Advanced Student Visa Issues

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Current Hot Topics—Students and Schools

- Expanded list of STEM extension-eligible CIP codes
- SEVP ramps up for enforcement of Intensive English Program accreditation law and conducts "out of cycle reviews"
- SEVP creates Field Representatives Unit
- New SEVP Analysis and Operations Center to lead SEVP enforcement/compliance efforts
- SEVP finally begins bi-annual recertification of F and M programs, also begins adjudicating Form I-17 updates, and issues confused and burdensome RFEs

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Current Hot Topics (cont'd)

- ICE Counterterrorism Criminal Exploitation Unit launches Campus Sentinel Program , through which ICE Field Agents visit DSOs and seek information about questionable schools and "problem students"
- As ICE site visits increase, and agents request records and state that "ICE is exempted from FERPA" (even threaten withdrawal of program for failure to comply) many schools consider/reconsider agency visit protocols and records release policies and protocols (actually DHS must undertake rulemaking to collect FERPA-exempt information—see 8 CFR 214.3)
- Special Student Relief for Syrian F-1 Students

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Current Hot Topics (cont'd)

- Has SEVIS 6.10 fixed SEVIS—CLAIMS glitch that caused common 10/1 cancellation of OPT?
- Has SEVP fixed the error built into SEVIS 6.10 that would allow STEM extension of OPT only if STEM major is indicated as "primary major" in SEVIS?
- Will recent "notorious incidents" at Tri-Valley University, University of Northern Virginia, Dickinson State University, and involving a rogue DSO cause further crack-down, restrictions on CPT or transferring between schools?
- Other?

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CPT and OPT

- Client, owner of an engineering firm, offered job to student who will graduate in December and begin OPT in January. She asks you to convince DSO at Enormous State University to grant full-time CPT for fall semester so student can begin training and job. DSO told client "absolutely not," in part because the student had already completed a Co-Op with client. Student is also discussing with DSO.
  - A proper CPT activity?
  - Would additional CPT jeopardize OPT?
  - Problems with CPT in last term that "turns into" OPT?
  - How will you know if student convinces DSO?

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- **A Proper CPT Activity?**
  - DSO may authorize CPT for activity that is "an integral part of an established curriculum," including a work/study program, internship, cooperative ed. or other required internship offered through cooperative agreements between a school and an employer **8 CFR 214.2(f)(10)(i)**
    - Institutional policies vary: some schools approve only for Co-Op or required internship, others require course credit, some require only faculty attestation (**SEVP's DSO Online Training** states that if not required, activity must earn credit; see also I.N.S. memorandum CO 243.69-C, Jan. 22, 1992, [*Interpreter Releases*, Vol. 69, No. 6, pp. 187-188, Feb. 10, 1992)
    - Recent "notorious incidents" involve misuse of CPT, and misguided NOIWs and RFEs have resulted, so expect DSOs to be even more cautious
    - If activity employer plans for student is closely related to program of study it's probably proper but must also meet institutional policy on "integral part of an established curriculum"

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- **Would Additional CPT Jeopardize OPT?**
  - Depends on whether CPT completed so far was full-time or part-time (most formal Co-Ops are full-time)
  - No limit on part-time or full-time CPT
  - Student who completes 12 months of full-time CPT is ineligible for OPT
  - Part-time CPT does not count against OPT
  - Regulations not model of clarity, but see **SEVP OPT Policy Guidance**, item 3.2 and **SEVIS User's Manual**

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- **Problems with CPT final term >> OPT?**
  - Not prohibited by the regulations or policy guidance, but if activity is not required for graduation, expect DSO to be quite reluctant
  - If granted, USCIS (suspecting misuse of CPT) may RFE in OPT application and/or H-1B petition
- **How will you know CPT has been granted?**
  - After updating student's SEVIS record, DSO issues student new Form I-20, with the CPT endorsement, that serves as employment authorization 8 CFR §274a.12(b)(6)(iii)

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Proper OPT Employment

- Luciano earned a graduate degree in musical performance from E.S.U. and is engaged in post-completion OPT. He's hired you to handle his H-1B process. You're surprised, while attending the local knock-off of the Ice-Capades, to note that he's a featured skater. When you phone him the next day, he asks "how lucky am I to have found such a great gig after so many months without one?"
  - Is he in violation of his F-1 status?
  - Is the length of the period of this work relevant?
  - What will DHS know?
  - Might this affect his H-1B petition process or a future AOS process?

