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BEWARE THE GAP: USCIS'S POLICY CHANGES CAUSE HEADACHES AND CONFUSION FOR F-1 CHANGE OF STATUS APPLICANTS

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There's never any good news coming from USCIS these days. The agency's treatment of applicants changing status to F-1 is another prime example of a confusing policy change that has no basis in law and regulation, and which severely hurts the U.S.'s ability to hold on to talented students. To fully grasp the ridiculousness of modern day USCIS, we should take a trip back through relevant policy interpretations dating back to legacy INS. We can start in April 2012 when the administration under President George W. Bush, frightened by the September 11, 2001 terrorist attacks, published an interim rule in the Federal Register. You can see from the preamble to the interim rule exactly the kind of xenophobic policy the administration was trying to implement, which has only gotten worse today:

> The terrorist attacks of September 11, 2001 highlight the need of the Service to maintain greater control over the ability of an alien to change nonimmigrant status once the alien has been admitted to the United States. This interim rule will allow the Service to fully review any request from a B nonimmigrant to change nonimmigrant status to that of full-time student before allowing the alien to enroll in a Service-approved school. The elimination of the ability of a B nonimmigrant to begin classes before receiving the Service's approval of the change of nonimmigrant status is also consistent with the Act's requirement in section 101(a)(15)(B) that a B nonimmigrant not be a person coming to the United States for the purpose of study.

The interim rule was effective upon publication, and was announced in a Memo from Johnny N. Williams, the Executive Associate Commissioner of the Office of

Field Operations (Williams, Ex. Assoc. Comm. Field Operations, *Requiring Change of Status from B to F-1 or M-1 Nonimmigrant Prior to Pursuing a Course of Study*, HQISD 70/6.2.2 (Apr. 12, 2002)). The new rule required a B-1/B-2 visitor to **first** obtain a change of status to F or M status **before** starting school. If a visitor had already started school, the change of status application would be denied. The rule became effective April 12, 2002 and the policy was codified in 8 CFR §214.2(b)(7). Going further, the change of status application needed to be timely filed before the B-1/B-2 status expires *and* within 30 days of the start of school. The latter requirement seems to stem from USCIS's interpretation of 8 CFR §214.2(f)(5)(i), part of which states:

> An F-1 student may be admitted for a period up to 30 days before the indicated report date or program start date listed on Form I-20. The student is considered to be maintaining status if he or she is making normal progress toward completing a course of study.

Then, a case brought before the Maryland District Court in 2011 challenged USCIS's interpretation of this regulation. In *Youseffi v. Renaud*, 794 F.Supp.2d 585 (D. Md. Mar. 11, 2011), the Plaintiff Narges Youssefi entered the U.S. in B-2 status and was granted a B-2 extension through December 27, 2007. After receiving a request from her employer back in Iran that she stay in the U.S. and take classes to improve her English language skills, Ms. Youssefi decided to apply to take English classes, acquired an I-20, and listed November 3, 2008 as the start date for her classes on the Form I-20. She timely filed a change of status application from B-2 to F-1 on June 25, 2008. USCIS denied her application, reasoning that she had failed to maintain her current nonimmigrant status up to 30 days before the start of classes and was therefore ineligible for a change of status. The Plaintiff appealed the case all the way up to district court. The court in *Youseffi* grappled with USCIS's interpretation of 8 USC §1258, 8 CFR §248.1(b), and 8 CFR §214.2(f)(5)(i) that a B-2 to F-1 change of status applicant must maintain active B-2 status up to the 30 days before the school program start date, and not just until the change of status application is filed. First and foremost, the court found that the statutory language at INA §248 is inherently ambiguous, as it "implies that the USCIS may not grant a change of status to someone who has failed to 'maintain' his or her nonimmigrant status, but it does not define what it means to 'maintain' status. It is unclear from the statute whether a nonimmigrant must continue to maintain her status only until she petitions for a change in classification, or

whether she must continue to maintain it until USCIS grants her new nonimmigrant status." *Youseffi v. Renaud*, 794 F.Supp.2d 585, at 593. But then the court looked at 8 CFR §248.1(b) where it found language that clarified the ambiguity in favor of the applicant:

> Section 248.1(b) states that "a change of status may not be approved for an alien who failed to maintain the previously accorded status or whose status expired before the application or petition was filed, except that failure to file before the period of previously authorized status expired may be excused in the discretion of the Service …." 8 C.F.R. § 248.1(b). **Under the plain language of the regulation, an applicant may be eligible for a change of status even if she failed to file before her previously authorized status expired**. The ultimate decision of whether to excuse the applicant's lapse lies within "the discretion" of the USCIS.

Id. (Emphasis added). The court concluded that 8 CFR §248.1 allows USCIS to use its discretion to excuse applicants who apply for a change of status and whose prior status remained valid at the time of filing but later expired. *Id*. The court went on to review this same regulation against 8 CFR §214.2(f)(5)(i), and found that the latter regulation is silent on situations like in *Youseffi* where the applicant's prior status expired more than 30 days prior to the program start date. It then remanded the case to USCIS which the court found could excuse a change of status applicant who filed while the prior status is valid but which later expired.

Since *Youseffi*, however, no higher federal court has addressed USCIS's interpretation of these regulations. And in the last few years, USCIS's views have moved further away from a reasonable plain meaning understanding of the statute and regulations.

