



JUNE 2018 IMMIGRATION UPDATE

Posted on June 5, 2018 by damirazhanatova

Headlines:

DHS Announces Additional 15,000 H-2B Temporary Nonagricultural Worker Visas for FY 2018 – Secretary Nielsen said there are not enough qualified, U.S. workers available to perform temporary nonagricultural labor to satisfy the needs of U.S. businesses in FY 2018. This allocation is in addition to the 66,000 visas already issued this year.

DHS Proposes Ending International Entrepreneur Program – DHS has issued a proposed rule to end a program that allows certain foreign entrepreneurs to be considered for parole to develop and build start-up businesses in the United States.

USCIS Reminds F-1 Students of Automatic Termination of OPT If They Transfer or Begin Study at Another Educational Level – USCIS reminded F-1 students on Optional Practical Training (OPT) that transferring to another school or beginning study at another educational level (for example, beginning a master's program after completing a bachelor's degree) automatically terminates their OPT as well as their corresponding employment authorization document.

Re-Registration Period Now Open for Nepal TPS Beneficiaries – Current beneficiaries of temporary protected status under Nepal's designation who want to maintain their status through the effective termination date of June 24, 2019, must re-register by July 23, 2018.

USCIS Corrects Biometric Services Appointment Notices with Wrong Application Support Center Locations – USCIS plans to mail new biometric services appointment notices to petitioners who received incorrect notices and did not reschedule their appointments or appear as walk-ins.

Guidance Revised on EB-5 Immigrant Investor Cases Involving Tenant Occupancy; Adjustment of Status Interview Guidelines/Waiver Criteria –

USCIS said it will no longer accept tenant-occupancy models for filings, and announced the same day that it is updating guidance on adjustment of status interview guidelines and interview waivers.

USCIS Recalls Incorrectly Dated Green Cards for Spouses of U.S. Citizens –

USCIS began recalling approximately 8,500 permanent resident cards ("green cards") due to a production error. The green cards were for approved Forms I-751, Petition to Remove Conditions of Residence, for spouses of U.S. citizens. The cards were printed with an incorrect "Resident Since" date and mailed between February and April 2018.

Firm in the News...**Details:****Seven States Sue to End DACA; NAACP Declares Victory in Another DACA Decision**

Seven states—Texas, Alabama, Arkansas, Louisiana, Nebraska, South Carolina, and West Virginia—filed a complaint in the U.S. District Court for the Southern District of Texas, Brownsville Division, to stop the Deferred Action for Childhood Arrivals (DACA) program. The lawsuit claims that the 2012 executive action creating DACA was unlawful, and seeks declaratory and injunctive relief.

Plaintiffs note that the court "has authority to immediately rescind and cancel all DACA permits currently in existence because they are unlawful," but states that plaintiffs "are amenable to a remedy that enjoins Defendants from issuing or renewing DACA permits in the future, effectively phasing out the program within two years."

In another DACA case, the National Association for the Advancement of Colored People (NAACP) celebrated a "huge victory for DACA recipients around the nation." A federal court in Washington, DC, found legally insufficient a memorandum issued by the Department of Homeland Security (DHS) terminating the DACA program and struck down the memorandum unless DHS can offer a stronger basis for ending the program, the NAACP noted.

Federal Judge John Bates said the decision by the Trump administration to rescind DACA was "virtually unexplained" and as such "unlawful." He gave DHS

90 days to provide a legally sufficient explanation. If DHS fails to provide an explanation that meets legal muster, the NAACP noted, "DACA will be vacated in its entirety and DHS will be required to maintain the program for current enrollees and to accept and process applications from new enrollees who meet the program's eligibility rules."

With the morass of DACA-related cases filed, some decided in favor of DACA recipients, and amid potentially disparate results, the issue could end up before the U.S. Supreme Court.

The seven-state complaint is at

https://www.scribd.com/document/377929932/TX-v-USA-Re-DACA-Complaint-050118#from_embed. The opinion in the NAACP case is at

<https://assets.documentcloud.org/documents/4446318/Microsoft-Princeton-Daca-20180424.pdf>. The NAACP's statement is at <https://bit.ly/2KXdfye>.

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USCIS Issues New Policy on Accrual of Unlawful Presence for F, J, M Nonimmigrants

U.S. Citizenship and Immigration Services (USCIS) issued a policy memorandum on May 10, 2018, "Accrual of Unlawful Presence and F, J, and M Nonimmigrants." The memo provides guidance to USCIS officers and "assists USCIS officers in the calculation of unlawful presence of those in student (F nonimmigrant), exchange visitor (J nonimmigrant), or vocational student (M nonimmigrant) status and their dependents while in the United States." The memo also revises previous policy guidance in the USCIS Adjudicator's Field Manual relating to this issue. The new guidance takes effect August 9, 2018.

