

Immigration & Naturalization Law

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I. Introduction

Several changes to immigration law were enacted in countries around the world in 2012.¹ Some of the new laws increase mobility, including deferred action for qualified youth in the United States, eased travel regulations for Cuban nationals, and additional recognition for same-sex couples in Italy. Other changes are responses to global dynamics, such as the high number of refugees from the Syrian crisis and the shortage of skilled labor in Germany. Regardless of the nation, the shifts of 2012 indicate significant global shifts in immigration policy in the coming years.

II. Deferred Action for Childhood Arrivals

On June 15, 2012, the Secretary of the Department of Homeland Security (DHS) announced the Obama Administration's new immigration policy for eligible young foreign nationals.² DHS has since named this program "Deferred Action for Childhood Arrivals" (DACA).³ The new U.S. immigration policy operates as a grant of positive discretion to a qualifying foreign national. The benefits of receiving a grant of deferred action include: (1) DHS's agreement not to remove (deport) the recipient during an initial period of two

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1. For developments during 2011, see Qiang Bjornbak et al., *Immigration and Naturalization Law*, 46 INT'L LAW. 335 (2012). For developments during 2010, see David W. Austin et al., *Immigration and Naturalization Law*, 45 INT'L LAW. 329 (2011).

2. Press Release, Dep't Homeland Sec., Secretary Napolitano Announces Deferred Action Process for Young People Who Are Low Enforcement Priorities (June 15, 2012), <http://www.dhs.gov/news/2012/06/15/secretary-napolitano-announces-deferred-action-process-young-people-who-are-low>.

3. Memorandum from Janet Napolitano, Sec'y U.S. Dep't of Homeland Sec., on Exercising Prosecutorial with Respect to Individuals Who Came to the United States as Children to David Aguilar, Acting Comm'r, U.S. Customs & Border Prot., Alejandro Mayorkas, Dir., U.S. Citizenship & Immigration Servs., and John Morton, Director, U.S. Immigration & Customs Enforcement (June 15, 2012), available at <http://www.dhs.gov/xlibrary/assets/s1-exercising-prosecutorial-discretion-individuals-who-came-to-us-as-children.pdf>.

years and (2) employment authorization for the same period.⁴ DACA helps DHS prioritize its resources to deport those who pose a serious threat to national security and public safety.

An applicant may request a discretionary grant of deferred action for a temporary period of two years, subject to renewal, if the applicant:

1. Was under the age of 31 as of June 15, 2012;
2. Entered the United States before his or her 16th birthday;
3. Has continuously resided in the United States since June 15, 2007 up to the present time (brief, innocent, and casual departures are acceptable as long as they were before August 15, 2012, or the applicant has received deferred action and has received authorization from DHS for advance parole for departures made after August 15, 2012);
4. Was physically present in the United States on June 15, 2012 and continues to be present in the United States at the time of filing the deferred action consideration request with U.S. Citizenship and Immigration Service (USCIS);
5. Entered the United States without inspection before June 15, 2012 or the applicant's lawful immigration status expired as of June 15, 2012;
6. Is currently in school, has graduated or obtained a certificate of completion from high school, has obtained a general education development (GED) certificate, or is an honorably discharged veteran of the Coast Guard or Armed Forces of the United States; and
7. Has not been convicted of a felony, significant misdemeanor, three or more other non-significant misdemeanors, and does not otherwise pose a threat to national security or public safety.⁵

The USCIS began accepting applications for this discretionary benefit on August 15, 2012.⁶ The process includes two separate forms and a government filing fee of \$465.⁷ Applicants must be fifteen years old or older to apply affirmatively through USCIS, unless the applicant is in removal proceedings before an immigration court, has received a final order of removal or order of voluntary departure from an immigration judge, or has had removal proceedings terminated or administratively closed by an immigration judge.⁸

Basic evidence should prove the applicant's eligibility for deferred action and economic need for employment. Documentation may include financial, medical, school, employment, and military records to prove that the applicant entered the United States before age sixteen, was physically present in the United States on June 15, 2012, and has accumu-

4. *Id.*

5. *Guidelines: Consideration of Deferred Action for Childhood Arrivals*, U.S. CITIZENSHIP & IMMIGRATION SERVS., (last updated Nov. 30, 2012).

