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MEMORANDUM

To: **International Education Program Administrators**

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2) SEVP Increases Fees

3) Department of State Issues
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1) US District Court Enjoins USCIS' Unlawful Presence Policy Memo

We have previously reported on the case of *Guilford College v. McAleenan* in the U.S. District Court for the Middle District of North Carolina (formerly *Guilford College v. Nielsen*). The case challenged the legality of USCIS' August 9, 2018 "Policy Memorandum" "Accrual of Unlawful Presence and F, J, and M nonimmigrants", as being contrary to the requirements of the Administrative Procedure Act, as well as the Due Process Clause of the U.S. Constitution. On May 3, 2019 a nationwide preliminary injunction was issued, effective immediately. The court found that the Plaintiff's claims were likely to be upheld at the termination of the litigation. Therefore, until ruled otherwise, the Policy Memo which penalized F, J, and M nonimmigrants with "unlawful presence" for overstaying or violating the terms of their status, even unintentionally, is on hold. It needs to be emphasized that the injunction is temporary, and although the Judge decided that the Plaintiffs were likely to succeed on the merits, the final decision has not yet been issued. The issue of departure from the US of an individual caught up in this Policy Memorandum prior to the decision, should be approached with caution and referral to a knowledgeable attorney. NAFSA has published a comprehensive analysis which may be found here.

2) SEVP Increases Fees

The *Federal Register* of May 23, carried a "Final rule" raising SEVP program fees effective June 24. The complete 50 page "Final rule" may be found here. It contains an extensive cost/benefit analysis justifying the increases, as well as responses to the 300 comments received in response to the "Notice of Proposed Rulemaking" (NPRM) of July 17, 2018.

On May 22 USICE posted a news release regarding the fee increases, which may be found here. In short, the news release notes the following specific changes:

> Fee increases include:
>
> - The I-901 SEVIS Fee for F and M international students will increase from $200 to $350.
> - DHS will maintain the $35 I-901 SEVIS Fee for J exchange visitors in the au pair, camp counselor, and summer work travel program participant categories, but increase the full I-901 SEVIS Fee for other J exchange visitors from $180 to $220.
> - The SEVP school certification petition fee for initial certification will increase from $1,700 to $3,000.
>
> New fees include:

- A $1,250 fee for SEVP-certified schools filing a petition for recertification.

- A $675 fee when schools file the Form I-290B, “Notice of Appeal or Motion.”

- DHS will maintain the $655 fee for an initial school site visit but will also charge this fee when a SEVP-certified school changes its physical location or adds a new physical location or campus to its Form I-17, “Petition for Approval of School for Attendance by Nonimmigrant Student.”

3) Department of State Issues

On May 1, 2019, AILA published the minutes of a Liaison Committee Meeting with the U.S. Department of State held on April 11, 2019. The minutes contain items of interest regarding:

a) USCIS Policy Memo (now enjoined - See item 1) on Unlawful Presence and F, J, and M status

On August 9, 2018, USCIS issued a final Policy Memorandum that directed its adjudicators to deem nonimmigrants in F, J and M status who engaged in an “unauthorized activity” to have begun accruing unlawful presence from the date after the activity began, or as of August 9, 2018, whichever was later, even in the absence of any affirmative finding by a judge or adjudicator. The FAM was similarly revised at section 9 FAM 302.11-3(B)(1)(d). Members report that, based on this new guidance, consular officers have found that visa applicants, who previously participated in Curricular Practical Training (CPT) programs that were approved by the applicants’ school and properly registered in SEVIS, are ineligible for admission under 212(a)(9)(B) on the grounds that they accrued more than 180 days of unlawful presence because—unbeknownst to the students, the school or the CPT employers—the CPT should not have been granted and this was deemed a status violation under the new guidance. Please confirm that an F, J or M nonimmigrant who remained present in the U.S. while participating in a CPT or OPT program approved by the applicants’ school and properly registered in SEVIS, in absence of any other adverse factor, is not accruing unlawful presence.

The guidance at 9 FAM 302.11-3(B)(1)(d) provides that aliens who previously were in F, J, or M status will start to

accrue unlawful presence the day after the applicant ceased engaging in the activities for which he or she was in the United States in F, J, or M status, such as when the alien "stopped attending school, engaging in authorized practical training, or participating in (an) exchange program." In the scenario described it does not appear that an alien who is participating in a CPT or OPT program approved by the alien's SEVP approved educational institution would start to accrue unlawful presence if the applicant continued engaging in the approved status-compliant activity without other violations of student status.

b) J-1 Waiver Procedures

J-1 Exchange Visitors

10. The Department of State's website was recently updated with substantially increased processing times for J-1 waiver applications. These new processing times are likely to have a detrimental impact on J-1 exchange visitors, particularly those seeking to change status, physicians urgently needed in medically underserved areas, and those seeking exceptional hardship waivers. Many exchange visitors are unable to extend their J-1 status after starting the waiver process and the timely processing of their waiver requests is critical not only to their ability to maintain lawful status, but to the U.S. employers and family members who depend on them. Will State please confirm:

a. What led to the substantial increase in posted adjudication times?