The new policy states various ways in which F, J, and M nonimmigrants and their dependents begin accruing unlawful presence. For example, F, J, and M nonimmigrants who failed to maintain nonimmigrant status before August 9, 2018, will start accruing unlawful presence based on that failure on August 9, 2018, unless the nonimmigrant had already started accruing unlawful presence based on several scenarios.

Individuals who have accrued more than 180 days of unlawful presence during a single stay, and then depart, may be subject to 3-year or 10-year bars to admission, depending on how much unlawful presence they accrued before

they departed the United States. Individuals who have accrued a total period of more than one year of unlawful presence, whether in a single stay or during multiple stays in the United States, and who then reenter or attempt to reenter the United States without being admitted or paroled, are permanently inadmissible, USCIS said.

USCIS said this new policy supersedes existing policy, which is that foreign students (F nonimmigrants) and exchange visitors (J nonimmigrants) who were admitted for, or present in the United States in, duration of status started accruing unlawful presence only after USCIS formally found a nonimmigrant status violation while adjudicating a request for another immigrant benefit or only after an immigration judge ordered the applicant excluded, deported, or removed (whether or not the decision was appealed), whichever came first. F and J nonimmigrants, and foreign vocational students (M nonimmigrants), who were admitted until a specific date certain accrued unlawful presence on the day after their Form I-94 expired, on the day after USCIS formally found a nonimmigrant status violation while adjudicating a request for another immigration benefit, or on the day after an immigration judge ordered the applicant excluded, deported, or removed (whether or not the decision was appealed), whichever came first.

The memo is at

<https://www.dropbox.com/s/aqm0zahtx10kscv/AccrualofUnlawfulPresenceFJMNonimmigrantsMEMO.pdf?dl=0>. A related USCIS statement is at <https://www.uscis.gov/news/news-releases/uscis-changing-policy-accrued-unlawful-presence-nonimmigrant-students-and-exchange-visitors>.

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DOJ, USCIS Announce Agreement on Protecting U.S. Workers

U.S. Citizenship and Immigration Services (USCIS) and the Department of Justice announced on May 11, 2018, a Memorandum of Understanding (MOU) that "expands their collaboration to better detect and eliminate fraud, abuse, and discrimination by employers bringing foreign visa workers to the United States." This new effort "improves the way the agencies share information, collaborate on cases, and train each other's investigators," USCIS said.

The MOU will increase the ability of the agencies to share information and identify, investigate, and prosecute employers who may be discriminating

against U.S. workers and/or violating immigration laws. In 2010, USCIS and the Justice Department's Civil Rights Division entered into an ongoing partnership to share information about E-Verify misuse and combat employment discrimination. The new MOU "expands upon the two agencies' existing partnership," USCIS said.

"In the spirit of President Trump's Executive Order on Buy American and Hire American, today's partnership adds to the Civil Rights Division's tools to stop employers from discriminating against U.S. workers by favoring foreign visa workers," said Acting Assistant Attorney General John M. Gore of the Civil Rights Division. "The Division looks forward to expanding its partnerships with USCIS to hold accountable employers that discriminate against U.S. workers based on their citizenship status."

"Protecting and maintaining the integrity of our immigration system remains a key priority for me, and underpins the exceptional work of the professionals at USCIS," said USCIS Director L. Francis Cissna. "This agreement enhances the level of coordination among investigators who often work on the same issues at different agencies. Breaking down silos and working with our federal partners to combat employment discrimination will help ensure that U.S. workers have the advocate they need at the highest level."

USCIS's statement is at <https://bit.ly/2ly1mQV>. The MOU is at https://www.uscis.gov/sites/default/files/USCIS/Resources/Reports/MOU_5.11.2018.pdf.

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DOJ Settles Immigration-Related Claim Against University of California, San Diego

The Department of Justice announced on May 10, 2018, that it has reached a settlement agreement with the University of California, San Diego. The settlement resolves the Department's investigation into whether the university's Resource Management and Planning Vice Chancellor Area (RMP) discriminated against workers in violation of the Immigration and Nationality Act (INA) when verifying their continued authorization to work.

The Department's investigation concluded that the RMP unnecessarily required certain work-authorized immigrants to re-establish their work authorization

when their documents expired, based on the citizenship status of those individuals when they were hired.

Under the settlement, the university will pay a penalty to the United States, train its RMP human resources personnel on the requirements of the INA's anti-discrimination provision, and be subject to departmental monitoring and reporting requirements.