6. Allan Wernick, *Here's What You Need to Know About the Deferred Action Program for Immigrants*, NY DAILY NEWS (Aug. 8, 2012, 4:00 AM), <http://www.nydailynews.com/new-york/citizenship-now/deferred-action-program-immigrants-article-1.1130027>.

7. *Id.*

8. *See Guidelines: Consideration of Deferred Action for Childhood Arrivals*, *supra* note 5.

lated more than five years of continuous residence in the United States before June 15, 2012.⁹

In general, USCIS has stated that it will not disclose applicants' or their families' or guardians' personal information to Immigration and Customs Enforcement (ICE) or the Customs and Border Protection (CBP) for removal enforcement unless "exceptional circumstances" apply or the applicant meets the criteria for a Notice to Appear (NTA) for a referral to ICE as set forth in NTA guidance.¹⁰ USCIS will generally keep information contained in the applications private and will not disclose the information to other federal agencies, unless USCIS determines that the information is needed for fraud or criminal investigative purposes, national security concerns, or public safety issues.

DACA is also available to those who are in removal proceedings, as well as those who have a final removal order or a voluntary departure order as long as the applicants are not detained.¹¹ DACA applicants do not accrue unlawful presence during the period of deferred action.¹²

Because this program is a discretionary policy, it is subject to change as DHS continues to decide how to implement it. Unfortunately, because it is not a law, it confers no rights or benefits. And because it is new, U.S. immigration practitioners are still learning how DHS is adjudicating applications as well as an applicant's chance of success. Despite these limitations, the program can be useful as a mechanism for those who qualify to stay in the United States for at least two years with employment authorization. This period may be significant for those who qualify to allow them the time to remain in the United States with the right to work while waiting for other relief to become available or a more substantial change in the law.

The DACA program has been criticized as a way to open a back door for the proposed DREAM (Development, Education, and Relief for Alien Minors) Act.¹³ The DACA program is different from the proposed DREAM Act (originally put forth by Senator Richard Durbin, D-Illinois) in several respects. First, DACA does not confer a lawful status to the applicant while the proposed DREAM Act provides a path to lawful permanent residence to undocumented young applicants. DACA is an agency regulation that provides only temporary relief that is subject to renewal. Second, the proposed DREAM Act requires undocumented young applicants to be under the age of thirty rather than under thirty-one as required by DACA. Third, the proposed DREAM Act requires the undocumented young applicants to be free of criminal records. Finally, USCIS has discretion to grant DACA applications even if the applicants meet all the requirements.

9. *Id.* (Filing Process for Consideration of Deferred Action for Childhood Arrivals).

10. See U.S. DEP'T HOMELAND SECURITY, U.S. CITIZENSHIP & IMMIGRATION SERVS., PM-602-0050 (Nov. 7, 2011), available at www.uscis.gov/nta.

11. Frequently Asked Questions, U.S. CITIZENSHIP & IMMIGRATION SERVS., <http://www.uscis.gov/portal/site/uscis/menutitem.eb1d4c2a3e5b9ac89243c6a7543f6d1a/?vgnnextoid=3a4dbc4b04499310VgnVCM100000082ca60aRCRD&vgnnextchannel=3a4dbc4b04499310VgnVCM100000082ca60aRCRD> (last updated Sept. 14, 2012).

12. *Id.*

13. For the text of the proposed DREAM Act, see S. 952, 112th Cong. (2011), available at http://durbin.senate.gov/public/index.cfm/files/serve?File_id=d15181fd-e37b-4ad6-9ca3-c5b2850c140c.

