide emergency funding for hurricane relief. Among other things, the legislation extends the Religious Worker, Conrad State 30, EB-5, and E-Verify programs until December 8, 2017. President Trump signed the legislation on September 8, 2017.

A White House statement is at

<https://www.whitehouse.gov/the-press-office/2017/09/08/statement-press-secretary-president-donald-j-trump-signing-hr-601>. The text of the bill is at <https://www.congress.gov/bill/115th-congress/house-bill/601/text>.

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## **3. ICE Temporarily Suspends Unspecified Enforcement Actions in Wake of Hurricanes; DHS States That Immigration Status Will Not Be a Factor During Rescues**

U.S. Immigration and Customs Enforcement (ICE) released a statement on September 7, 2017, that appears to temporarily suspend unspecified enforcement actions in areas affected by recent hurricanes:

While we generally do not comment on future potential law enforcement actions, operational plans are subject to change based on a variety of factors. Due to the current weather situation in Florida and other potentially impacted areas, along with the ongoing recovery in Texas, U.S.

Immigration and Customs Enforcement (ICE) had already reviewed all upcoming operations and has adjusted accordingly. There is currently no coordinated nationwide operation planned at this time. The priority in the affected areas should remain focused on life-saving and life-sustaining activities.

For the safety and security of our communities, ICE fugitive operations teams will continue to target and arrest criminal aliens and other individuals who are in violation of our nation's immigration laws, in non-affected areas of the country, as part of routine operations.

A separate statement issued by the Department of Homeland Security (DHS) on September 6, 2017, states, among other things, that "DHS will not conduct non-criminal immigration enforcement operations in the affected area." The statement also notes, "When it comes to rescuing people in the wake of Hurricane Irma, immigration status is not and will not be a factor. However, the laws will not be suspended, and we will be vigilant against any effort by criminals to exploit disruptions caused by the storm." DHS also stated that ICE detainees from the Krome Detention Center, Monroe County Jail, Broward Transitional Center, and Glades Detention Center "are being temporarily transferred to various other detention facilities outside the projected path of the hurricane. In the event of transfers, the detainee's attorney of record is notified, the Online Detainer Locator is updated, and the transfer is temporary in nature."

The ICE statement is at

<https://www.ice.gov/news/releases/ice-statement-regarding-questions-enforcement-planning>. The DHS statement is at

<https://www.ice.gov/news/releases/dhs-statement-regarding-safety-and-enforcement-during-hurricane-irma>.

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#### **4. Ninth Circuit Rules Grandparents, Cousins, Others Exempted From Travel Ban; Supreme Court Intervenes**

A three-judge panel of the U.S. Court of Appeals for the Ninth Circuit ruled on September 7, 2017, that certain relatives from Iran, Libya, Somalia, Sudan, Syria, and Yemen banned by the Trump administration from entering the United States should be admitted while the ban is under legal review, contrary to the

administration's interpretation of a June Supreme Court ruling. However, on September 12, the Supreme Court blocked the Ninth Circuit's ruling indefinitely.

The administration had interpreted the Supreme Court's June reference to close or bona fide family relationships as including immediate family members and in-laws but excluding grandparents, grandchildren, brothers- and sisters-in-law, aunts and uncles, nieces and nephews, and cousins. The Ninth Circuit panel observed, "Stated simply, the Government does not offer a persuasive explanation for why a mother-in-law is clearly a bona fide relationship, in the Supreme Court's prior reasoning, but a grandparent, grandchild, aunt, uncle, niece, nephew, or cousin is not." Noting that the administration had relied on specified provisions of the Immigration and Nationality Act, the court noted, "The Government's 'cherry-picked' INA provisions recognize immediate family relationships as those between parents, spouses, children, and siblings, yet other provisions of the INA and other immigration laws offer broader definitions for close family." The court also said that the INA was implemented with the underlying intention of preservation of the family unit, and noted that the administration's "artificially narrow interpretation of close familial relationships directly contradicts this intention."

The Ninth Circuit panel also rejected the Trump administration's ban on refugees formally accepted by resettlement agencies. The court noted that it typically takes a refugee applicant 18 to 24 months to successfully complete the complex, lengthy application and screening process before he or she can be resettled in the United States. The court cited various hardships that would be faced by resettlement agencies, local affiliates, church congregations, volunteers, and landlords if formally assured refugees were barred. The court also noted that refugees' lives "remain in vulnerable limbo during the pendency of the Supreme Court's stay. Refugees have only a narrow window of time to complete their travel, as certain security and medical checks expire and must then be re-initiated. Even short delays may prolong a refugee's admittance."