The increase in the waiver processing times is due to both a realignment of VO staffing for other priority projects and an increase in the volume of the waiver applications received.

b. Have the resources been allotted to adjudicate J-1 waivers changed**?**

The Visa Office has realigned staff consistent with the overall Department reduction of personnel begun in January 2017.

c. How many staff are assigned to the Waiver Review Division (WRD) and how many of those staff are attorneys?

We do not share staffing information, but believe the current staffing is appropriate, in light of resource constraints. WRD

staff also are supported by Visa Office attorneys and the Office of the Legal Adviser, as needed.

d. Have there been any changes to the adjudication process of J-1 waivers within WRD?

No, there have not been any changes to the Waiver Review Division adjudication process.

e. Have there been any changes, of which State is aware, to the adjudication process related to USCIS processing of J-1 waiver requests?

The Department is not aware of any changes that are related to the USCIS processing of the J-1 waiver requests, but refer you to USCIS.

f. Would a change in available resources or policies allow a return to the previous processing times?

The Department is constantly reviewing our policies and procedures to gain efficiencies. We do not expect any changes to available resources. We encourage applicants to be aware of our processing times and to apply sufficiently early as to allow us to process their case within the needed time frame.

...

12. Current USCIS policy allows for the filing of an application for adjustment of status with just a copy of a Department of State recommendation letter for a J-1 waiver. Would NVC be willing to forward immigrant visa application files to consular posts while the applicant is awaiting their final J-1 waiver approval notice?

NVC does not routinely hold immigrant visa cases pending a waiver of 212(e). These cases will be scheduled for interview if otherwise documentarily complete.

13. In order to apply for a J-1 home country residence waiver case number, the DOS website requests the A-number of the individual seeking a waiver. However, the DOS online form only recognizes A-numbers with 8 digits, and not those with 9 digits. When attempting to enter an A-number with 9 digits, an error message is received. Members have utilized workarounds including, leaving the section blank, and

handwriting the correct A-number on the hard copy of the application. Would State be able to address this software limitation, or alternatively confirm that a hand-written entry on the application is acceptable?

A hand written entry on the DS-3035 will be acceptable.

14. There are instances when an Exchange Visitor seeking a J-1 waiver is unable to obtain copies of their IAP66 or DS-2019 forms, or where the copies are so old that they are illegible. Additionally, AILA has received reports that program sponsors will often decline to provide a copy of Form DS-2019 when the 3- year retention period has elapsed, even though they may still access the electronic forms in SEVIS and provide that to the Exchange Visitor for inclusion with the Form, DS-3035. Lastly, in some cases the IAP66/DS-2019 may pre-date the SEVIS system such that no record is available at all to the program sponsor. Given the issues described above, please address the following:

a. Would the Bureau of Educational and Cultural Affairs (ECA) be willing to direct J-1 program sponsors to make a copy of the inactive DS-2019 record available to Exchange Visitors for the purpose of understanding whether they are subject to INA 212(e)?

We would refer you to ECA. It is our understanding that in order to direct sponsors to make a copy of the inactive DS-2019 available to Exchange Visitors, the Department would have to formally propose this step by adding it to a regulation (Subpart A).

b. In situations where there is no SEVIS record of the J-1 program documentation and the IAP66/DS-2019 is either lost or illegible, is this data accessible to State in another way?

No, there are no additional resources available to obtain information regarding the SEVIS record, and the lost or stolen IAP-66/DS-2019 forms.

c. Please confirm that the WRD will accept and process a J-1 waiver request based upon as much documentation as the J-1 Exchange Visitor has available to them, in the event that they do not have access to a complete copy of all IAP66/DS-2019 forms.

In the event that the J-1 Exchange Visitor is unable to obtain copies of their IAP-66/DS-2019 forms a letter from their previous sponsor will suffice to complete the adjudication of the waiver applications.

AILA Follow Up: What information should the letter contain? Answer: Program number, funding source, and program dates.

15. AILA has learned that there is a moratorium on designating new J-1 exchange visitor programs across categories. Can the ECA please explain the motivation for this moratorium? Does ECA have a plan as to when it may start accepting new designation requests?

ECA has deferred designating new exchange visitor programs across some categories. On September 26, 2017, in response to the Executive Order on Buy American and Hire American issued April 18, 2017 (E.O. 13788), ECA/EC imposed a temporary deferral of decisions on requests for program expansions in four private sector categories – Camp Counselor, Intern, Trainee, and Au pair. This deferral included new applications for designation decisions. The Department has not made a decision about lifting the deferral on these categories.

