U.S. Department of Homeland Security
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U.S. Citizenship and Immigration Services

Interoffice Memorandum

To: REGIONAL DIRECTORS
SERVICE CENTER DIRECTORS

cc: OFFICE OF INTERNATIONAL OPERATIONS
OFFICE OF COMMUNICATIONS
DISTRICT DIRECTORS

From: Michael Aytes /s/
Acting Associate Director, Domestic Operations
United States Citizenship and Immigration Services
Department of Homeland Security

Date: December 15, 2005

Re: Processing Guidelines for E-3 Australian Specialty Occupation Workers and Employment Authorization for E-3 Dependent Spouses

Revisions to *Adjudicator's Field Manual* (*AFM*) Chapters 34.1 and 34.6 (AFM Update AD05-24)

Purpose

This memorandum notifies and provides guidance to the field (in particular the Vermont Service Center (VSC)) on the implementation of the new E-3 visa category for nationals of the Commonwealth of Australia created by the REAL ID Act of 2005.

Background

On May 11, 2005, President Bush signed into law the Emergency Supplemental Appropriations Act for Defense, the Global War on Terror, and Tsunami Relief, 2005 (Pub. L. No. 109-13). Division B of the Emergency Supplemental Appropriations Act is the REAL ID Act of 2005. Section 501 of the REAL ID Act created a new category of E visa, the E-3 visa. The E-3 visa allows for the admission of an alien who is a national of the Commonwealth of Australia and who is entering the U.S. to perform services in a "specialty occupation." The E-3 provisions became effective upon signing of the Act and this guidance is being issued to implement those provisions to allow aliens in the U.S. to change their status to E-3 and eventually apply to extend their stay in E-3 status. USCIS's role in adjudicating E-3 cases is limited to requests for either a change of nonimmigrant status to that of E-3 or a request for an extension of stay in that classification. Note

that an alien who is in E-3 classification and seeks to change employers must file an application for an extension of stay or apply for an E-3 visa at a U.S. consulate abroad. Those applying for a change to or extension of E-3 nonimmigrant status will be eligible for Premium Processing once a notice has been published in the Federal Register that adds this category of nonimmigrant to those eligible for this service. Please note that although the E-3 classification involves specialty occupation employment, it is a separate classification from the H-1B classification and thus the additional fees described in sections 214(c)(9) and (11) of the INA do not apply to E-3 applicants. Note also that the dependent spouse and children of an E-3 principal may also derive E-3 nonimmigrant status, if otherwise eligible, irrespective of the spouse or children's nationality. Further, an otherwise eligible dependent spouse of an E-3 principal nonimmigrant may apply for an Employment Authorization Document, irrespective of the dependent spouse's nationality.

If there are any questions concerning this memorandum, please contact Kristina Carty-Pratt in the Office of Program and Regulation Development or Joe Holliday in Service Center Operations, through appropriate channels.

Accordingly, the *AFM* is revised as follows:

☞ 1. Chapter 34.1 Background, is revised to read as follows:

Other nonimmigrant workers are discussed in Chapter 31 (H-classes), Chapter 32 (L-class), and Chapter 33 (O & P-classes). This chapter is a catch-all for the remaining nonimmigrant classes of aliens who are entering the U.S. principally to engage in employment. Included in this chapter are treaty traders and investors, representatives of the information media, various religious workers and E-3 Specialty Occupation Workers. These classes are considered collectively within this chapter because, unlike the H, L, O and P classes, none requires pre-approval of a petition by USCIS, unless there has been a substantial change in the terms or conditions of E status (see 8 CFR 212.2(e)(8)). Initial application for a visa to enter in any of these classes may be made at a consular office overseas. For applicants already in the U.S. in another nonimmigrant category, application may be made using Form I-129 (except for the I class, which is filed on Form I-539). Among these classes, only the E-1 and E-2 classes, treaty traders and investors, have any significant amount of policy guidance in the form of regulations or precedent decisions. The I category has been in existence for many years. The R category, added in 1990 by section 209 of Pub. L. 101-649, was created to permit the temporary admission of religious workers as defined in paragraphs (I), (II) or (III) of section 101(a)(27)(C)(ii) of the Act. The E-3 category, added in 2005 by section 501 of Division B of Pub. L. 109-13, was created to permit the temporary admission of nationals of the Commonwealth of Australia who are entering the U.S. to perform services in a "specialty occupation."