The Ninth Circuit's order was set to take effect on September 12. However, on that date the Supreme Court indefinitely blocked part of the Ninth Circuit's ruling. For now, the Trump administration's travel ban remains in effect with respect to refugees who have formal assurances from resettlement agencies. The Supreme Court will hear arguments on October 10, 2017, in a consolidated case challenging the travel ban.

The Ninth Circuit's opinion is at

<http://cdn.ca9.uscourts.gov/datastore/general/2017/09/07/17-16426%20Opinion%20Filed.pdf>. The Supreme Court's order blocking part of the Ninth Circuit's

ruling is at

<http://www.scotusblog.com/wp-content/uploads/2017/09/17A275-16-1540-Trump-v.-Hawaii-Order-2.pdf>.

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## **5. EB-1, EB-3 Categories Show Progress in Visa Bulletin for October**

Several developments in employment-based categories were announced in the Department of State's Visa Bulletin for the month of October 2017.

For the past several months, there has been a backlog for Chinese-mainland and Indian nationals for EB-1. With the new fiscal year, the EB-1 category is now current for all nationalities, and visa applications may be filed regardless of the applicant's priority date. It is unknown how long this category will remain current.

Also, the September 2017 Visa Bulletin included a cutoff date of January 1, 2012, for China-mainland born EB-3 applicants. It has advanced two years to January 1, 2014. The Department estimates that this cutoff date will move up approximately four months in the coming months.

The October 2017 Visa Bulletin is at

<https://travel.state.gov/content/visas/en/law-and-policy/bulletin/2018/visa-bulletin-for-october-2017.html>.

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## **6. Registration for Diversity Visa Program for FY 2019 Begins in October**

Registration for the Diversity Visa Program for fiscal year 2019 (DV-2019) will begin at noon ET on October 3, 2017, and end at noon ET on November 7, 2017. For FY 2019, 50,000 diversity visas will be available. There is no cost to register for the DV program.

For DV-2019, natives of the following countries are not eligible to apply, because more than 50,000 natives of these countries immigrated to the United States in the previous five years: Bangladesh, Brazil, Canada, China (mainland-born), Colombia, Dominican Republic, El Salvador, Haiti, India, Jamaica, Mexico,



Nigeria, Pakistan, Peru, Philippines, South Korea, United Kingdom (except Northern Ireland) and its dependent territories, and Vietnam.

Persons born in Hong Kong SAR, Macau SAR, and Taiwan are eligible.

Applicants must submit entries for the DV-2019 program electronically at <https://dvlottery.state.gov/>. The Department of State advises applicants not to wait until the last week of the registration period to enter, as heavy demand may result in website delays. No late entries or paper entries will be accepted. The Department noted that it "uses sophisticated technology to detect multiple entries. Individuals with more than one entry will be disqualified." Older browsers (Internet Explorer 8 and earlier) may encounter problems with the online system; the Department advises using an updated browser. Also, it is extremely important to retain the confirmation page and unique confirmation number. Without this information, applicants will not be able to access the online system that informs them of their entry status.

All DV-2019 entrants must go to the Entrant Status Check using the unique confirmation number saved from their DV-2019 online entry registration to find out whether their entry has been selected. Entrant Status Check will be available at <https://dvlottery.state.gov/> beginning May 1, 2018, through at least September 30, 2019.

Entrant Status Check will be the only means by which the Department of State notifies applicants of their selection for DV-2019. The Department of State will not mail notification letters or notify selectees by email. U.S. embassies and consulates will not provide a list of selectees.

Those who applied for the DV-2018 program can check their status at <https://www.dvlottery.state.gov/>.

Instructions for DV-2019, including additional eligibility requirements, are at [https://travel.state.gov/content/dam/visas/Diversity-Visa/DV-Instructions-Translations/DV-2019-Instructions-Translations/Clean\\_DV-2019\\_Plain\\_Language\\_Instructions\\_and\\_FAQs%20.pdf](https://travel.state.gov/content/dam/visas/Diversity-Visa/DV-Instructions-Translations/DV-2019-Instructions-Translations/Clean_DV-2019_Plain_Language_Instructions_and_FAQs%20.pdf).

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## **7. State Dept. Changes Standard for Assessing 'Residence Abroad' for F-1 Nonimmigrant Students**

The Department of State recently changed language regarding the way in which



F-1 student visas are adjudicated. An amendment to the Foreign Affairs Manual at 9 FAM 402.5-5(E)(1) revises the "Residence Abroad Required" provision. The new provision states:

**b. Examining Residence Abroad:** General rules for examining residence abroad are outlined in 9 FAM 401.1-3(F)(2). If you are not satisfied that the applicant's present intent is to depart the United States at the conclusion of his or her study or OPT, you must refuse the visa under INA 214(b). To evaluate this, you should assess the applicant's current plans following completion of his or her study or OPT. The hypothetical possibility that the applicant may apply to change or adjust status in the United States in the future is not a basis to refuse a visa application if you are satisfied that the applicant's present intent is to depart at the conclusion of his or her study or OPT.