III. Temporary Protected Status for Syrian Refugees

During 2012, the bloody conflict between the Syrian government and opposition fighters continued to escalate, as did the continued diaspora of Syrians fleeing the violence to neighboring countries and throughout the world.¹⁴ Since the beginning of the conflict, close to 700,000 people have left Syria because of the fighting.¹⁵ But, to date, only the United States and Turkey have offered Temporary Protected Status (TPS) to Syrian refugees. Jordan has in place a de facto temporary protection policy for Syrians seeking refuge.¹⁶ Similarly, other countries, such as Iraq and Lebanon, have opened their borders and allowed the establishment of refugee camps, but have no formal TPS program or policy in place.¹⁷

No country in the European Union has announced a TPS or similar program for Syrian refugees.¹⁸ While Syrian refugees, like other foreign nationals, may apply for asylum in any European country under international law, asylum applies to protect only someone who is a “refugee” in the legal sense; in other words, an individual who can establish an individualized, well-founded fear of persecution based on political opinion, race, nationality, religion, or membership in a particular social group.¹⁹

Conversely, TPS does not require a showing of a fear of persecution based on membership in a protected class but is instead typically granted to all eligible individuals of a country when current conditions in their country caused by civil strife or an environmental disaster make it too dangerous for their safe return.²⁰

A. UNITED STATES TPS

On March 29, 2012 the U.S. DHS Secretary designated the Syrian Arab Republic for TPS based on a finding of “extraordinary and temporary conditions in Syria that prevent Syrian nationals from returning in safety, and that permitting such aliens to remain temporarily in the United States would not be contrary to the national interest of the United States.”²¹ U.S. TPS applies only to Syrian nationals who have continuously resided in and been continually physically present in the United States since March 29, 2012.²²

Individuals granted TPS in the United States may also apply for an Employment Authorization Document (EAD), and may stay in the United States as long as the program is in effect, and they continue to timely re-register.²³

14. Neil MacFarquhar et al., *Cold Ravages Syria Refugees as Aid Falts*, N.Y. TIMES, Jan. 26, 2013, at A1.

15. Anne Barnard & Nick Cumming-Bruce, *U.N. Cities Record Numbers as Syrians Flee to Jordan*, N.Y. TIMES, Sept. 11, 2012, at A7.

16. U.N. HIGH COMM’R FOR REFUGEES, SYRIA REGIONAL RESPONSE PLAN 83 (Sept. 2012), available at <http://www.unhcr.org/5062c7429.html>.

17. *Id.* at 45-46, 75.

18. Email from Peter Clarke to author (Nov. 8, 2012) (on file with author).

19. Convention Relating to the Status of Refugees art. 1A(2), July 28, 1951, 19 U.S.T. 6223, 189 U.N.T.S. 150.

20. *See, e.g.*, Immigration and Nationality Act § 244, 8 U.S.C. § 1251a (repealed 1961).

21. Designation of Syrian Arab Republic for Temporary Protected Status, 77 Fed. Reg. 19,026 (Mar. 29, 2012).

22. *Id.* U.S. TPS for Syria also applies to individuals who are stateless, but have “habitually resided” in Syria. *Id.*

23. *Id.*

While U.S. Syrian TPS is currently scheduled to expire on Sept. 30, 2013,²⁴ if current conditions persist in Syria, it is to be expected that it will be extended in additional increments, as has been the case with other TPS programs in the United States.²⁵

B. TPS IN TURKEY

As of September 2012, it was estimated that Turkey may be “hosting and assisting as many as 280,000 Syrian refugees in its camps by the end of 2012.”²⁶ Turkey has in force a formal TPS program for Syrian refugees.²⁷ According to the U.N. High Commissioner on Refugees (UNHCR),

owing to the numbers of Syrians entering Turkey, the homogenous nature of the arrivals, and also the desire expressed by the vast majority of the population to return home when conditions allow, the [Turkish] government has chosen not to attempt to disperse such a sizable population either locally or across the country. .²⁸

Most Syrian refugees in Turkey reside in one of several camps.²⁹ The UNHCR notes that Syrians with family ties in Turkey or with sufficient financial resources “are allowed to reside outside the camps under specific conditions, and are also considered under Temporary Protection.”³⁰ It does not appear that Turkey’s TPS allows beneficiaries to obtain permission to work.

C. JORDAN, LEBANON, AND IRAQ: RESPONSES TO INFLUXES SYRIAN REFUGEES

Jordan does not have a *de jure* or formal TPS program for Syrian refugees. But it has continued its “open border policy” and provides “*de facto* temporary protection to Syrian refugees, crossing legally and illegally into its territory.”³¹

Since July 23, 2012, the government of Iraq has allowed Syrian refugees admission at various designated border points.³² Iraq does not have any formal or informal TPS in effect, although as of January 23, 2013, there were approximately 77,000 Syrian refugees in Iraq³³ who are mainly relegated to living in camps established by the Iraqi authorities.

