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MEMORANDUM

To: International Education Program Administrators

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Announcement

We are pleased to announce the addition of several artist and entertainer newsletters on our website. The newsletters cover various topics that may be of interest to those considering an extraordinary O-1 and/or EB1-1 visa. From time to time new articles will be posted. Of course, we welcome any feedback and future topic suggestions. Feel free to distribute them to those who may find them helpful.

1) DHS Defines Prosecutorial Discretion for Removals

The Department of Homeland Security has released an August 18, 2011 letter from Secretary Janet Napolitano to Senator Dick Durbin of Illinois. The letter discusses the use of prosecutorial discretion in prioritizing targets for removal of out of status individuals. The letter expands on the ICE June, 2010 Memorandum by Director John Morton which set forth ICE priorities. Apparently, that Memo, as well as an August 10th ICE Memo, were not enough to inspire the ICE rank and file.

Homeland Security has now created an Advisory Task Force made up of individuals from various Homeland Security components as well as immigration advocates and academics. The Advisory Task Force will study the use of the Secure Communities program and its effect on removing individuals who are supposed to have been criminals, but often turned out to have been arrested for a broken tail light. The Task Force will develop an interagency process to "…identify low-priority removal cases that should be considered for an exercise of discretion." Review will be on a case-by-case basis and will consider cases already within the removal process. It will also issue case guidance on a case-by-case basis to prevent low priority cases from entering the system. The object is to save resources which can then be used for removal of high priority criminal aliens.

WHAT THIS PROGRAM IS NOT. It is not an amnesty. There are no regulations or procedures in place at this time. No individual should fall for any story that the government has created a new amnesty. Nobody should pay any money to individuals in order to file a nonexistent application. At this time there is only a statement that individuals already under removal proceedings will have those proceedings reviewed and prioritized. If the individual is found to be a low priority, they are expected to be able to apply for work authorization.

How will this program affect students who are out of status? At this point we cannot even speculate as to the effect of this program on overstayed students, or on lapsed F-1 students. Is a lapsed F-1 student a high or low priority? Will these individuals be looked upon as a threat to the F-1 visa process and, therefore, of high priority, or will they be seen on a case-by-case basis merely as individuals who got caught up in a complex set of regulations? Time will tell.

2) USCIS Issues "Policy Memorandum" on Nonimmigrant Treatment of Cohabitating Partners, and Others

In its continuing pattern of clarifying Service policy by issuing "guidance" instead of publishing a "Notice" in the "Federal Register," USCIS published a "Policy Memorandum" (PM-602-0045) dated August 19, 2011 which, by adapting an expansive definition of the term "household member," conforms USCIS policy to that of the State Department's Visa Office regarding individuals cohabiting with principal nonimmigrants, who are unable to qualify for derivative status. Due to its importance, the "Background" and "Policy" sections are quoted in full:

> **Background**
> In some circumstances, elderly parents, cohabitating nonimmigrant partners, and other household members of principal nonimmigrants may be ineligible for derivative status. For purposes of this memorandum, a "household member" of a principal nonimmigrant is an alien who regularly resides in the same dwelling as the principal nonimmigrant and with whom the principal nonimmigrant maintains the type of relationship and care as one normally would expect between nuclear family members. There are also circumstances when it may be inconvenient or impossible for spouses or children of principal nonimmigrant aliens to apply for the proper derivative status. These aliens may seek B-2 visas, or change their status to B-2, to allow them to reside with the principal nonimmigrant visa holder who is in the United States in another status (H-1B, F-1, etc.). Department of State (DOS) guidance provides for issuance of B-2 visas to these household members. See 9 FAM 41.31 N14.4. DOS guidance directs consular officers to notate the B-2 visa with the principal nonimmigrant's visa type and duration, and to advise the B-2 visa holder to seek admission for one year at the point of entry if the B-2 visa holder plans to stay in the United States more than 6 months. Applicants may also seek extensions in six month increments from the Department of Homeland Security (DHS) for the duration of the principal alien's nonimmigrant status. See 8 CFR 214.2. USCIS guidance relating to B-2 visa extensions is silent on this type of extension. This guidance is intended to ensure USCIS adjudicates these applications uniformly and consistently with the manner in which DOS issues the visas.
>
> **Policy**
> This policy does not change eligibility requirements for change of status to B-2, or extension of B-2 status. Rather, it clarifies that such a change and/or one or more extensions are appropriate in the exercise of discretion for household members, including the cohabitating partner of a principal nonimmigrant visa holder, when