☞ 2. Chapter 34 of the *AFM* currently has five paragraphs. The chapter is further revised to include a new paragraph entitled 34.6 E-3 Specialty Occupation Workers. The new paragraph follows the section 34.5 entitled "Religious Occupation-Based Nonimmigrants." The new paragraph reads:

34.6 E-3 Specialty Occupation Workers

(a) Eligibility Requirements.

The Alien. An E-3 alien must be a national of the Commonwealth of Australia coming to the U.S. to perform services in a specialty occupation.

(2) Specialty Occupation. A specialty occupation for an E-3 alien is defined in the Act in the same manner as in the H-1B context. In particular, pursuant to section 214(i)(1) of the Immigration and Nationality Act, specialty occupation means an occupation that requires the theoretical and practical application of a body of highly specialized knowledge, and attainment of a bachelor's or higher degree in the specific specialty (or its equivalent) as a minimum for entry into the occupation. As such, in order to be eligible for an E-3 classification, an alien must be able to show he or she will be employed in a specialty occupation in the U.S. and he or she possess the required U.S. bachelor's or higher degree (or its equivalent) in the specific specialty to meet the minimum requirement for entry into the occupation in the United States.

Change of Status

An alien is also expected to meet any other occupational requirements specified by the jurisdiction in which the alien will be employed, such as licensure or other official permission to practice in the occupation in question. An alien seeking to change status to E-3 must submit a certified copy of any license or other official permission to practice the specialty occupation in the jurisdiction of intended employment, if such licensure or other official permission is required in order to commence the duties of the specialty occupation. If licensure is not necessary to commence immediately employment in the intended specialty occupation, the alien must submit evidence that he or she otherwise meets the requirements for obtaining the license or taking the relevant jurisdiction's licensure examination, as well as evidence that he or she will, upon passage of the examination, be obtaining the required license within a reasonable period of time after being granted E-3 classification.

Extension of Stay

For E-3 aliens applying to extend their stay in the U.S. in a specialty occupation that requires a license or other official permission to practice in the specialty occupation, the alien must submit, together with his or her extension application, a copy of the license or proof of other official permission to practice the occupation in the jurisdiction of intended employment.

(3) Length of Stay E-3 Specialty Occupation Workers may be admitted initially for a period not to exceed the validity period of the accompanying E-3 labor attestation (i.e., for a

maximum of two years), and extensions of stay may be granted indefinitely in increments not to exceed the validity period of the accompanying E-3 labor attestation (i.e., for increments of up to two years each). As there is no limit on the total length of stay for an E-3 alien in the legislation, there is no specified number of extensions a qualifying E-3 Specialty Occupation Worker may be granted. Under the current E regulation, 8 C.F.R. 214.2(e)(5), an alien classified under section 101(a)(15)(E) as an E-3 nonimmigrant shall maintain an intention to depart the United States upon the expiration of termination of E status. An application for initial admission, change of status or extension of stay in E-3 classification, however, may not be denied solely on the basis of an approved request for permanent labor certification or a filed or approved immigrant visa preference petition.

(4) Educational Requirements. An E-3 alien must be able to show that he or she possess the required U.S. bachelor's or higher degree (or its equivalent) in the specific specialty.

(5) Labor Attestation. A certified labor attestation must have been issued on behalf of the E-3 Specialty Occupation Worker (in the form specified by the Department of Labor.)

Note 1: The dependent spouse and children of an E-3 principal, if otherwise admissible, may be granted E-3 classification notwithstanding the spouse or children's nationality.

Note 2: Notwithstanding AFM Chapter 55.2(d)(2), the dependent spouse of an E-3 nonimmigrant may apply for work authorization. Public Law 107-124 added a new subsection to section 214(e)(6) of the INA which states that in the case of the spouse admitted under section 101(a)(15)(E) of the INA who is accompanying or following to join a principal alien admitted under this section, the Secretary of Homeland Security "shall authorize the alien spouse to engage in employment in the United States and provide the spouse with an 'employment authorized' endorsement or other appropriate work permit." As such, spouses of the principal E-3 aliens are eligible for work authorization. Specifically, in order to obtain an employment authorization document, the E-3 nonimmigrant dependent spouse must file Form I-765, Application for Employment Authorization, and provide evidence that he or she qualifies as an E-3 spouse and that the nonimmigrant principal is in E-3 principal status. Except as noted below with respect to where to file, requests for work authorization filed by such persons will be processed in a similar manner to the requests from spouses of E-1 and E-2 aliens as outlined in the February 22, 2002 memo entitled "*Guidance on Employment Authorization for E and L Nonimmigrant Spouses, and for Determinations on the Requisite Employment Abroad for L Blanket Petitions."*