24. *Id.*

25. RUTH ELLEN WASEM & KARMA ESTER, CONG. RESEARCH SERV., RS 20844, TEMPORARY PROTECTED STATUS: CURRENT IMMIGRATION POLICY AND ISSUES 3-5 (2010) (noting that “aliens from seven countries currently have TPS,” and listing current and past TPS programs, virtually all of which have been repeatedly extended.).

26. SYRIA REGIONAL RESPONSE PLAN, *supra* note 16, at 83.

27. *See id.* at 83.

28. *Id.*

29. *Id.*

30. *Id.*

31. *Id.* at 17.

32. *See id.* at 91.

33. *See Syria Regional Refugee Response*, UNHCR – THE UN REFUGEE AGENCY, <http://data.unhcr.org/syrianrefugees/regional.php> (last updated Jan. 23, 2013).

As of January 25, 2013, Lebanon was hosting over 155,000 Syrians.³⁴ Lebanon has not set up camps for refugees, and most refugees have settled in various parts of the country.³⁵ They are not allowed to work or travel within Lebanon at will.³⁶

IV. European Union

The European Council adopted the Blue Card Directive in 2009; it now works alongside the single permit directive of 2011 to form the EU Blue Card Scheme.³⁷ The Blue Card is a residence and work permit that provides distinct immigration advantages for highly skilled, non-EU nationals, salaries equal to EU nationals, socio-economic rights, permanent residence status, a system for family reunification, and mobility throughout the European Union.³⁸ Both Germany and Portugal enacted legislation in 2012 to enter into compliance with the European Union's Blue Card directive.

A. GERMANY

Germany introduced additional changes to the Blue Card guidelines in August 2012 in an effort to offer the same benefits as the U.S. "green card," a phrase commonly used to describe those with Lawful Permanent Residence status.³⁹ The Blue Card is available to those with a university degree, or "certified qualifications based on at least five years of work experience,"⁴⁰ earning a gross annual salary of at least €44,800.⁴¹ The salary calculations are derived from an EUE regulation that requires the pay of Blue Card holders' to be 1.2 to 1.5 times higher than the average national salary.⁴² But Germany has made special provisions for certain jobs. Several industries in Germany have experienced shortages in recent years, including the automotive, engineering, research and development, and healthcare industries.⁴³ For jobs in those industries, the minimum required salary to be eligible is at a reduced level of €34,944.⁴⁴

One industry in particular, information technology, highlights the challenges Germany faces in attracting skilled immigrants. When compared with the United Kingdom, United

34. *Id.*

35. SYRIA REGIONAL RESPONSE PLAN, *supra* note 16, at 52.

36. *See id.* at 9.

37. EU BLUE CARD, EU BLUE CARD NETWORK, <http://www.apply.eu/BlueCard/> (last visited Jan. 22, 2013).

38. *See id.* The Blue Card is available only for non-EU nationals who possess a higher education and have a valid work contract or binding job offer in the European Union. *Id.*

39. *See* Monika Lohmüller, *Labor Market: Blue Card Labor Scheme Convinces Few*, DEUTSCHE WELLE [GERMAN WAVE] (Nov. 11, 2012), <http://www.dw.de/blue-card-labor-scheme-convinces-few/a-16398743>.

40. *See* Sabine Kinkartz, *Immigration: German 'Blue Card' to Simplify Immigration*, DEUTSCHE WELLE [GERMAN WAVE] (Apr. 28, 2012), <http://www.dw.de/german-blue-card-to-simplify-immigration/a-15915424>.

41. *See German Immigration Policy Update*, NAIR & CO. (Nov. 27, 2012), <http://www.nair-co.com/GermanyOpensMarketforHighlyskilledProfessionals-27-11-2012.aspx>.

42. Kinkartz, *supra* note 40.

43. Lohmüller, *supra* note 39.

44. *German Immigration Policy Update: Opens Labor Market for Highly-Skilled Professionals*, *supra* note 41.

