ADVANCED STUDENT ISSUES

by Elizabeth Goss, Adam Green, and Steve Springer

Elizabeth Goss is a Partner at Tocci, Goss & Lee, PC of Boston, London & Cape Cod. She is an active member of NAFSA; Association of International Educators, holding a variety of leadership positions for her region. She has previously served as the Director of Tufts Health Sciences campus, International Affairs Office with responsibly for student and scholar advising for the campus as well as visa processing for physicians and researchers at affiliated hospitals.

Adam Green is a former foreign student advisor at Harvard University and was chair of the AILA student/scholar committee for a number of years. He also was vice chair of its State Dept. committee. Adam has produced videos on the student regulations and spoken before consulate meetings about the F regulations when he practiced in Rome, Italy. He represents universities and research organizations.

Steve Springer is director of Regulatory Practice Liaison for NAFSA: Association of International Educators, has worked as an immigration attorney and university student/scholar advisor, and serves on AILA’s Students and Scholars Committee.

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The following are discussions of several specific issues related to the F-1 student classification that may be unfamiliar to attorneys who occasionally represent students. For additional information concerning student issues, the Student and Exchange Visitor Information System (SEVIS), and other higher education topics, please see AILA’s Practice Tip: The Top 25 Things Every Immigration Practitioner Should Know about Students and Scholars (F-1, M-1, and J-1) (Top 25, AILA Doc. No. 09091065) and Immigration Options for Academics and Researchers, 2nd Ed.

OPT EMPLOYMENT AND UNEMPLOYMENT

The regulations that brought the “cap gap” fix and “STEM extension” of Optional Practical Training (OPT) for F-1 students in 2008 also limited the aggregate time during which a student engaged in post-completion OPT may be unemployed [8 CFR § 214.2(f)(10)(ii)(E)]. The regulations do not specify the kind of employment the student must undertake but indicate only that it must be “directly related to the student’s major area of study” [8 CFR § 214.2(f)(10)(ii)(A)]. Nor do they specify the kind of employer or the amount of employment (part-time or full-time) required. Soon after the regulations were published, though, the Student and Exchange Visitor Program (SEVP), the Immigration and Customs Enforcement agency entity that administers the Student and Exchange Visitor Information System (SEVIS), issued policy guidance describing the kinds of “employment allowed while on OPT” [SEVP OPT Policy Guidance].

These are important issues because the regulations provide that “during post completion OPT, F-1 status is dependent on employment,” and SEVP has stated that “a student may be denied future immigration benefits that rely on the student’s valid F-1 status if DHS determines that the student exceeded the limitations on employment” [8 CFR §214.2(f)(10)(ii)(E); SEVP OPT Policy Guidance, item 7.4.4.] This has led to concerns that students who violate the unemployment provisions might, for example, be denied a change of status at the completion of the OPT period. The regulations also imposed new OPT-related reporting requirements on both students and Designated School Officials (DSOs), and SEVP has stated that it may examine SEVIS data and terminate a student’s record if the student cannot establish that she or he has been properly employed [8 CFR §214.2(f)(12)(i); SEVP OPT Policy Guidance, item 7.4.4.] These reporting requirements and the potential penalties for violating the unemployment limits lead students to ask attorneys about both unemployment and appropriate employment during OPT.

Given the state of the nation’s economy, it is not uncommon for students—even those in high-demand fields—to experience periods of unemployment during OPT. During post-completion OPT “students may not accrue an aggregate of more than 90 days of unemployment” [8 CFR §214.2(f)(10)(ii)(E).] Students granted a 17-month STEM extension of OPT “may not accrue an aggregate of more than 120 days of unemployment during the total OPT period,” including the initial period and the STEM extension period. In other words, students who are granted the regular period of OPT of up to one year, may be unemployed for up to 90 days,
and those granted a STEM extension are allowed an additional 30 days of unemployment. SEVP policy guidance states that weekends are counted, not just business days, and that temporarily departing the United States while unemployed does not stop the “clock,” but that when a student fails to receive the employment authorization document (EAD) from U.S. Citizenship and Immigration Services (USCIS) and must apply for a new one the “clock” stops until the replacement EAD is issued [SEVP OPT Policy Guidance, items 7.1.6–7.1.8.]