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- **Violation of status?**
  - "A student may apply to USCIS for authorization for temporary employment for optional practical training **directly related to the student's major area of study**" **8 CFR 214.2(f)(10)(ii)(A)**
  - USCIS guidance defines "unemployment time" as "the total time spent without a **qualifying job** during post-completion OPT" ***04/23/2010 Policy Guidance 1004-03 – Update to Optional Practical Training*** **(AILA Doc. No. 10042761)**
    - But no such definition in the regulations
- **Length of the period of work? (two issues)**
  - If unemployed for 90 days before landing the Ice-Capades gig, then in violation of **8 CFR 214.2(f)(10)(ii)(E)**
  - Also, if Ice-Capades is "non-qualifying" job, and that is equivalent to unemployment, then considered in violation of **8 CFR 214.2(f)(10)(ii)(E)**

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- **What will DHS know?**
  - F-1 student on post-completion OPT "is required to report any change of name, address, or interruption of [OPT] employment to the DSO for the duration" of the OPT, and DSO must update student's SEVIS record accordingly **8 CFR 214.2(f)(12)(i)**
    - Currently no mechanism to require student reporting
- **Future impacts?**
  - USCIS may consider "non-qualifying employment"
    - Could lead to denial of COS request in H-1B process (student may need H-1B petition with COS request for cap-gap extension)
    - Could also complicate AOS application unless exception applies (i.e., "immediate relative," INA 254(k) applies, or maybe "technical violation" per 8 CFR 245.1(d)(2)?)
  - Few reports of RFEs concerning OPT employment, but possible greater emphasis in the future

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Reinstatement and OPT

- Maria, another music performance major at E.S.U., ran out of money and wasn't able to register for the Spring 20102 semester. Her SEVIS record has been terminated. She recently obtained a new loan and registered for fall term, after which she should graduate. She's consulted you about applying for reinstatement and OPT.
  - Strong case for reinstatement?
    - What if she's been Luciano's skating partner in the Ice-Capades?
  - If she applies for reinstatement, can she attend the second summer term while awaiting a decision?
  - If the application is denied, what are the consequences?
  - Can she travel and re-enter to re-establish status?
    - What if she departs 180+ days after her record was terminated?
  - If she's reinstated when will she be eligible for OPT?

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- **Strong case for reinstatement?**
  - If out of status for 5+ months she must demonstrate exceptional circumstances caused the delay and she filed a.s.a.p. **8 CFR 214.2(f)(16)(i)(A)**
    - Did she experience a financial disaster of some kind?
    - "Unauthorized employment" makes a student ineligible for reinstatement, so Ice-Capades gig would change analysis dramatically **8 CFR 214.2(f)(16)(i)(D)**
- **Can she attend school while awaiting reinstatement?**
  - Not prohibited and regs. require that the student "is currently pursuing, or intending to pursue a full course of study in the immediate future at the school which issued the Form I-20" **8 CFR 214.2(f)(16)(i)(C)**
- **Consequences of denial of reinstatement application?**
  - Become "overstay," so per INA 222(g) visa void and visa applications only in home country
  - Unlawful presence begins to accrue (bar after 180 days)

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- **Travel to regain status?**
  - Possible, esp. if student has good explanation/docs. (if visa needed, prepare to answer "have you ever violated the terms of a U.S. visa . . .")
  - Does status violation trigger unlawful presence or visa revocation?
    - Legacy-INS/current USCIS guidance: Those admitted "D/S" become unlawfully present/overstay only if so determined by USCIS in adjudicating an application/petition or by an immigration judge in proceedings **05/06/2009 memo "Consolidation of Guidance Concerning Unlawful Presence . . ." (AILA Doc. No. 09051468)** but questions about ICE position
- **Opt eligibility after reinstatement?**
  - Student who has accumulated one full academic year in F-1 status before falling out of status, and is reinstated, may use the period before reinstatement to satisfy the requirement for OPT eligibility
  - For student who has not accrued one full academic year in F-1 status before falling out of status, the OPT eligibility "clock" re-starts
    - See Letter from J. Bednarz, INS, to Lisa Enfield 70 *Interpreter Releases*, 1120-21 (Aug. 23, 1993)

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Cap-Gap

- Wei contacts you about transitioning from OPT to H-1B. She's just been offered a job as the Ice-Capades' first graphic designer, and the company has agreed to file an H-1B petition for her. She earned a B.S. in graphic design from E.S.U., holds a similar job with another employer that seems to be "going under," and has one month of OPT left. She asks:
  - Can she keep working once the H-1B petition is filed?
  - Can she travel abroad this summer?
  - What happens if she's accepted to graduate school and decides to return to school full-time in September
  - If she's eligible for a STEM extension and if this might be a better alternative?