States, and Australia, Germany poses both a language barrier and a unique culture for students who have already learned English, such as those in India.⁴⁵

B. PORTUGAL

Portugal also enacted a new law (29/2012) in August 2012 to implement several EU directives and immigration policies, including the introduction of the EU Blue Card.⁴⁶ Blue Card holders in Portugal receive the status for an initial year and are eligible for renewal in two year increments. Other benefits include the freedom to change employers without prior authorization after the first two years, access to work in other EU Member States after a period of 18 months, work permits for spouses, and permanent residency after five years.⁴⁷

Amendments to the Portuguese Immigration Law took effect on October 9, 2012.⁴⁸ In addition to the aforementioned Blue Card guidelines, the amendments will increase the amount of time of authorized residence for those with temporary visas from the current ninety days to a new maximum of four months.⁴⁹ The changes also place more restrictions on foreign nationals working as local employees in high skill occupations; when seeking residence visas, they “must earn at least [one and a half times] the gross national average wage, or three times the Portuguese social security index value.”⁵⁰ New regulations apply to job creators as well, providing incentives as well as penalties. First, foreign nationals who intend to contribute “at least €1,000,000 in capital, purchase property with a value of at least €500,000, or create at least 30 jobs” in Portugal are now able to receive a residence permit after they arrive in the country as a visitor, eliminating the need to arrange for residence visas before travelling.⁵¹ As for penalties, anyone who employs or facilitates the employment of unauthorized foreign workers is now subject to criminal penalties, including one to six years in prison. Furthermore, those businesses that employ unauthorized foreign workers will face fines ranging from €2,000 to €90,000, calculated according to the number of unauthorized workers employed.⁵²

C. ITALY

Finally, several decisions by government and judicial officials throughout Italy indicate the country’s recognition of same-sex partners in immigration matters. In early 2012, a judge in Reggio Emilia, Italy, recognized the family status of an Italian citizen and his

45. See Kai Küstner, *Blue Card: Bait for Skilled Foreign Workers?*, DEUTSCHE WELLE [GERMAN WAVE] (Jan. 8, 2012), <http://www.dw.de/blue-card-bait-for-skilled-foreign-workers/a-16136043>.

46. Lei no. 29/2012, de 9 de Agosto de 2012, DIÁRIO DA REPÚBLICA [D.R.] 154 de 9.8.2012 (Port.) (4191); see *Alterations to Portuguese Immigration Law*, RELOCATE MAG. (Aug. 29, 2012, 10:16 AM), <http://www.relocatemagazine.com/immigration-a-visas/immigration-a-visa-news-main/5746-alterations-to-portuguese-immigration-law>.

47. See *Alterations to Portuguese Immigration Law*, *supra* note 46.

48. *Id.*

49. See *id.*

50. See *id.*

51. See *id.*

52. *Id.*

partner, a Uruguayan, who were married in Spain.⁵³ In the ruling, the judge recognized that while each EU member state has the right to determine its own laws regarding families and marriage, EU member states must also recognize their responsibility to apply the rules governing the free movement of EU citizens and their families.⁵⁴

Later in the year, the immigration authorities in Rome authorized a permit of stay for the same-sex Israeli partner of an Italian citizen, while another permit of stay was granted for a couple who married in Canada.⁵⁵ On October 26, 2012, the Italian Ministry of Internal Affairs officially announced that “same-sex partners of Italian or European Union (EU) citizens are entitled to obtain a family permit of stay in Italy, provided that their marriage is duly registered and recognized by the foreign country where the marriage was celebrated.”⁵⁶

V. Cuban Exit Visas

On October 16, 2012, the Cuban government announced its intention to remove the current exit visa requirement by January 14, 2013, a change that has the potential to allow more Cubans to leave the country with only a passport and a visa from the country of their destination.⁵⁷ The new policy was promised by Cuban President Raul Castro in 2011 and formally announced in the Communist Party newspaper, *Granma*.⁵⁸ Even with the changes, Cubans already in possession of a passport will need to get their passports renewed.⁵⁹ Nevertheless, the new law maintains prohibitions on travel for certain people. Cubans with pending criminal charges, as well as those with civil, military, or national-security obligations, are unlikely to receive authorization.⁶⁰ Because the government also desires to minimize brain drain and preserve its human capital, restrictions are in place for Cubans with jobs linked to the “economic, social and technical or scientific development,” or “security and the protection of official information.”⁶¹