Answer: We have kept it on the Unified Agenda, but have had to prioritize other efforts, so have no update on timing or substance.

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c) Locations for Obtaining Visas for Venezuelans, and Suspension of Visa Processing at U.S. Consulate in Caracas, Venezuela

Following the designation of the Embassy in Bogota as the post to process immigrant visa applications for citizens of Venezuela, please confirm the following:

a. What is the process available to follow up on visa applications filed in Caracas that are subject to 221(g) administrative processing?

Cases that were pending with Embassy Caracas at the time that routine consular services were suspended have been transferred to Embassy Bogota. Applicants and petitioners can email IVBogota@state.gov for case status inquiries.

b. Has State issued any guidance to other posts in the region concerning acceptance of nonimmigrant visa applications filed by citizens of Venezuela?

Venezuelan non-immigrant visa applicants may apply at any Embassy or Consulate in the world, provided they are physically present in the consular district. Posts in the region are aware of this policy.

c. Have any additional resources been allocated to other posts in the region to allow acceptance of a greater number of nonimmigrant visa applications from Venezuelan citizens?

Yes, some consular staff already have been temporarily reassigned to Embassy Bogota and other actions are being considered.

d. Would State be willing to request that consular posts in the region publish on their websites their policy regarding third country immigrant and nonimmigrant visa applicants?

We are encouraging posts that articulate restrictions regarding third-country national NIV applicants on their websites to update their language to include Venezuelan applicants.

4) USCIS Begins Returning Rejected H-1B Petitions

On May 17, USCIS announced that it had completed data entry for all 2020 H-1B cap-subject petitions which it had selected. Rejected petitions will now be returned, and successful petitioners will be notified. USCIS would not provide a time frame for when the rejected petitions would be returned. It was also noted that some petitions would be transferred from the Vermont to the California Service Centers to balance workload. In this case a Transfer Notice will be issued. The USCIS announcement may be found here.

5) NYC/NJ CBP Issues

The Meeting Minutes of an April 8, 2019 Liaison Meeting between the NYC Chapter of AILA and the NYC/NJ CBP Office noted a few interesting issues:

♦ CBP announced that travelers could expect increased wait times at airports during the summer travel season. This problem was blamed on limited funding, but there is discussion that it may be caused by personnel shifts to the S.W. border.

♦ If a student has ever asked if they need current documents to enter the US after a cruise beginning and ending in the US but which stops at a foreign port such as Jamaica, Bahamas, St. Martin, etc., the answer is yes, they do. This answer is not applicable to trips to Puerto and the US Virgin Islands which are U.S. territories, but beware of sailing excursions to the British Virgin Islands!

♦ The continuing issue of searching electronic devices at entry was also addressed:

> Q. Please advise what procedures are in place to ensure that officers do not access information from the cloud using the cell phones of applicants for admission. What is the consequence if an applicant refuses to provide his or her cell phone password? Is it different for U.S. citizens?
>
> A. The SOP for examining electronic devices is that the devices are required to be put in airplane mode so that CBP cannot access cloud data. CBP needs to confirm that devices are in airplane mode when searching, CBP reports that devices that are detained are generally for reasons associated with terrorism, narcotics, and/or child pornography. When there are questions about detaining device/searches, including questions about attorney/client privilege, CBP will reach out to legal counsel. CBP noted that this policy includes all travelers, even USCs.

6) Electronic Filing of I-539

On May 22, USCIS posted an announcement "Certain Nonimmigrants Can Now File Form I-539 Online." The announcement may be found here.

In short, single applicants who do not have lawyers can file to extend a stay (but not change it) if their present status is:

- B-1 temporary visitor for business;
- B-2 temporary visitor for pleasure;
- F-1 academic student with a specific status expiration date;
- F-2 spouse or child of an academic student with a specific expiration date;
- M-1 vocational student; or

- M-2 spouse or child of an M-1 student.

For F-2 and M-2 nonimmigrants:

If you are in the U.S. with F-2 or M-2 nonimmigrant status and want to extend your stay, compare the expiration date of your status with your spouse or parent's F-1 or M-1 status. If the expiration dates on both are:

- Different, you may apply online as an individual.

- The same, you may apply as a co-applicant using a paper Form I-539.

7) USCIS Introduces Updated Edition of Form I-566

On April 9, USCIS announced that the present Form I-566 with a publication date of 12/07/16 will not be accepted after 06/29/19. The new form with a publication date of 4/09/19 will then be required.

The I-566 is used for a change to or from A, G, or NATO status, and accompanies Form I-539. It is also used for employment authorization for A-1, A-2, G-1, G-3, G-4, or NATO 1-6 dependents accompanying Form I-765. There has been, and continues to be, no additional fee for the I-566. The USCIS announcement may be found here.

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