> other eligibility requirements are met. When evaluating an application for change to or extension of B-2 status based on cohabitation, the cohabitating partner's relationship to the nonimmigrant principal alien in another status will be considered a favorable factor in allowing the household member to obtain or remain eligible for B-2 classification. When considering a change of status and/or multiple extensions for the cohabitating partner or other household member, the finite nature of the stay, rather than the duration of the stay or number of extensions sought, is controlling with respect to nonimmigrant intent. For example, the visit should be considered temporary even if the status may be extended several times over several years in order to match an extended course of study undertaken by the principal alien. However, while the I-539 (B-2) application must be adjudicated on its own merits, a finding that the principal nonimmigrant lacks nonimmigrant intent is a negative factor in the exercise of discretion.

Although the State Department interpretations have been in effect for several years, USCIS had made no effort to conform its' regulations or policies. Although, nowhere, in the Memorandum is the word "gay" used, its timing makes it obvious, but nonetheless welcome.

Not so welcome is the last sentence in the Policy section: "However, while the I-539 (B-2) application must be adjudicated on its own merits, a finding that the principal nonimmigrant lacks nonimmigrant intent is a negative factor in the exercise of discretion."

This interpretation would appear to contradict statutory and regulatory requirements of "dual intent" which may be found in the H,L,O, and P categories, among others. For example: The cohabiting partner/spouse of an H-1B entrant files an extension of an B-2 status after the principal has filed a PERM Labor Certification, or an I-140 permanent visa petition. Although the H-1B principal remains in the H-1B status, she/he has manifested an intent to remain, which under the concept of "dual intent" would permit extension of the H-1B until she/he obtains the green card. Under the last sentence, the B-2 partner/spouse would be ineligible for a B-2 extension.

Perhaps the last sentence resulted from a negotiated compromise within the USCIS policy cabal. However, these are the problems which develop when the compromised issue is dealt with in piecemeal fashion, and not through comprehensive legislation. Time (and effort) will tell.

3) H-1B Cap Count

On August 26, 2011 USCIS updated the H-1B cap count to note that as of August 12, 2011, approximately 29,000 H-1B cap-subject petitions were receipted against the 65,000 total cap.

Further, USCIS has also receipted 15,800 H-1B petitions against the 20,000 cap for beneficiaries with advanced degrees.

1) SEVP Developments

SEVP has been busy distributing broadcast messages. Broadcast message 1108-01 sets forth SEVIS password policy to use in designating PDSOs and DSOs. It has also distributed a check list for PDSOs and DSOs for those individuals to use in requesting updates to PDSO and DSO lists in SEVIS.

Broadcast message 1107-04A sets forth a change in process for transferring students from the University of Northern Virginia (UNVA). New DSOs have been appointed and transferee DSOs may now be in direct contact with UNVA. UNVA students can continue to call SRC at 703-603-3400 which will be staffed from 7am-5pm.

2) DHS Publishes Business Transformation Regulation

On August 29, 2011 DHS posted an announcement regarding the first of a series of transformation regulations. The announcement describes how the regulations are designed to help USCIS move towards a paperless operation. NAFSA.news of August 30, 2011 posted a summary of the regulation (as did USCIS). For those of you who ran out of summer reading, a PDF of the entire regulation may be found here.

3) NAFSA Comments on Improving I-765

In response to a “Federal Register” Notice of July 20, 2011 regarding form I-765, NAFSA has noted that I-765 instructions regarding full time off campus employment authorization pursuant to “special student relief” should be added; as well as amending the instructions to clarify procedures for M-1 students seeking post completion practical training. An amendment is also sought to instructions to clarify eligibility codes at item 16, as well as to add an “in care of” line in the address fields.