The old provision stated, in relevant part:

b. The context of the residence abroad requirement for student visas inherently differs from the context for B visitor visas or other short-term visas. The statute clearly presupposes that the natural circumstances and conditions of being a student do not disqualify that applicant from obtaining a student visa. It is natural that the student does not possess ties of property, employment, family obligation, and continuity of life typical of B visa applicants. These ties are typically weakly held by student applicants, as the student is often single, unemployed, without property, and is at the stage in life of deciding and developing his or her future plans. Student visa adjudication is made more complex by the fact that students typically stay in the United States longer than do many other nonimmigrant visitors.

c. The residence abroad requirement for a student should therefore not be exclusively connected to ties. You must focus on the student applicant's immediate intent. Another aspect to consider: students' typical youth often means they do not necessarily have a long-range plan, and hence are relatively less likely to have formed an intent to abandon their homes. Nonetheless, you must be satisfied at the time of application for a visa that the visa applicant possesses the present intent to depart the United States at the conclusion of his or her approved activities. That this intention is subject to change or even likely to change is not a sufficient reason to deny a visa.

It is not yet clear how this update will affect future adjudications of the F-1 student visa. It will be important for applicants to emphasize their intent to leave the United States at the end of their studies or optional practical training.

The related section of the FAM is at

<https://fam.state.gov/fam/09FAM/09FAM040205.html>.

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## **8. State Dept. Issues New 90-Day Rule for Misrepresentation**

The Department of State recently updated the Foreign Affairs Manual at 9 FAM 302.9-4(B)(3) with a new 90-day rule on misrepresentation, related to those in the United States "who conduct themselves in a manner inconsistent with representations they made to consular officers concerning their intentions at the time of visa application or to when applying for admission or for an immigration benefit."

The FAM now has an updated subsection titled "Inconsistent Conduct Within 90 Days of Entry" that states, "If an alien violates or engages in conduct inconsistent with his or her nonimmigrant status within 90 days of entry..., you may presume that the applicant's representations about engaging in only status-compliant activity were willful misrepresentations of his or her intention in seeking a visa or entry." This appears to have discarded the prior "30/60-day rule with respect to adjustment of status after entry on a nonimmigrant visa. That prior rule held that if a person filed for adjustment within 30 days of entry, the government could presume that the person misrepresented his or her intention in seeking a visa or entry. A finding of misrepresentation or fraud could result in a lifetime bar to entering the United States. If the act occurred more than 30 days but less than 60 days after entry, no presumption of misrepresentation arose. However, if the facts showed the reasonable belief that intent was misrepresented, the person must present countervailing evidence. If the act occurred more than 60 days after admission into the United States, generally there was no basis for a misrepresentation or inadmissibility finding.

For purposes of applying the new 90-day rule, conduct that violates or is otherwise inconsistent with nonimmigrant status includes:

- Engaging in unauthorized employment;

- Enrolling in a course of academic study, if such study is not authorized (e.g., B Visitor status);
- Marrying a U.S. citizen or permanent resident and taking up residence in the United States after entering in nonimmigrant B (Visitor) or F (Student) status, or any other status prohibiting immigrant intent; and
- Undertaking any other activity for which a change of status or an adjustment of status would be required, without the benefit of such a change or adjustment.

The section explains that if a U.S. consular officer "becomes aware of derogatory information indicating that an alien in the United States who has a valid visa, may have misrepresented his or her intentions to you at the time of visa application, or to DHS at the port of entry or in a filing for an immigration benefit," they are directed to "bring the derogatory information to the attention of the Department for potential revocation."

Immigration practitioners note the potentially devastating consequences of this new guidance. The Immigration and Nationality Act states that anyone who, by willfully misrepresenting a material fact, seeks to procure (or has sought to procure or has procured) a visa, other documentation, or admission into the United States or other immigration benefit is inadmissible and may be barred for life from entering the United States.

The related section of the FAM is at

<https://fam.state.gov/fam/09FAM/09FAM030209.html>.

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## 9. **Firm In The News**

**Cyrus D. Mehta** and **Sophia Genovese-Halvorson** published [State Department Toughens Standard For Assessing A Foreign Student's Ties With Home Country](#) on September 12, 2017.

**Cyrus D. Mehta** and **Sophia Genovese-Halvorson** published [A Few Suggestions To Defend Oneself Against A Misrepresentation Finding Under The 90-Day Rule](#) on September 18, 2017.