Calculating periods of unemployment and documenting employment are key in analyzing risk in this area.

SEVP policy guidance states that students engaged in OPT may work part-time (at least 20 hours per week) or full-time, and they may work for multiple employers (even short “gigs”), as contractors or through agencies or placement firms, and as self-employed business owners, and the employment may be paid or unpaid if not in violation of the law [SEVP OPT Policy Guidance, items 7.2.1.] Students who have been granted a STEM extension may engage in similar employment, except that unpaid employment is not permitted, and with the provision that all entities employing the student must be registered in E-Verify (if through an agency or placement firm, only the agency or placement firm—not the third parties—must be registered in E-Verify) [8 CFR §214.2(f)(10)(ii)(C)(3); SEVP OPT Policy Guidance, items 7.2.2.]

In light of the unemployment provisions mentioned above, all students engaged in OPT—and particularly those with multiple employers and “gigs”—should retain documentation of their employment.

The new reporting requirements are intended to gather information about a student’s OPT employment in her or his SEVIS record. In addition to “ensur[ing] that … the student is aware of his or her responsibilities for maintaining status while on OPT,” such as “report[ing] certain information to the DSO, including “interruption of employment,” the DSO “is responsible for updating the student’s record to reflect these reported changes [8 CFR §214.2(f)(11)(ii)(A); 8 CFR §214.2(f)(12)(i).] F-1 students granted a 17-month STEM extension must report “loss of employment” and have additional reporting requirements during the STEM extension [8 CFR §214.2(f)(12)(iii).] SEVP has clarified, though, that the “DSO is not responsible for calculating unemployment time or taking action in SEVIS based on unemployment time” since “DHS maintains responsibility for” such determinations [SEVP OPT Policy Guidance, items 7.4.3.] Perhaps most surprising is the fact that the regulations also make one eligibility factor for a STEM extension that “the employer agrees to report the termination or departure of an OPT employee to the DSO,” but there is no mechanism currently in place to verify the employer’s willingness to do so (such as an attestation), to inform the employer of the requirement, or to enable the employer to make such a report other than informally to the DSO [8 CFR §214.2(f)(10)(ii)(C)(4).]

**TRAVEL DURING OPT**

Students engaged in post-completion OPT often travel, sometimes at the behest of their employers. A student may also find it necessary to travel while waiting for USCIS to adjudicate his or her OPT application. Both groups present their attorneys with challenging questions. Often the answers depend on whether the OPT application (Form I-765) is pending with USCIS, the EAD is in hand and the student has begun employment, or the student is in the “cap gap” and transitioning to H-1B. The risk assessment that attorneys guide students through may involve questions about these and many other factors, such as whether a new visa will be required for return and the purpose of the trip.

In order to return to the United States, a student waiting to begin OPT or engaged in OPT must have a valid passport, a properly endorsed Form I-20 (even if expired, after completion of studies), a valid visa unless exempt from this requirement, and either an EAD and proof of employment if engaged in OPT or proof of a pending Form I-765 for OPT. Those who have a valid visa face a somewhat more predictable trip, though they may face various questions concerning eligibility and documents at the port of entry upon return to the United States. Those who must apply for a visa while abroad face additional uncertainty, and they must be prepared to establish their eligibility for the visa and face additional scrutiny of their intent to depart the United States after completing OPT and whether they continue to have an unabandoned residence abroad [INA §101(a)(15)(F); 22 CFR §41.61(b); 9 Foreign Affairs Manual (FAM) 41.61(b); 9 FAM 41.61 N.4.]

