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MEMORANDUM

To: International Education Program Administrators

As many of you know, our firm provides presentations at schools for international students without charge. Please let us know, as soon as possible, if you would like us to come to your campus.

1) NAFSA/USCIS Engagements

2) International Students and Obamacare

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7) SEVP Issues Policy Guidance on Timely Filing and Temporary Absence and Vacations

8) In Search of the Elusive I-94

9) USCIS Rolls Out Online Change of Address Tool

10) News from VSC

11) IRS Discusses Fake W-8 BENs

Welcome back from a terrific Region X Conference. Great panels, an enthusiastic gathering and a wonderful time for all. A terrific job by Saundra Hampton and the Region X Team, and congratulations to Beverly Plowucha for her well deserved surprise O'Driscoll award. See you next year in Albany – where there won't be a slot machine in a hundred miles.

1) NAFSA/USCIS Engagement

On July 18, 2013 an Academic Engagement between the Nebraska Service Center and NAFSA was held with NAFSA regbuds. On August 12, 2013 a California Service Center Engagement was also held with NAFSA regbuds. The minutes are now available and are full of interesting and useful tidbits. They may be found here and here, respectively

2) International Students and Obamacare

Obamacare became effective on October 1, 2013. To the best of our knowledge, there have been no regulations published by any US government agency which are specific to international students and exchange visitors. The closest that any agency has come to discuss coverage requirements for this population is item 11 in a Q&A published by IRS on September 24, 2013. The specific item follows:

> **11. Are all individuals living in the United States subject to the individual shared responsibility provision?**
>
> All U.S. citizens are subject to the individual shared responsibility provision as are all permanent residents and all foreign nationals who are in the United States long enough during a calendar year to qualify as resident aliens for tax purposes. Foreign nationals who live in the United States for a short enough period that they do not become resident aliens for federal income tax purposes are not subject to the individual shared responsibility payment even though they may have to file a U.S. income tax return. The IRS has more information available on when a foreign national becomes a resident alien for federal income tax purposes.

Generally, in short and according to the above, F-1 students and J-1 exchange visitors who must file as tax residents will be required to obtain coverage, unless otherwise exempt. Student visa holders do qualify for marketplace coverage. Whether the individual must take out individual coverage or benefit from institutional coverage is another issue. These are questions which will find answers, hopefully, in the near future. Your institution's general counsel will be busy.

Further, according to a memorandum from ICE dated October 25, 2103:

> Consistent with the ACA's, the SSA's, and implementing regulations' limitations on the use of information provided by individuals for such

> coverage, and in line with ICE's operational focus, ICE does not use information about such individuals or members of their household that is obtained for purposes of determining eligibility for such coverage as the basis for pursuing a civil immigration enforcement action against such individuals or members of their household, whether that information is provided by a federal agency to the Department of Homeland Security for purposes of verifying immigration status information or whether the information is provided to ICE by another source.

The memorandum may be found here.

The memorandum does not discuss criminal enforcement, only civil enforcement.

3) USCIS Clarifies Eligibility for STEM OPT Extensions

On October 21, 2013 USCIS published a "Policy Memorandum" dated October 6, 2013 under PM-602-0090 as an "Interim Memoranda." The "Policy Memorandum" Issue Summary and its "Summary Conclusion" follows:

> **Issue**
>
> Whether F-1 students engaging in post-completion OPT under 8 CFR 214.2(f)(10)(ii)(A) are eligible for the 17-month STEM extension under 8 CFR 214.2(f)(10)(ii)(C) if they have not yet completed their thesis requirement or equivalent for their STEM degree when applying for the STEM extension.
>
> **Summary Conclusion**
>
> F-1 students engaging in post-completion OPT are eligible for a 17-month STEM extension even if they have not yet completed the thesis requirement or equivalent for their STEM degree.

The policy analysis concludes with the statement:

> Therefore, in accordance with the above interpretation of 8 CFR 214.2(f)(10)(ii)(C)(1) and (2), F-1 students who are currently in a period of post-completion OPT while completing his or her thesis and has completed all other course requirements for his or her STEM degree, is eligible to apply for a 17-month STEM extension, notwithstanding the fact that the student has not yet completed the thesis requirement or equivalent for his or her STEM degree.