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- **Can she keep working once the H-1B petition is filed?**
  - Yes, if it's filed before her EAD expires and requests COS effective 10/1
    - H-1B's still available?
  - If it's filed during her grace period, after the EAD has expired, she can remain in the U.S. until October 1 but without OPT work authorization
- **Can she travel abroad?**
  - During the "cap-gap" she doesn't have valid EAD, so very risky **8 CFR 214.2(f)(13)(ii)**
  - While H-1B petition pending, travel will cause denial of the COS request and result in "split decision" (at best) on H-1B petition
  - After H-1B petition approved, but before COS takes effect on 10/1, probably no "last action" issue pursuant to informal legacy-INS guidance, but still may be risky **AILA Doc. No. 05042565**

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- **Return to school full-time in September?**
  - If decided before H-1B petition is approved
    - Have employer withdraw H-1B petition
    - Obtain change of level or transfer I-20
  - If decided after H-1B petition is approved
    - Student's SEVIS record will have "completed" (next slide)
    - Will require SEVIS Help Desk "data fix"
      - What seems to be required is evidence that H-1B petitioner has requested withdrawal of the petition (not necessarily USCIS withdrawal notice)
    - Obtain change of level or transfer I-20

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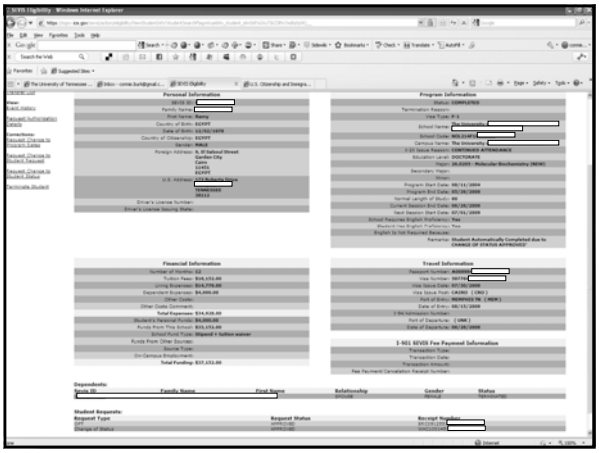

- **STEM extension?**
  - Probably not, but depends on the CIP code on her I-20
    - Not STEM-designated:
      - 50.0409 Graphic Design
      - 10.0301 Graphic Communications, General
      - 50.0102 Digital Arts
    - But, related STEM-designated:
      - 11.0803 Computer Graphics
      - 11.0801 Web Page Digital/Multimedia and Info. Resources Design
      - 11.1004 Web/Multimedia Management and Webmaster
      - Computer/Info. Sciences "other" (".99") codes just added to eligible list **AILA Doc. No. ??**
  - Advantages/disadvantages of STEM extension
    - SEVP guidance: to file STEM extension after cap-gap extension has begun, H-1B petition must be withdrawn (file STEM then H-1B?)
    - H-1B filing fees and likely "specialty occupation" RFE avoided, for now
    - STEM requires no COS so returning to school would be less complicated
    - STEM extension not employer-specific
    - Will there be an H-1B lottery next year?

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Change of Status

- At the Ice-Capades you see Wei, and she introduces you to a friend who is visiting from China, has been accepted to the ESL program at E.S.U. for the fall term, and asks if you can help with his application to change status to F-1. He's anxious because his B-2 status expires in a few weeks. He asks:
  - What are his chances of approval?
  - Is it a problem that his B-2 status expires before the school term starts?
  - What happens if his COS application has not been approved by the 9/1 program start date (his friend told him USCIS is very slow)?

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- **Chances of approval?**
- Complicated—Two Issues: timing and "pre-conceived intent"
  - **Adjudicator's Field Manual** Change of Nonimmigrant Status Under Section 248, Note 2: "Preconceived Intent . The adjudicator will encounter applications where it appears, either from the statements made on the application or from the sequence of events . . . that the applicant concealed his or her true purpose for entering the U.S., . . . Most frequently, this situation occurs in requests to change status from B-2 to F- 1 . . . USCIS policy discourages such deliberate actions."
- **Is B-2 expiration before the school term a problem?**
- If expires 30 days before program start date, it's a problem
  - USCIS ' position , based on the regulation "an F-1 may be admitted for a period of up to 30 days before the indicated report date or program start date listed on Form I-20," that an applicant for COS to F-1 must not "request" a gap of more than 30 days between the end of the prior status and the beginning of the requested F-1 status **8 C.F.R. § 214.2(f)(5)(i)**

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- **What happens if COS application has not been approved by 9/1 program start date?**
- Cannot begin studies, since Bs are prohibited from pursuing a course of study **8 CFR 248.1(c)(3)**
- Student's SEVIS record will have to be "deferred" by the DSO to the next school term. USCIS usually RFEs for new I-20 indicating that record has been deferred, but do not wait. This is crucial!
  - If 30-day+ gap results due to USCIS processing times, apparent agency policy is not to penalize the applicant **VSC Stakeholder Meeting Q&A, AILA Doc. No. 09090265, item 25**

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Questions & Answers

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