4) DOL Developments

- DOL Stakeholder Conference Call

A summary of the August 18th stakeholder's conference call between the Department of Labor's Office of Foreign Labor Certification and NAFSA, ACIP, and AILA discusses delays in prevailing wage determinations, as well as missing ACWIA codes from iCERT. As a result of a court order, DOL was required to re-determine prevailing wage requirements for the H-2B category. DOL states it hopes to complete their re-determinations by September 30, 2011. In the meantime, prevailing wage requests for H-1B and permanent or PERM labor certifications are not being adjudicated, and serious backlogs have resulted. Prevailing wage findings are only good for three months and recruitment advertising is only valid for six months. In order to avoid having to re-advertise at significant cost, it may be necessary to file a PERM application with an expired prevailing wage determination. What effect this will have on PERM applications is unknown, nor will the Labor Department disclose how these issues will be handled, as this problem was completely the fault of the Labor Department. Those of you who are involved with the Labor Department will need to wait and see.

- Electronic PERM Ads Permitted – King Canute Retires

For many years the Labor Department required a college or university which was filing a labor certification application for a faculty member to advertise the position in a print journal. DOL stuck to this position refusing to recognize that most, if not all, academic employment advertising in recent years has been done electronically. After the Board of Alien Labor Certification appeals told DOL that is must accept electronic postings, DOL had agreed to do so.

Follows in a Q&A recently released by DOL:

> **Question: Is the employer permitted to use an electronic or web-based national professional journal instead of a print journal when conducting recruitment under 20 CFR 656.18, Optional special recruitment and documentation procedures for college and university teachers?**
>
> **Answer:** Yes, an employer may use an electronic or web-based national professional journal to satisfy the provision found at 20 CFR 656.18(b)(3), which requires use of a national professional journal for advertisements for college or university teachers. The electronic or web-based journal's job listings must be viewable to the public without payment of subscription and/or membership charges. The advertisement for the job opportunity for which certification is sought must be posted for at least 30 calendar days on the

journal's website. Documentation of the placement of an advertisement in an electronic or web-based national professional journal must include evidence of the start and end dates of the advertisement placement and the text of the advertisement.

5) 2012 DV Lottery Instructions

The State Department has been very assiduous in notifying DV12 applicants that winners will not receive notice by either snail mail or by email. All applicants will have to check their applications by going to http://www.dvlottery.state.gov between May 1, 2011 and June 30, 2012. If individuals receive notifications in any other manner that they have won (which will usually require sending a check somewhere) the notice should be ignored as a scam.

6) Reminder to File for TPS Extension for Haitians

USCIS has reminded eligible Haitians to file for Temporary Protective Status (TPS). Those filing for the first time may do so through November 15, 2011. Those with pending applications as of May 19, 2011 will not need to file a new application. Those re-registering must have done so no later than August 22, 2011. Their EADs will automatically be extended through January 22, 2012. A "USCIS Update" dated August 12, 2011 may be found at www.uscis.gov.

7) Deferred Enforced Departure for Liberians

On August 16, 2011 the Secretary of Homeland Security published a Release extending Deferred Enforced Departure for Liberians for eighteen months from September 30, 2011. Although the civil war in Liberia ended in 2003 and conditions have improved such that TPS ended on October 1, 2007, the Bush administration deferred enforced departure of Liberians previously granted TPS. The current administration had extended DED again, through September 30, 2011. A Q&A on this topic was recently posted on www.uscis.gov. The PDF may be found by clicking here.

8) E-Verify Self Check Comes to New York and New Jersey

USCIS has noted an amendment to E-Verify self check. You may now find out in both Spanish and English if you can legally work if you live in the states of New York and New Jersey, among others. Good luck!

9) Statistics Time!

- J-1 Home Residence Waivers for FY2010

  The State Department has distributed its 212(e) waiver recommendation statistics for fiscal year 2010. For those individuals subject to a two year home residence requirement who sought waivers the results are:

  No objection statement: favorable 4786, unfavorable 155

  Exceptional hardship: favorable 213, unfavorable 65

  Persecution: favorable 24, unfavorable 1

  Interested government agency: favorable 165, unfavorable 6

  Physician waivers were unanimously approved.

- Who Are Our International Students

  The "Chronicle of Higher Education" reported on August 16, 2011 that admission offers to international students by U.S. graduate schools have climbed at a higher pace this year than in prior years. Graduate students from China, India, and Korea are now fifty percent of the international student population. Acceptances of Chinese students increased 23%, Indian students by 8%, but Korean students were flat. Offers to students from the Middle East and Turkey increased by 16% over 2010. In general, international students comprise approximately 15% of all graduate enrollments.

Many thanks for your comments, your suggestions and for referring your students, scholars and faculty members.

Please let me know if you have any questions, or if you would like copies of any of the materials covered.