The Form I-765 must be submitted to the Service Center with jurisdiction over the dependent spouse's place of residence. However, applications for employment authorization concurrently filed with Form I-129 for E-3 principal aliens can only be filed at the VSC.

Note 3: There is an annual cap of 10,500 initial E-3 applications for each fiscal year that applies to principal E-3 aliens. This cap applies to all initial E-3 applications made abroad and to all change of status to E-3 applications made through USCIS. The cap does not apply to extensions of E-3 provided that the E-3 alien continues to be employed by the *same* employer named in the application for change of status to E-3 classification or, in the case where an alien first obtained E-3 classification by applying for an E-3 visa abroad, in the alien's original E-3 visa application. In cases where an E-3 alien seeks to *change* employers either by applying for an extension of nonimmigrant stay within the United States or by applying for a new E-3 visa at a U.S. consulate abroad, the E-3 alien will be counted against the cap again. The dependent spouse and children of an E-3 principal alien will not be counted against the annual cap.

(b) Application Process. Because an E-3 Specialty Occupation Worker does not require a separate petition, E-3 status may be obtained either directly through the Department of State (by applying for an E-1 visa) or, in the case of an alien already in the U.S., by applying to the Vermont Service Center for a change of status or extension of status on Form I-129. As the current Form I-129 E Supplement refers only to the E-1 and E-2 visa categories, the E Supplement is not currently required for E-3 aliens. Supporting documents to be submitted with an E-3 application include proof the alien is a national of the Commonwealth of Australia, letter from the U.S. employer describing the specialty occupation to be engaged in, the anticipated length of stay, and the arrangements for remuneration, evidence the alien meets the educational requirement for the specialty occupation, which must be a U.S. bachelor's degree or higher (or its equivalent) in the specific specialty, evidence the alien meets any other licensure or occupational requirements and an U.S. Department of Labor (DOL) issued certified labor condition application (LCA) for E-3 Specialty Occupation Worker (in the form specified by DOL. Note: DOL has informed USCIS that applicants may *not* submit, as part of their E-3 application, an LCA that was filed in conjunction with a separate petition for H-1B classification in lieu of the required E-3 Specialty Occupation Worker LCA. Until DOL develops a separate LCA Form for the E-3 classification, prospective E-3 applicants may submit Form ETA-9035 to a special address to be provided by the Department of Labor, together with a request that the Form be annotated as an E-3 LCA. These annotated Forms ETA-9035 should be distinguished from H-1B LCAs (which are also submitted on Form ETA-9035) that bear no such DOL-approved "E-3" annotation.

(c) Approval. If, from the evidence submitted, the application appears approvable, endorse the approval block and issue Form I-797 (through CLAIMS), showing the period of validity and the alien beneficiary's name and classification. An E-3 application may be approved for a period not to exceed the validity period of the accompanying E-3 labor attestation (i.e. for a maximum of two years) and extended in increments not to exceed the validity period of the accompanying E-3 labor attestation (i.e., for increments of up to two years each).

(d) Denial. If the evidence does not clearly establish the beneficiary's eligibility for E-3 status and a request for additional evidence does not appear warranted, prepare a denial

notice setting forth the specific reasons why the application cannot be approved. If a request for evidence is warranted, issue accordingly.

☞ 3. The AFM Transmittal Memoranda button is revised by adding a new entry, in numerical order, to read:

AD05-24 [INSERT SIGNATURE DATE OF THIS MEMO]	Chapters 34.1 and 34.6	This memorandum revises Chapter 34.1 and adds Chapter 34.6 of the *Adjudicator's Field Manual* (*AFM*) to provide interim policy and processing guidelines for E-3 Specialty Occupation Workers and Employment Authorization for E-3 Dependent Spouses

cc: USCIS Headquarters Directors
Bureau of Immigration and Customs Enforcement
Bureau of Customs and Border Protection