Some analysts have suggested the lifted travel restrictions are motivated by financial incentives — by increasing the number of people able to leave the country, Cuba can expect additional remittances from its citizens working abroad.⁶² Indeed, remittances to Cuba have risen from US \$1 billion in 2004 to approximately US \$2.3 billion a year at

53. Reggio Emilia, *Uruguayano Sposato con Italiano Ottiene Permesso di Soggiorno* [Uruguayan Marries Gets Italian Residence Permit], LA REPUBBLICA [REPUBLIC] (Mar. 26, 2012), http://www.repubblica.it/cronaca/2012/03/26/news/permesso_soggiorno_uruguayano_sposato_italiano-32223979/?ref=HREC1-4.

54. *Id.*; see Council Directive 2004/38, 2004 O.J. (L 158) 77 (EC).

55. *Italy Immigration: Ministry of Internal Affairs Validates Same Sex Partnerships*, RELOCATE MAGAZINE (Nov. 15, 2012, 10:28 AM), <http://www.relocatemagazine.com/immigration-a-visas/immigration-a-visa-news-main/6556-italy-immigration-ministry-of-internal-affairs-validates-same-sex-partnerships>.

56. *Id.*

57. Damien Cave, *Easing Path Out of Country, Cuba is Dropping Exit Visas*, N.Y. TIMES, Oct. 17, 2012, at A1, available at http://www.nytimes.com/2012/10/17/world/americas/cuba-lifts-much-reviled-rule-the-exit-visa.html?pagewanted=all&_r=0.

58. *Id.*

59. *Id.*

60. Tracey Eaton, *Goodbye, Cuban Exit Visas*, THE DAILY BEAST (Oct. 17, 2012, 8:40 AM), <http://www.thedailybeast.com/articles/2012/10/17/goodbye-cuban-exit-visas.html>.

61. *Id.*

62. Cave, *supra* note 57.

present.⁶³ In addition to removing the exit visa, the new law increases the period of time Cubans can live abroad to twenty-four months; extensions can be requested if they desire to stay longer.⁶⁴ At present, “Cubans lose residency and their rights to property, social security, free health care and free education after [eleven] months overseas.”⁶⁵ The third major change removes the requirement of a letter of invitation from a sponsoring institution or a person in the destination country for an individual to be able to leave the country.⁶⁶

The changes in Cuba’s migration guidelines are another example of how Raul Castro has gradually eased restrictions since succeeding his brother in 2008.⁶⁷ Other recent restrictions have permitted opening private small businesses, owning cell phones, staying in hotels typically used by tourists, and buying and selling homes and cars.⁶⁸

Current U.S. immigration policy is best known as “wet foot, dry foot;” Cubans caught at sea are returned to Cuba or another country, while those who make it to dry land are able to apply for residency.⁶⁹ U.S. officials have not indicated any desire to change this policy, despite the potentially large number of Cubans who will be able to travel to the United States and choose to remain.

VI. Changes in Australian Immigration Law

There were quite a few changes in the Australian migration system this year, perhaps the most notable being the revamp of the permanent employer sponsored visa program. According to the Department of Immigration and Citizenship (DIAC), the reasons for the changes are to “improve the program’s ability to meet Australia’s economic needs, respond quickly to labour market demand, [and] ensure that limited program places go to those who will make the greatest contribution to Australia.”⁷⁰

The main reforms were as follows:

- collapsed the existing visa subclasses from six to two (although the two new subclasses have three “streams” each, so in reality there are still six categories);
- created a clear-cut pathway to permanent residence for 457 long-term work visa holders;
- raised the upper age limit from forty-five to fifty years;
- increased the English language requirements for certain applicants;

63. *Id.*

64. Peter Orsi & Andrea Rodriguez, *Cuba Scraps Exit Visa Requirement, Eliminating Major Impediment for Travel Overseas*, HUFFINGTON POST (Oct. 16, 2012, 7:22 PM), http://www.huffingtonpost.com/2012/10/16/cuba-scraps-exit-visa_n_1969188.html.