Students traveling after beginning OPT employment who present an unexpired EAD and a Form I-20 (which may be expired) “endorsed for re-entry by the DSO within the last six months,” and are otherwise
admissible, “may return to the United States to resume employment after a period of temporary absence [8 CFR §214.2(f)(13)(ii).] The phrase “to resume employment” is understood to mean that the student must have a job and not be returning simply to seek employment [SEVP Travel FAQ item 2.O.] Students who travel while engaged in OPT are also well-advised to have proof of employment at hand, such as a letter from the employer and “pay stubs.”

Students who travel after having applied for OPT but before it has been approved by USCIS face a more complicated situation. The regulations do not address this situation, but both SEVP and Department of State (DOS) have indicated that an F-1 student who has timely applied for post-completion OPT may travel outside the United States while the application is pending [DOS Cable, January, 2004; NAFSA Liaison with DOS and SEVP, May, 2004; SEVP Travel FAQ items 2.N and 2.O.] The DOS cable indicates that such a student, who has a properly annotated Form I-20 and receipt notice for the pending Form I-765, may be eligible for a visa. The SEVP FAQ states that a student with a pending OPT application “may reenter to search for employment.” Advising a student in this situation requires great caution and a careful discussion of the risks of such travel, particularly if a new visa is required for return to the United States.

Students engaged in OPT who are transitioning to H-1B, and particularly those in the “cap gap,” also present attorneys with challenging questions. During the “cap gap”—the period between the expiration of the student’s EAD and the effective start date (October 1) of his or her H-1B status—the student lacks the unexpired EAD required by the regulations for return to the United States [8 CFR § 214.2(f)(13)(ii).] Many have suggested that the agencies should consider the “cap gap I-20” to be the unexpired EAD, but there is yet no agency guidance to this effect and no indication that the Department of Homeland Security (DHS) or DOS would agree with this proposition. In fact, SEVP’s guidance on the subject, though slightly oblique, suggests that without an unexpired EAD issued by USCIS a student would not be eligible for readmission in F-1 status and should instead apply for an H-1B visa and return to the United States as an H-1B when eligible to do so [SEVP OPT Policy Guidance.]

Students engaged in OPT who are beneficiaries of approved H-1B petitions requesting change of status, and who wish to travel before the effective start date of the H-1B status face a murky situation. Many attorneys worry about how the “last action rule” might apply in this scenario, whether the re-entry to the United States in F-1 status prior to the effective date of the change of status might nullify the approved change of status. In a 2004 letter to an attorney, a USCIS official stated the most practical answer to the “last action” question: the “change of status takes effect automatically on the effective date noted on the Notice of Action (Form I-797), even if there is an intervening admission … because the last action is the taking effect of the change of status” (emphasis added) [Letter from E. Hernandez, AILA Doc. No. 05042565.] In other words, the “last action” is not the intervening admission to the United States between approval of the petition and the H-1B status start date, but is the taking effect of the change of status in the future. Lacking a regulation or even formal agency guidance on this issue, attorneys must proceed with caution and counsel students carefully about the risks of such travel.

TRANSITIONING FROM OPT TO H-1B AND THE “CAP GAP”

Students who are engaged in OPT and are transitioning to H-1B status, particularly those in the “cap gap,” often present attorneys with difficult questions. In addition to the travel questions, discussed above, some of the most difficult questions involve SEVIS and its interaction with the USCIS Computer-Linked Application Information Management System (CLAIMS). Also complicating the situation is the fact that the DSO of the student’s school, which she or he no longer attends while engaged in OPT, may need to perform certain SEVIS transactions during the student’s OPT period, which for some students lasts up to 29 months after the student has left campus.