The announcement is at

<https://www.justice.gov/opa/pr/justice-department-settles-immigration-related-discrimination-claim-against-university>.

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TPS for Hondurans to End in January 2020

On May 4, 2018, Secretary of Homeland Security Kirstjen M. Nielsen announced her decision to terminate the temporary protected status (TPS) designation for Honduras with a "delayed effective date of 18 months to allow for an orderly transition before the designation terminates" on January 5, 2020.

The USCIS Web page asks users not to pay for or submit any form until USCIS updates the official re-registration information at <https://www.uscis.gov/humanitarian/temporary-protected-status/temporary-protected-status-designated-country-honduras>. Honduran citizens with current TPS registrations will be required to re-register for TPS and apply for employment authorization documents to legally work in the United States until the termination of Honduras' TPS designation takes effect on January 5, 2020. Further details about this termination for TPS, including the re-registration period, will appear in a Federal Register notice, USCIS said. Honduran TPS beneficiaries "should not submit re-registration applications until the re-registration period is announced through the Federal Register notice."

Additional details are at

<https://www.dhs.gov/news/2018/05/04/secretary-homeland-security-kirstjen-m-nielsen-announcement-temporary-protected>.

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IT Company to Pay 12 Employees for Violations of H-1B Program

IT employer Cloudwick Technologies Inc., based in Newark, California, will pay \$173,044 to 12 employees for violations of the federal H-1B foreign labor certification program, after an investigation by the U.S. Department of Labor's Wage and Hour Division (WHD). According to the Department, Cloudwick Technologies provides "data solution services" to major corporations nationwide, including American Express, Bank of America, Apple, Cisco, Comcast, Intuit, Safeway, Verizon, Visa, and many others.

WHD investigators found that the company paid affected employees well below the wage levels required under the H-1B program based on job skill level, and also made illegal deductions from workers' salaries. As a result, some of the H-1B employees that Cloudwick brought from India with promised salaries of up to \$8,300 per month instead received as little as \$800 net per month.

"The intent of the H-1B foreign labor certification program is to help American companies find the highly skilled talent they need when they can prove that a shortage of U.S. workers exists," said Susana Blanco, Wage and Hour Division District Director in San Francisco. "The resolution of this case demonstrates our commitment to safeguard American jobs, level the playing field for law-abiding employers, and protect guest workers from being paid less than they are legally owed."

In addition to the recovery of back wages, the IT employer has also signed an enhanced compliance agreement requiring it to hire an independent third-party monitor to help ensure future compliance.

The Department's announcement is at

<https://www.dol.gov/newsroom/releases/whd/whd20180501-2>.

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Trump Says Guest Workers Will Be Allowed into United States

At a Make America Great Again Rally in Washington, Michigan, on April 28, 2018, President Donald Trump was quoted as saying, "For the farmers, OK, it's going to get good. And we're going to have strong borders, but we have to have your workers come in." That appeared to contradict other Trump administration efforts to reduce migration to the United States generally.

According to reports, President Trump added, "The unemployment picture is so good, it's so strong, that we have to let people come in. They're going to be guest workers. They're going to come in, they're going to work on your farms, we're going to have the H-2Bs come in, we're going to have a lot of things happening but then they have to go out."

There was no immediate indication of specifics, such as when, how, or how many guest workers will be able to enter the United States, and how many will be agricultural or nonagricultural. In the omnibus spending bill, the Department of Homeland Security was authorized to expand the H-2B visa program. President Trump's Mar-a-Lago resort and other businesses use hundreds of guest worker visas, news reports have noted. During his campaign, then-candidate Trump told CNN, "You cannot get help during the season. The season goes from, like, October to March. It's almost impossible to get help. And part of the reason you can't get American people is they want full-time jobs."

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Firm In The News

Cyrus Mehta was a speaker on a panel entitled *Particular Social Groups: Recent Cases and Cutting Edge Theories* at the Federal Bar Association Immigration Conference in Memphis, TN on May 19, 2018. The other distinguished speakers on this panel were Professor Deborah Anker, Professor Karen Musalo and Dr. Alicia Triche.

Cyrus Mehta has authored a new blog entry. "State Department's Change to Public Charge Guidance in Foreign Affairs Manual Will Result in Many More Visa Refusals" is at <https://bit.ly/2J85SXC>.

David Isaacson has authored a new blog entry. "Those Who Cannot Remember the Past: How Matter of Castro-Tum Ignores the Lessons of Matter of Avetisyan" is at <https://bit.ly/2LzrA49>.

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