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US IMMIGRATION & NATIONALITY LAW

JULY 2018 IMMIGRATION UPDATE

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USCIS Recalls 800 Incorrectly Printed Employment Authorization Documents – USCIS said the cards contain a production error that transposed the first and last names of the individuals receiving the EADs.

ICE/SEVP Warns Students About Volunteer Positions – SEVP warned that reporting non-qualifying volunteer opportunities as OPT employment will be deemed a violation of reporting requirements and subject the student to removal from the United States.

USCIS Releases Data on DACA Requestors With 'Criminal Arrest Record' – USCIS said the report includes those whose applications were approved and denied, criminal and immigration-related civil offenses, and arrests and "apprehensions." The report notes that the data include those who have not been convicted of any crimes.

USCIS Completes Lottery for Temporary Increase in FY 2018 H-2B Cap – USCIS has completed a lottery for H-2B temporary nonagricultural petitions under a temporary final rule that increased the numerical limit, or cap, on H-2B nonimmigrant visas by up to 15,000 additional visas through the end of FY 2018.

ICE Arrests 146 on Immigration Violations at Ohio Meat-Processing Company – ICE said the enforcement action is part of a year-long, ongoing investigation based on evidence that Fresh Mark may have knowingly hired undocumented workers at its meat processing and packaging facility, and that many of these workers are using fraudulent identification belonging to U.S. citizens.

ABIL Global: Australia – Australia has implemented the Temporary Skills Shortage visa and employer nomination sponsored visas.

USCIS Recalls 800 Incorrectly Printed Employment Authorization Documents

On June 21, 2018, U.S. Citizenship and Immigration Services (USCIS) began recalling approximately 800 employment authorization documents (EADs) that were issued in conjunction with Form I-589, Application for Asylum and for Withholding of Removal, which were granted by USCIS asylum officers. USCIS said the cards contain a production error that transposed the first and last names of the individuals receiving the EADs. USCIS mailed these cards to recipients in April and May 2018.

USCIS said it is sending notices to individuals who received the incorrect EADs, as well as to their attorneys or accredited representatives, if a G-28 was submitted with the corresponding Form I-589. The agency said the affected individuals should return their incorrect EADs to USCIS in the provided pre-paid envelope within 20 days of receiving the notice. Recipients may also return their EADs to a USCIS field office. Replacement EADs will be sent within 15 days of receiving the incorrect card, USCIS said.

USCIS noted that the recall does not affect these individuals' employment authorization because they are authorized for employment without needing an EAD. Affected recipients' Forms I-94 showing that they were granted asylum is also evidence that they are authorized to be employed. USCIS said that any affected individuals who need proof of their employment authorization can notify the USCIS Contact Center.

The USCIS notice is at https://www.uscis.gov/news/alerts/uscis-recall-800-incorrectly-printed-employment-authorization-documents. More information about the USCIS Contact Center, including the telephone numbers to call, is at https://www.uscis.gov/contactcenter.

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ICE/SEVP Warns Students About Volunteer Positions

U.S. Immigration and Customs Enforcement's Student and Exchange Visitor Program office broadcast the following on May 18, 2018, to students on optional practical training (OPT):

Volunteer positions that are not directly related to your course of study do not qualify as and must not be listed as OPT employment. Reporting non-qualifying volunteer opportunities as OPT employment will be deemed a violation of your reporting requirements and subject you to removal from the United States.

In addition, non-qualifying volunteer positions do not stop the accrual of unemployment which is limited to a total of 90 days during OPT. Accordingly, if you have been unemployed for more than 90 days, you must leave the United States or be subject to removal even if you have volunteered while unemployed.

Note: A volunteer position does not meet the conditions of a science, technology, engineering and mathematics OPT extension.

The alert is at https://www.ice.gov/sites/default/files/documents/Document/2018/bcm-1805-01.pdf.

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USCIS Releases Data on DACA Requestors With 'Criminal Arrest Record'

U.S. Citizenship and Immigration Services (USCIS) recently released data on Deferred Action for Childhood Arrivals (DACA) requestors who have a "criminal arrest record." USCIS said the report includes those whose DACA applications were approved and denied, criminal and immigration-related civil offenses, and arrests and "apprehensions." The report notes that the data include those who have not been convicted of any crimes.

The report notes that since 2012, about 1% of approved DACA requestors have an arrest in any given year. "An arrest indicates the individual was arrested or apprehended only and does not mean the individual was convicted of a crime. Further, individuals may not have been charged with a crime resulting from the arrest, may have had their charges reduced or dismissed entirely, or may have been acquitted of any charges. Errors may result from the mining of complex text files."

A breakdown on approved DACA requestors with a prior arrest, by type of offense, shows that the vast majority were for driving-related offenses (20,926),

which include driving without a valid license, moving and non-moving violations, and speeding, but exclude driving under the influence. The next-largest category of offense was immigration-related, which include visa overstays, immigration holds, and removal and deportation proceedings.

The report is at https://bit.ly/2K5OO47.