Although the regulations concerning the “cap gap” extension of “duration of status” and OPT are rather straightforward, some of the related SEVIS processes are not. The regulations provide that “the duration of status and [OPT] employment authorization … of an F-1 student who is the beneficiary of an H-1B petition and request for change of status shall be automatically extended until October 1” if the petition is timely filed and requests an October 1 start date (emphasis added) [8 CFR §214.2(f)(5)(vi).] But SEVP has suggested that
these “cap gap” beneficiaries should obtain a new Form I-20—often referred to as a “cap gap I-20”—from the DSO indicating continuing status and work authorization, if any [SEVP OPT Policy Guidance, items 9.1 through 9.4.5] SEVIS and CLAIMS interface, and SEVIS is regularly updated with CLAIMS information. Petitions that have not yet been received and wait-listed petitions, however, are not entered into CLAIMS. Furthermore, the SEVIS – CLAIMS interface is far from perfect, and occasionally a student’s record is not properly updated so that a “cap gap I-20” may be issued. In fact, during the 2010 “cap gap season,” DSOs reported many discrepancies. SEVP has recognized this fact and created a mechanism through which the DSO may contact the SEVIS Help Desk and request a data fix [SEVP OPT Policy Guidance, item 9.3; SEVIS Training Slides]. Bear in mind that this manual process for correcting records may be slow and cumbersome.

Another serious problem resulting from SEVIS – CLAIMS interface issues is the regular early termination in SEVIS of a student’s period of OPT. In short, the problem seems to be that the interface treats many beneficiaries of H-1B petitions who are engaged in OPT as if they are “cap gap” beneficiaries (intending an October 1 H-1B start date), when they clearly are not. Apparently the SEVIS – CLAIMS interface includes an automatic process that updates the SEVIS records of students on post-completion OPT who are the beneficiaries of receipted H-1B petitions, so that the students’ SEVIS records will reflect “cap gap” extension benefits. It appears, though, that SEVP and USCIS are unable to ensure that the automatic updates occur only to “cap gap” beneficiaries, and DSOs report many instances in which an H-1B petition beneficiary’s OPT is terminated in SEVIS on September 30 even though the OPT has been approved for a longer period and the H-1B status will not begin on October 1. These F-1 students possess an EAD indicating continuing work authorization into the future, but their SEVIS records indicate that the work authorization has ended. This presents myriad problems for them, such as problems obtaining driver licenses. DSOs may request a SEVIS data fix in these situations, but—as noted above—this manual process for correcting records may be slow and cumbersome.

Occasionally attorneys will encounter a beneficiary of an approved H-1B petition who is engaged in OPT and wants to effect a withdrawal of the petition in order to continue OPT instead. Apparently USCIS will accept a request to withdraw an H-1B petition only from the employer (or employer’s attorney) who filed it, and not from the beneficiary, even if the petition included a request to change the status of the beneficiary. If the employer withdraws the petition before the effective start date of the H-1B status, and provides evidence of the withdrawal to the DSO, it is usually possible for the DSO to arrange with the SEVP Help Desk a “data fix” of the student’s record. In other words, once the H-1B petition is withdrawn, the student’s SEVIS record can be revised so that it no longer indicates a future change of status. DSOs have reported both success and failure in obtaining such a “data fix” with only proof of the employer’s request to USCIS to withdraw the petition. The SEVIS Help Desk most often requires a copy of the actual petition revocation notice issued by USCIS. Obvious problems arise when the effective start date of the H-1B status is approaching and the employer and beneficiary are still awaiting the USCIS notice. It is apparently impossible, once the effective start date of the H-1B status has passed, to effect a “data fix” to the student’s SEVIS record to re-establish the terminated OPT and F-1 status.