4) NSC Stakeholder Call

- ❖ Timely STEM OPT Filing

The minutes of the NSC monthly Local Stakeholder Call of October 10, 2013 related to student/school issues. One issue involved the consequences from the late filing of a STEM OPT extension application. The Q&A follows:

> 1. Can you please cover reinstatement and STEM OPT? The specific scenario is this – Student on OPT forgot to mail the application for STEM OPT extension in a timely manner (the application was one week late). USCS denied the STEM OPT extension. Is there such a thing as reinstatement of OPT status?
>
> **RESPONSE:** The STEM extension application must be filed while the applicant still is in a valid period of OPT, therefore there is no such thing as reinstatement of either OPT or reinstatement to student status to be able to refile OPT.

While Service Regulations contain provisions for excusing late filed extensions and changes of status, there is no regulation excusing late work extension filings.

- ❖ Fixing Typos

Another issue of concern involved correcting typographical errors in petitions or applications:

> 4. Often a typographical error in the petition or application, such as in the beneficiary's last name or date of birth, results in approval notices that contain the same errors. The documents attached to the filing contain the correct information and the filing as a whole clearly indicates that the error was indeed typographical. We have received inconsistent results when the error is reported by inquiry to NCSC. Often the error is fixed by USCIS's issuance of an amended notice. On other occasions, however, USCIS requires a formal amendment to the filing, which results in substantial additional cost. Does the NSC have a policy by which such errors can be corrected without a formal amendment filing?
>
> **RESPONSE:** If the error is noticed before the case is adjudicated you should contact the NCSC at 1-800-375-5283 or nscfollowup.ncsc@uscis.dhs.gov. If the error is not discovered prior to adjudication and it was an attorney or filer error then a formal request for notice correction or amendment may need to be made together with the appropriate filing fee.

5) <u>Late Filed H-1Bs due to Government Shutdown</u>

On October 18th, after the government was back at work, USCIS, which had been open during the shutdown, advised that:

> "if an H-1B… petitioner submits evidence establishing that the primary reason for failing to timely file an extension of stay or change of status request was due to the government shutdown, USCIS will consider the government shut down as an extraordinary circumstance and excuse the late filing, if the petitioner meets all other applicable requirements."

USCIS is complying with its own regulations regarding extensions and changes of status. The only question is why it took so long for them to do so.

6) Department of State Updates Fraud Instructions – the 30/60 Day Rule

The "Foreign Affairs Manual" is used by the Department of State as its internal guidance to consular officers regarding their adjudication of immigrant and nonimmigrant visas. The "Foreign Affairs Manual" may be found online at the Department of State website at www.travel.state.gov. You can also view it by clicking here. DOS recently updated the section on fraud.

The rule notes that the consular officer:

> a. In determining whether a misrepresentation has been made, some of the most difficult questions arise from cases involving aliens in the United States who conduct themselves in a manner inconsistent with representations they made to the consular officers concerning their intentions at the time of visa application or to immigration officers when applying for admission. Such cases occur most frequently with respect to aliens who, after having obtained visas as nonimmigrants, either:
>
> (1) Apply for adjustment of status to permanent resident; or
>
> (2) Fail to maintain their nonimmigrant status (for example, by engaging in employment without authorization by DHS).
>
> b. To address this problem, the Department developed the 30/60-day rule. This rule is intended to facilitate adjudication of these types of cases consistent with the statutory mandates.
>
> …
>
> If you become aware of derogatory information indicating that an alien who has applied to USCIS to adjust to immigrant status or change nonimmigrant status in the United States may have misrepresented his or her intentions to you at the time of visa application or to the immigration officer at the port of entry, you should bring the derogatory information to the attention of the appropriate USCIS office that has jurisdiction over the adjustment or change of status application.
>
> …
>
> You should apply the 30/60-day rule if an alien states on his or her application for a B-2 visa, or informs an immigration officer at the port of entry (POE), that the purpose of his or her visit is tourism, or to visit relatives, etc., and then violates such status by:
>
> (1) Actively seeking unauthorized employment and, subsequently, becomes engaged in such employment;
>
> (2) Enrolling in a program of academic study without the benefit of the appropriate change of status;
>
> (3) Marrying and taking up permanent residence; or
>
> (4) Undertaking any other activity for which a change of status or an adjustment of status would be required, without the benefit of such a change or adjustment.