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USCIS Completes Lottery for Temporary Increase in FY 2018 H-2B Cap

U.S. Citizenship and Immigration Services (USCIS) has completed a lottery for H-2B temporary nonagricultural petitions it began receiving on May 31, 2018, under a temporary final rule that increased the numerical limit, or cap, on H-2B nonimmigrant visas by up to 15,000 additional visas through the end of fiscal year (FY) 2018. In the first five business days of filing, USCIS received petitions for more beneficiaries than the number of H-2B visas available under the FY 2018 supplemental cap. USCIS used a computer-generated selection process to randomly select enough petitions to meet, but not exceed, the increased H-2B cap for FY 2018. USCIS ran this lottery on June 7, 2018, and on June 11, 2018, began issuing notifications to the selected petitioners.

USCIS said it is rejecting and returning unselected petitions with their filing fees, as well as any cap-subject petitions received after June 6, 2018. Petitions accepted for processing will have a receipt date of June 11, 2018. Premium processing service for these petitions begins on that receipt date. Only employers whose petitions were accepted will receive receipt notices.

USCIS noted that a petition may be denied if USCIS discovers, after a petition has been filed, that an original approved temporary labor certification (TLC) was not submitted with the petition in accordance with the Form I-129 instructions, or if a petitioner requests more workers than were certified on the TLC. USCIS will not refund fees for a petition that has been denied.

USCIS continues to accept H-2B petitions that are exempt from, or not counted toward, the cap. These include petitions for:

- Current H-2B workers in the United States seeking to extend their stay and, if applicable, change the terms of their employment or change their

employers;
- Fish roe processors, fish roe technicians, or supervisors of fish roe processing; and
- Workers performing labor or services in the Commonwealth of the Northern Mariana Islands and/or Guam, until December 31, 2019.

USCIS noted that Congress set the H-2B cap at 66,000 per fiscal year, with 33,000 for workers who begin employment in the first half of the fiscal year (October 1 through March 31) and 33,000 for workers who begin employment in the second half of the fiscal year (April 1 through September 30). The 15,000 additional visas for FY 2018 are available only to U.S. businesses which, among other requirements, attest that they will likely suffer irreparable harm without the ability to employ all the H-2B workers requested in their petitions.

The USCIS notice is at https://www.uscis.gov/news/alerts/uscis-completes-lottery-temporary-increase-fy-2018-h-2b-cap. Information on premium processing is at https://www.uscis.gov/forms/how-do-i-use-premium-processing-service. More information on the cap count for H-2B nonimmigrants is at https://www.uscis.gov/working-united-states/temporary-workers/h-2b-non-agricultural-workers/cap-count-h-2b-nonimmigrants.

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ICE Arrests 146 on Immigration Violations at Ohio Meat-Processing Company

U.S. Immigration and Customs Enforcement's (ICE) Homeland Security Investigations (HSI) unit executed a criminal search warrant at Fresh Mark in Salem, Ohio, on June 19, 2018, and federal document search warrants at three other Fresh Mark locations in northern Ohio. During the search warrant execution, authorities identified 146 Fresh Mark employees working at the Salem meat processor who were subject to arrest for immigration violations.

ICE said the enforcement action is part of a year-long, ongoing HSI investigation based on evidence that Fresh Mark may have knowingly hired undocumented workers at its meat processing and packaging facility, and that many of these workers are using fraudulent identification belonging to U.S. citizens.

The action was coordinated with HIS's federal, state, and local counterparts,

including the Northern District of Ohio's U.S. Attorney's Office; U.S. Border Patrol, ICE Enforcement and Removal Operations; U.S. Customs and Border Protection Air and Marine Operations; HSI Detroit and Chicago Special Response Teams; the Salem Police Department; and the Columbiana County Sheriff's Office.

ICE said that in the context of any enforcement action, "ICE utilizes prosecutorial discretion on cases involving humanitarian concerns, such as health or family considerations." Accordingly, during the June 19 action, "several individuals were processed and released from custody the same day as a result of humanitarian considerations," ICE said. Aliens who are being detained will be transported to a nearby processing facility and placed in removal proceedings. Aliens will be detained in facilities in Michigan and Ohio while awaiting removal proceedings.

A 24-hour toll-free detainee locator hotline is available for family members of those arrested in the operation to field questions about detention status and the removal process. The hotline operates in English and Spanish; the phone number is 1-888-351-4024.

The ICE notice is at https://www.ice.gov/news/releases/ice-executes-federal-criminal-search-warrants-fresh-mark-146-arrested-immigration.

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ABIL Global: Australia

Australia has implemented the Temporary Skills Shortage visa and employer nomination sponsored visas.

While certain transitional arrangements remain, the old Subclass 457 Visa in Australia has now been replaced by the Temporary Skills Shortage (TSS) Visa (Subclass 482).

As with the previous 457 process, the TSS visa process consists of three separate applications: the application by the employer to be approved as a sponsor, the nomination, and the visa application. To sponsor an employee, the employer must be approved as a Standard Business Sponsor. Sponsorship approvals may be valid for five years. In certain circumstances, a sponsor may seek accreditation, which may enable future nominations and may expedite

visas for that accredited sponsor.