There are important exceptions and limitations concerning the extension of duration of status and OPT employment authorization during the “cap gap.” The regulations provide that “the duration of status and any employment authorization granted under 8 CFR §274.a12(c)(3)(i)(B) [post-completion OPT] and (C) [STEM extension] of an F-1 student who is the beneficiary of an H-1B petition and request for change of status shall automatically be extended until October 1” if the petition has been timely filed and requests an October 1 start date [8 CFR §214.2(f)(5)(vi).] It is essential to note that a student’s OPT will be automatically extended through the “cap gap” only if it is still in effect on the day that the H-1B petition is filed [SEVP OPT Policy Guidance, item 9.1.2.(p. 32).] If the student’s OPT has expired before the H-1B petition is filed, the “duration of status” may be extended but the OPT will not. For example, if a student’s OPT expired on March 15, and she is in her 60-day grace period on April 1 when an H-1B petition is filed on her behalf, her “duration of status” is extended until April 1, but not her OPT work authorization. [For information about other limitations on “cap gap” benefits, see 8 CFR §214.2(f)(5); SEVP OPT Policy Guidance; and Top 25, AILA Doc. No. 09091065]
LEAVE OF ABSENCE AND THE OPT ELIGIBILITY CLOCK

Since F-1 students are required to enroll for a “full course of study” (with some exceptions), leaves of absence from school present challenging advising situations and may lead to unexpected consequences [8 CFR §214.2(f)(6)]. The regulations provide that an F-1 student may be re-admitted to the United States after “a temporary absence of five months or less” [8 CFR §214.2(f)(4)]. This is understood to mean that after a break of five months or less, a student may be re-admitted to resume status, but after a break of more than five months, a student must enter as an initial student. Such an initial student would require a new SEVIS record, a new Form I-20, a new SEVIS I-901 fee payment, and—according to DOS (but not necessarily U.S. Customs and Border Protection (CBP)—a new F-1 visa [9 FAM 41.61 N17.4(b); DOS Cable, March 2007.], and the “clock” for eligibility for benefits such as practical training would be reset [SEVP Travel FAQ, item 2.L.] Attorneys may encounter students who have received a job offer and are expected to utilize OPT for work authorization but have taken a leave of absence and not yet accrued the “one academic year” of study necessary for eligibility since the re-setting of the “clock” and are therefore not eligible for OPT [8 CFR § 214.2(f)(10).]

ATTORNEY–DSO COOPERATION IN THE REINSTATEMENT PROCESS

While the regulations addressing reinstatement to student status do not explicitly state the role of the DSO in the process, they do imply that by issuing the necessary Form I-20 the DSO is recommending reinstatement [8 CFR §214.2(m)(16)(i).] In order to issue the Form I-20 the DSO must “request reinstatement” for the student in SEVIS if the student has a completed or terminated SEVIS record [SEVIS User’s Manual, 2.4.5.2.14 (p. 83).] Furthermore, a letter from the DSO supporting the student’s application to USCIS may be quite useful. For these reasons, attorneys should not be surprised to find that DSOs feel both some discretion in whether they must “request reinstatement” for a student and some responsibility for the reinstatement process. In order to ensure a smooth and successful reinstatement process for a client, the attorney should plan to cooperate with the DSO in the process.

Before issuing the Form I-20 to be filed with the reinstatement application to USCIS, the DSO will normally require all of the documents necessary to issue a new Form I-20, such as updated documentation of financial support. While not explicitly required by the regulations, most applicants submit a detailed letter to USCIS specifically addressing each of the eligibility criteria, and the DSO may ask to see this letter before “requesting reinstatement” for the student and issuing the Form I-20. Some DSOs ask to see the completed Form I-539 to be filed with USCIS before issuing the Form I-20 in order to ensure that the student actually intends to use the Form I-20 for its intended purpose. If the student must pay a new SEVIS I-901 fee, required if the student has been out of status for five months or more, the DSO may ask to see the receipt [8 CFR §214.3(d)(7).] Most often these precautions are best interpreted as an attempt by the DSO to ensure that his or her recommendation is not frivolous and that the student submits to USCIS a complete application with the best chance of approval.

Attorneys may be interested in the process the DSO undertakes to issue the Form I-20 for the reinstatement application. As mentioned above, if the student has a completed or terminated SEVIS record—which is most often the case when reinstatement is required—the DSO must select the “reinstate student” link in the student’s SEVIS record and complete “the reinstatement screens” with biographical information about the student and information about the student’s program of study and financial support. Once the information is submitted in SEVIS, a “confirmation” screen appears with the message “update successful,” a link to the new Form I-20, and a “request i.d.” number [SEVIS User’s Manual, 2.4.5.2.14 (pp. 83–93).] If the student’s reinstatement application is approved by USCIS, the DSO must review the student’s SEVIS record to determine if updates are necessary [SEVIS User’s Manual, 2.4.5.2.14 (p. 84).]