Although this material has been used for many years by DOS, USCIS has actually used a 90 day rule, but has not published its authority to do so. In fact, if

an individual contacts an institution of higher education in writing within 90 days of their arrival in the U.S., USCIS is almost sure to deny a change of status from B-2 to F-1. Further, even if the change of status application is filed before or after the 90 day limit and is granted by USCIS, but the individual leaves the U.S. and applies for an F-1 visa, at a U.S. Consulate there is a high risk of denial. Individuals affected by this rule should be very careful before taking any action and should obtain knowledgeable counsel.

7) SEVP Issues Policy Guidance on Timely Filing and Temporary Absence and Vacations

SEVP Policy Guidance for Adjudicators 1308-02 issued and effective on August 15, 2013 eliminates the grant of an additional three days for schools to respond to SEVP notices. SEVP had kept this regulation for notices sent by snail mail. As SEVP now sends official notices electronically, the three day extension is no longer necessary.

SEVP Policy Draft Guidance 1306-07 regards temporary absence and does not note an issuance or an effective date. The Guidance defines when a terminated status may be made active and the actions needed to be taken by the DSO.

SEVP Policy Draft Guidance 1306-02 regards annual vacations and was also issued without an issue date or effective date. The Guidance discusses eligibility for vacations in the context of various calendar structures and individual issues.

SEVP also has pending guidance regarding bridge programs and conditional admission, as well as contractual relationships between schools including contracting out one institution for ESL training to another school. Draft Guidance is also pending on the issue of what constitutes shared governance for purposes of schools sharing one form I-17.

All SEVP Guidance issues may be found here.

8) In Search of the Elusive I-94

The minutes of an AILA/USCIS meeting on October 23, 2013 discussed problems with obtaining a paper copy of the electronic I-94 for use with USCIS applications. AILA made the following suggestions for retrieving a paper copy:

- Enter the first and middle name in the *First Name* field;
- Switch the order of the first and last names;
- Enter multiple first names or multiple last names without spaces;
- Check for multiple passport numbers;
- Refrain from entering the year if the year is included in the passport number;

- Check and compare the designated classification on the visa with the designated classification on the admission stamp;
- Call or visit a CBP Deferred Inspection office for assistance in obtaining a paper copy of Form I-94.

The minutes noted that USCIS would be issuing no further guidance about the electronic I-94. However, if the USCBP record cannot be located … "A photocopy of the biographical page(s) of the passport, the visa (if applicable), and the admission stamp would be acceptable in most cases as an alternative to a print-out of the I-94 information from the CBP website. USCIS may request additional evidence if necessary."

9) USCIS Rolls Out Online Change of Address Tool

On October 25, 2013 USCIS introduced an online tool for change of address notification. Simply go to the change of address tool at www.uscis.gov where "customers will simply complete a single form with questions that guide them through the process. In addition, the updated tool is now compatible with multiple web browsers and confirms the change by email." (Provided they note the email address correctly.)

10) News from VSC

On October 17th the Vermont Service Center distributed an Update for October, 2013. The Update described substantial growth of VSC with the implementation of a second shift which began on February 25th which is expected to last through March, 2014 at which time a new facility will take over from an existing Service Center.

VSC has 956 federal employees of which 531 are in St. Albans and 425 are in Essex. 64% of the work force are adjudications officers. The Customer Service Division was most happy to note that it had maintained processing times for all I-765s, including student classifications during the Spring surge.

11) IRS Discusses Fake W-8 BENs

IRS has issued a notice regarding fake W-8 BEN forms used in IRS tax scams. The W-8 BEN is a certificate of foreign status of beneficial owner for United States tax withholding, and is a legitimate US tax exemption document. However, scam artists have targeted non U.S. residents and used the form format to acquire personal details including mother's maiden name, passport number, date of birth, pin numbers, and pass codes. The legitimate form does not request any of this information. Should anyone receive any of these notices, they should be ignored and no attachments should be opened nor links clicked upon.

The IRS notice may be found here.

Many thanks for your comments, your suggestions and your confidence in 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.

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