Central to the nomination application has been the establishment of two separate lists of approved occupations: the Short-Term Skills Occupation List (STSOL) and the Medium and Long-Term Strategic Skills List (MLTSSL). Visas granted relating to nominations of occupations on the STSOL will only be granted for a two-year period. After the two years, a further and final period of two years may be sought. Where International Trade Obligations apply, a four-year visa may be granted. Visa applications granted relating to nominations for occupations on the MLTSSL may be approved for a four-year period.

Only the holders of TSS visas relating to MLTSSL occupations are entitled to be nominated for an Employer Nomination Subclass 186 Permanent Visa. This provision has caused substantial angst. After criticism, certain revisions of the lists have already taken place and occupations previously on the STSOL have been removed and inserted on the MLTSSL.

Nomination

For a nomination to be approved, the following criteria must be met:

- It must be made by an approved sponsor;
- It must relate to an occupation appearing on one of the two lists;
- There must be no adverse information relating to the business of the sponsor;
- The position must be genuine and full-time;
- The sponsor must establish that the salary is a market rate salary; and
- There must be evidence of labor market testing.

As mentioned above, labor market testing is now required for all 482 visas subject to certain exemptions relating to international trade obligations. At present, under the regulations, the relevant position must have been advertised twice within the last six months for at least 21 days on two separate occasions. Amendments to this provision specifying a one-month period of advertising within the last four months have been passed by the Upper House but not yet implemented.

A further change, not yet effective, that has passed the Senate is the introduction of the Skilling Australians Fund. Under the previous 457 Program, an employer had to demonstrate that it met certain training benchmarks by providing evidence that it had spent the equivalent of 1% of its payroll in

training Australian employees. Alternatively, if the employer was unable to establish the 1% requirement, it could pay an amount equivalent to 2% of its payroll to a registered training body to meet this benchmark.

The Skilling Australians Fund legislation will replace the training benchmark provisions with the requirement that, at time of nomination, an employer having a turnover of greater than $10 million pay to Fund the sum of $1,800 for each year of the TSS visa. For sponsors having a turnover of less than $10 million, the amount is $1,200. The approved amendments also provide for a cap on the contributions payable by a sponsor.

The current training benchmarks remain in force until the new amendments come into effect.

Visa Application

The following are now the requirements for a TSS visa:

- The visa applicant must be the subject of an approved nomination;
- In certain circumstances, the visa applicant must have completed a skills assessment;
- The visa applicant must meet the English language requirement, unless exempted; and
- The visa applicant must meet health and character requirements.

English language requirement. Applicants who are not subject to an exemption must meet the English language requirement. Note that the English language scores required for those visa applicants applying for occupations appearing on the MLTSSL are higher than those appearing on the STSOL.

Health criteria. The TSS regulations now require medical examinations for all TSS visa applicants.

Character requirements. The TSS regulations now require all TSS visa applicants to provide police clearances. However, visa applicants sponsored by an accredited sponsor are not required to obtain these certificates.

Prior work experience. Both the STSOL and MLTSSL require evidence that the visa applicant has worked in the nominated occupation or a related field for at least two years before filing the application. This provision effectively excludes recent graduates from being sponsored for a TSS visa.

The visa applicant who applies for a STSOL occupation must demonstrate that the application is genuine.

EMPLOYER NOMINATION—SUBCLASS 186 VISA

Below is a brief summary of the requirements for the Subclass 186, Employer Nomination Visa. Certain transitional provisions apply to holders of either a TSS or 457 Visa granted prior to April 2017.

The structure of the Subclass 186 visa is unaffected and still consists of three streams: the Temporary Residence Transition (TRT) Stream; the Direct Entry (DE) Stream, and the Labour Agreements Stream. This brief overview does not discuss the latter.

TRT Stream

The following are the current requirements:

- The applicant must hold a TSS as a nominee for an occupation appearing on the MLTSSL. Transitional arrangements continue to apply to those visa applicants who were granted visas prior to April 2017.
- The applicant must have worked for the employer for at least three of the previous four years in the same position for which he or she has been nominated.

Eligibility for All Streams

The applicant must:

- Have been nominated by an Australian employer within the six months prior to application;
- Be under 45 years at the date of application;
- Have the required skills and qualifications at the time of application;
- Have at the time of application the required English language skills;
- Meet health and character requirements; and
- Generally be less than 45 years old at the time of application. However, certain exemptions apply for those applicants applying for an ENS through the Temporary Residence Transition Stream who have been working for the nominating employer as the holder of a TSS or 457 visa for at least three years and who, in each of those years, have received a salary over $142,000.

English language requirements. Applicants, unless exempted, must prove that they have "competent English". This means that IELTS Level 6 is required in all 4 categories. Other English language tests have been approved.

Skills requirements. All applicants must demonstrate at least three years of relevant work experience and, in the case of the Direct Entry Stream, a valid Skills Assessment in the nominated position.