SEVIS AND UNLAWFUL PRESENCE

Attorneys occasionally raise the question of whether a student whose SEVIS record has completed or been terminated is deemed to be unlawfully present in the United States pursuant INA §212(a)(9)(B)(ii). The authors know of no legal authority for a conclusion that termination or completion of a SEVIS record is in any
way connected with the accrual of unlawful presence. In fact, the only agency guidance on unlawful presence and aliens admitted to the United States for duration of status—issued by legacy Immigration and Naturalization Service (INS) and confirmed by USCIS—indicates otherwise. Granted, we have formal confirmation of the INS guidance only by USCIS, and some attorneys worry that U.S. Immigration and Customs Enforcement (ICE), in particular, may not follow the INS guidance. To date, though, there have been no formal pronouncements to this effect.

The law provides that “an alien is deemed to be unlawfully present in the United States if the alien is present in the United States after the expiration of the period of stay authorized by the Attorney General or is present in the United States without being admitted or paroled” [INA §212(a)(9)(B)(ii).] F-1 students and their F-2 dependents are admitted for duration of status, so their period of stay authorized by the Attorney General does not expire. The INS guidance, later formally adopted by USCIS (and apparently by DOS), is that a non-immigrant admitted for duration of status will be considered unlawfully present for purposes of §212(a)(9)(B) only if:

(1) USCIS determines in the course of adjudicating an application for an immigration benefit that the alien violated his or her nonimmigrant status; or (2) an immigration judge finds in the course of exclusion, deportation or removal proceedings that the alien violated his or her nonimmigrant status [USCIS Adjudicator’s Field Manual (AFM) ch. 40.9.2(b)(1)(E)(iii); USCIS Consolidated Guidance on Unlawful Presence, AILA Doc. No. 09051468; Unlawful Presence Practice Advisory, AILA Doc. No. 09091869.] A SEVIS record is most often terminated by the DSO, and clearly such a termination would not, pursuant to current and prior agency guidance, result in the accrual of unlawful presence. SEVP certainly has the ability to terminate SEVIS records, but to date the only widely-reported instance of SEVP terminating students’ SEVIS records was related to withdrawal of a school’s program certification after school officials were alleged to have committed fraud and other crimes.

CRIMINAL CONVICTIONS AND SEVIS RECORDS

Occasionally questions arise as to whether a DSO must terminate a student’s SEVIS record when the DSO knows that the student has been convicted of a crime. The DSO is not required to report a conviction, but rather is required to report only a “disciplinary action taken by the school against the student as a result of the student being convicted of a crime” [Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Division C of the Omnibus Appropriations Act of 1996 (H.R. 3610), Pub. L. No. 104-208, 110 Stat. 3009, §641(c)(1)(D); 8 CFR §214.3(g)(2)(ii)(D).] When a school does take disciplinary action against a student as the result of a conviction, the DSO simply enters the information about the disciplinary action in SEVIS [SEVIS User’s Manual, item 2.4.5.2.11 (p. 76).] The student’s SEVIS record is not necessarily terminated (unless, for instance, the student is prohibited from enrolling). Through the report in SEVIS, ICE may learn of the disciplinary action and may investigate to determine the nature of the conviction and whether it would impact immigration status.

CURRICULAR PRACTICAL TRAINING

Curricular Practical Training (CPT) is work authorization for a specific training activity that is authorized by a DSO. Since only a DSO may authorize it, but since it might be used by the student for employment with an attorney’s employer-client, attorneys often have an interest in CPT and questions about how it is authorized.