65. *Id.*

66. *Id.*

67. *Cuba to End Exit Permits for Foreign Travel*, BBC (Oct. 16, 2012, 2:53 AM), <http://www.bbc.co.uk/news/world-latin-america-19958577>.

68. Orsi & Rodriguez, *supra* note 64.

69. Eaton, *supra* note 60.

70. DEP’T IMMIGRATION & CITIZENSHIP, REFORMS TO THE PERMANENT EMPLOYER SPONSORED VISA PROGRAM (May 2012) *available at* (Austl.).

- created one consolidated list of qualifying occupations, which replaced the 457 occupation list, the Employer Nomination Skilled Occupation List (ENSOL), and the State and Territory Sponsored Occupation List (StatSOL);
- integrated the new Employer Nomination Scheme (ENS) and Regional Sponsored Migration Scheme (RSMS) visas with the new skilled migrant selection model — SkillSelect — an online system whereby applicants with sufficient “points” as per the relevant points test can submit an “Expression of Interest,” which Australian employers and other bodies looking for labor can view and select for further processing; and
- replaced the somewhat subjective exceptional circumstances provisions for applicants above the age limit with clearer, albeit tighter, exemptions.⁷¹

The old 121, 856, 120, 855, 119, and 857 employer-sponsored subclasses were replaced with the following new subclasses:

- Subclass 186 Employer Nomination Scheme for standard applicants; and
- Subclass 187 Regional Employer Nomination Scheme for applicants working in regional areas of Australia.

Each new visa subclass contains the following three streams:

- Temporary Residence Transition Stream;
- Direct Entry Stream; and
- Agreement Stream.

The Temporary Residence Transition Stream is for 457 visa holders who have been with their nominating employer for at least two years and has several advantages over the Direct Entry Stream. In the words of DIAC, “[t]his was in recognition of the important economic and social contribution these skilled workers make to Australia.”⁷² It is similar to the pathway for permanent residence in the U.S. immigration system provided by the L-1A Intracompany Transferee nonimmigrant visa category, which links up perfectly with the U.S. EB-1-3 permanent residence category. The EB-1-3 category has several benefits over other permanent residence categories, such as waiver of the labor certification process (labor market testing). The benefits of the Temporary Residence Transition Stream are as follows:

- No skill assessment required (Direct Entry Stream applicants must provide a positive skills assessment from an approved skill assessment body as well as three years full-time work experience unless exempt);
- Lower English language requirement (a score of 5.0 in each section of the test is sufficient, whereas a score of 6.0 in each section is required for the Direct Entry Stream unless exempt);
- The age limit is fifty for all streams, but the Temporary Residence Transition Stream contains an age exemption available for applicants who have been employed by their

71. *See id.* at 1-7.

72. *Id.* at 2-3.

457 visa sponsor for at least four years and are paid at or above the high income threshold each year (currently set at AU \$123,300 and increases each year); and

- Health waiver available under certain circumstances for applicants with serious medical issues (this is not available for Direct Entry Stream applicants).

The Agreement stream is for employers who have gone through a grueling and lengthy negotiation process with DIAC and successfully signed an agreement to sponsor foreign nationals for particular semi-skilled occupations. The visa requirements are set out in each specific labor agreement.

The streams for the new Subclass 187 Regional Sponsored Migration Scheme have generally stricter requirements than the old regional employment sponsored visa classes. For example:

- Whereas applicants previously only required an overall average English language test score of 4.5 across all four sections of the test, applicants now must achieve scores of at least 5.0 in each section of the test for the Temporary Residence Transition Stream and 6.0 in each section of the test for the Direct Entry Stream;
- Whereas applicants previously did not require a skills assessment, this is now required for Direct Entry Stream applicants; and
- Whereas employers previously only had to pay applicants at or above the minimum wage level, they are now required to pay market rates.

Given the great difficulties encountered by employers in regional areas of Australia to source local labor, especially in the resource sector, it is somewhat perplexing that the Australian Government would choose to tighten the requirements for the Regional Sponsored Migration Scheme. The creation of a clear pathway for 457 visa holders to permanent residence is a welcome development to source local labor.