A DSO may authorize CPT for an activity that is “an integral part of an established curriculum,” including a work/study program, an internship, cooperative education or other required internship or practicum offered through cooperative agreements between a school and an employer [8 CFR §214.2(f)(10)(i).] The DSO does so by updating the student’s SEVIS record to reflect that either full-time or part-time practical training has been authorized for a specific employer, at a specific location, and between certain dates, and issuing the student a Form I-20 with the CPT endorsement. The student’s Form I-20, with the CPT endorsement, serves as employment authorization [8 CFR §274a.12(b)(6)(iii).]
Despite the language at 8 CFR §214.2(f)(10) that would seem to limit a student to 12 months of practical training, there is no such limit on either part-time or full-time CPT; however, a student who uses a full year of full-time CPT is ineligible for OPT at the same academic level (part-time CPT does not count against OPT) [SEVP OPT Policy Guidance, item 3.2; see also SEVIS User’s Manual.] Students who complete less than a year of full-time CPT or any amount of part-time CPT do not become ineligible for OPT.

The language of the regulations pertaining to CPT leaves room for widely varying institutional approaches. Some schools authorize CPT only for required experiential learning such as a practicum or internship, while others authorize CPT for any experiential learning considered “an integral part of an established curriculum.” School approaches to determining whether an activity is “an integral part of an established curriculum” also vary widely, with some schools requiring that a student receive course credit for the activity and others accepting a faculty member’s evaluation that the activity meets this standard. Bear in mind that reasonable university officials have arrived at quite different institutional CPT policies. Some may seem more facilitative of experiential learning and employment than others, but policies that appear more restrictive may have been formulated through careful consideration of a variety of institutional factors and with the best interests of students in mind. While it is the DSO who makes the final determination of eligibility and “grant[s] authorization” [8 CFR §214.2(f)(10)(ii).] the DSO is often simply implementing the institution’s CPT policies, and may or may not have had a role in setting the policies.

**GRACE PERIODS**

There are several periods specified in the regulations during which students are allowed to remain in the United States before beginning the program of study or after completing or withdrawing from it. An F-1 student may be admitted up to 30 days before the program start date listed on Form I-20 [8 CFR §214.2(f)(5)(i).] “An F-1 student who has completed a course of study and any authorized practical training following completion of studies will be allowed an additional 60-day period to prepare for departure from the United States or to transfer” to another program of study [8 CFR §214.2(f)(5)(iv).] During the 60-day grace period following completion of studies, the student may not engage in employment but may apply for OPT [8 CFR §214.2(f)(10)(i)(B)(2).] After completing a period of authorized OPT, the student has another 60-day grace period [8 CFR §214.2(f)(10)(ii)(D).] Both the regulations and USCIS policy guidance recognize that students are eligible for change of status to another nonimmigrant status during these 60-day grace periods following completion of studies and OPT [8 CFR §214.2(f)(6)(iii)(C); 08/04/2004 Yates Memo, AILA Doc. No. 04081167.]

Students who withdraw from school may be eligible for a shorter grace period. The regulations provide that an “F-1 student authorized by the DSO to withdraw from classes will be allowed a 15-day period for departure from the United States. However, an F-1 student who fails to maintain a full course of study without the approval of the DSO or otherwise fails to maintain status is not eligible for an additional period for departure” [8 CFR §214.2(f)(5)(iv).] The 15-day grace period following an authorized withdrawal begins on the date that the DSO notes the withdrawal in the student’s SEVIS record. The regulations appear to limit permissible activities during this grace period to “preparation for departure,” so employment and transfer to another program appear not to be permitted.

**CHANGE OF STATUS TO F-1 AND ISSUES OF TIMING**

Attorneys should be aware of two important timing issues for clients applying for a change of status to F-1. The first concerns the end date of the client’s nonimmigrant status, if it is date-specific. The second concerns the program start date or report date on the Form I-20 issued to the student by the school’s DSO. A failure to understand the relationship of these dates and the mechanism for deferring the program start date, if necessary, may result in denial of a client’s change of status applications.

USCIS has taken the position, based on the regulation providing that “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 change of status 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 CFR §214.2(f)(5)]. For example, if an applicant’s B-2 status ends more than 30 days prior to the start of the F-1 program listed on the Form I-20 submitted with the change of status application, USCIS will deny the application. A key problem for applicants who will pursue a student program is that most institutions have fixed and inflexible program start dates, such as school term start dates, so it is not possible for DSOs to vary program start dates to accommodate applicants.

The term “request” is used above to emphasize that, in another situation, a 30-day gap between the change of status applicant’s date-specific current status and the requested F-1 status is not fatal to the application. If the gap is due to USCIS processing times, apparent agency policy is not to penalize the applicant. For example, if an applicant’s B-2 status ends on the same day that the F-1 program is to begin, but USCIS takes 60 days beyond the program start date to process the application, the student’s program start date will have to be deferred to the next school term, but the resulting gap of more than 30 days will not result in a denial of the application [VSC Stakeholder Meeting Q&A, AILA Doc. No. 09090265, item 25]. The deferral of the program start date in the SEVIS record by the DSO will be crucial.

One key to a successful change of status application involving a SEVIS record is the cooperation of the DSO. As in the example just mentioned, if due USCIS processing time a student is still waiting for adjudication of the change of status application when the program start date passes, the DSO will need to defer the start date. USCIS usually does not request a new Form I-20 (since adjudicators have access to the SEVIS record and can see the deferral), but such a request is possible. Furthermore, there are automatic SEVIS operations that may result in a cancellation or termination of the record. Sixty days after the start date of the F-1 program listed on the Form I-20 and in SEVIS, an automatic SEVIS process will cancel or terminate the record if the student has not enrolled in school and the DSO “registered” the SEVIS record to indicate enrollment. The fact that the student has a pending change of status application, and the fact that enrollment may not be possible until the application is approved, do not stop the automatic process. For the application to remain viable, the DSO must defer the record to a future program start date [VSC Stakeholder Meeting Q&A, AILA Doc. No. 09090265, item 25; NAFSA-SEVP Liaison Call, 02/09/2005, item 7; Geary Memo, 02/04/2005]. There is a further SEVIS “maintenance job” that may affect a change of status application pending beyond 180 days, but a discussion of it is beyond the scope of this article other than to note that requesting the DSO to fix the problem may be required.

Another common question posed by clients seeking a change of status to F-1 is whether they can begin their program after filing the change of status application but before being granted F-1 status. Arriving at an answer requires careful analysis of both the regulations addressing change of status and the regulations governing the applicant’s current status. An initial consideration is whether the applicant’s current status allows study. For example, H-1Bs and H-4s are not prohibited from pursuing a course of study as a secondary activity, and so may begin classes prior to approval of the change of status application. Those in B-1 or B-2 status, on the other hand, are prohibited from pursuing a course of study, and so must wait for approval of the application to begin studies [8 CFR §248.1(c)]. The current regulations prohibit F-2 spouses from enrolling in a full course of study and allow them only to “engage in study that is avocational or recreational in nature” [8 CFR §214.2(f)(15)(ii)(a)]. Further complicating the analysis is the fact that the regulations concerning change of status to F-1 or M-1 indicate that—except for applicants whose current status is B-1 or B-2—an applicant is not ineligible for the requested change of status solely because he or she may have started a course of study before submitting the application [8 CFR §248.1(c)(1)]. Some have noted that the regulation restricting F-2 study was issued after the regulation penalizing only B-1s and B-2s for beginning a course of study prior to submitting a change of status application. DHS has recently announced plans to [revise its regulations to allow F-2s less restricted part-time study [DHS Press Release, 01/31/2012, AILA Doc. No. 12013168]].

Many aspects of the change of status scenario are beyond the scope of this article. For additional information and references to authority, see Top 25, AILA Doc. No. 09091065.