Case in point, a few years ago, immigration attorneys began reporting USCIS denials of applications to change status from B-2 to F-1 where the applicant had timely filed while his prior status was valid, the program start date indicated on the Form I-20 was within 30 days of the expiration of the underlying status, but then because of lengthy processing times at USCIS service centers, the school's Designated School Official (DSO) had to defer the program date in SEVIS. The effective result was that although it was still within 30 days of the initial start date listed on the Form I-20, the applicant's prior status had expired more than 30 days before the new program start date.

There were so many incidents of this that the American Immigration Lawyers Association (AILA) was prompted to send a letter to Leon Rodriguez, then-Director of USCIS and the agency's Chief Counsel, Ur Mendoza Jaddou. The letter, dated December 15, 2016 (and available here for AILA members), explained how USCIS was erroneously denying these applications by misinterpreting 8 CFR §248.1(b), 8 CFR §214.2(f)(5)(i), and Form I-539 instructions to require B-2 to F-1 change of status applicants to maintain their B-2 statuses up to 30 days before a new program start date even though the original start date was only deferred because of USCIS's own extremely lengthy processing times. AILA's letter again reasoned that USCIS's interpretation of these regulations went far beyond what they state, and that in fact nowhere in the regulations does it state that change of status applicants have to maintain their prior status so that they remain in that prior status until 30 days before the program start date. AILA pointed to the fact that even the court in *Youseffi* cited *Unification Church v. Attorney Gen. of the U.S.*, 581 F.2d 870, 877 (D.C. Cir. 1978) (stating, in dicta, that it "appears to be the position taken" in 8 CFR §248.1 that "an applicant nonimmigrant must continue to maintain his 'status' only until he petitions for a change in classification," not "until his petition is granted"); and *Salehpour v. INS*, 761 F.2d 1442, 1447 (9th Cir. 1985) ("The plain regulatory language allows an applicant to file for change of classification up to the last day of his prior authorized stay."). Moreover, USCIS practice had been to routinely approve these types of change of status applications, and the I-539 instructions even stated that a change of status applicant "must maintain current, or other, nonimmigrant status up to 30 days before the report date or start date of the course of study listed on Form I-20 or requested change of status may not be granted." (Emphasis added). The I-539 instructions clearly state that USICS is to rely on the date listed on the I-20 when adjudicating the application, and not a deferred start date that's listed by the DSO on SEVIS. AILA then argued that "bridge petitions" that the applicant would file to extend the B-2 even while the change of status to F-1 is pending are not only cost prohibitive, they cause confusion to applicants, force USCIS to adjudicate unnecessary applications, which in turn lengthen already long processing times, and additionally creates issues around the "intent" of the applicant who already filed to change a status from temporary visitor to temporary student and then has to file an extension of a temporary visitor status. Moreover, at the time of the letter, AILA's members found that USCIS's bridge petition requirement for B-2 to F-1 change of status applicants was inconsistently applied, where some

B-2 extension applications were denied because it went against B-2 intent, or returned because they were not required.

Seemingly in answer to all the complaints from stakeholders about the inconsistent application of the bridge application requirement, USCIS decided in April 2017 to formalize the new policy. USCIS updated its website to formally require B-1/B-2 to F-1 or M-1 change of status applicants whose status will expire more than 30 days before the initial F-1 or M-1 program start date, or whose program start dates had to be deferred because of USCIS processing times, to file a second Form I539 requesting an extension of the B-1/B-2 status and pay a separate fee for that application. By the way, if the change of status application takes so long that the first extension time runs out, the applicant must file another extension of status application with another fee, and keep going until the original change of status has been approved.

Then, to cause even more confusion, and in a completely unhinged and callous move, USCIS decided to apply this "new" policy to ***pending*** B-1/B-2 change of status applications that were filed **before** USCIS posted its guidance. How do we know? Because USCIS issued Requests for Evidence (RFEs) to these applicants! In these RFEs, USCIS states that the applicant's underlying B-1/B-2 statuses had expired and that the F-1/M-1 start date had been deferred to a date more than 30 days after the B-1/B-2 status expired. And by virtue of the new policy, which again was posted **after** the change of status application had been filed, USCIS requests evidence through the RFE that either the applicant submitted the additional Form I-539 application to extend her B-1/B-2 status, or if the applicant had not (and let's again recall that the policy was adopted after the application was filed, and there is no indication on the USCIS website that it would apply retroactively to pending applications), that the applicant file the new I-539 now and ask USCIS to excuse the late filing pursuant to 8 CFR §214.1(c)(4).

Let's recap what we have so far. USCIS decided in April 2017 that it will require B-1/B-2 extension of status applications filed even if an application to change status is already pending, and is applying this policy to already filed change of status applications, and all without issuing a formal policy memorandum or undergoing a normal notice and comment period. USCIS merely posted new "guidance" on its website, provides no statutory or regulatory basis for this change, and does not explain what happens to the B-1/B-2 extension of status applications once they are filed.

The result of USCI's failure (or perhaps refusal) to undergo a formal notice and comment period for a sweeping policy change is that applicants and other stakeholders are simply not well informed about USCIS's requirements, usually to detrimental and often disastrous results. What had started off as USCIS's formalization of its policy toward B-1/B-2 to F-1/M-2 change of status applicants has recently expanded to affect **all other nonimmigrants** who want to change status in order to remain in the U.S. to study. USCIS's original website posting of the new "guidance" referred exclusively to B-1/B-2 status holders changing status to F-1 or M-1 (the original website post has been preserved by AILA, and can be viewed here by members). A careful review of the most recent USCIS website discussing this policy, which was most recently updated in February 2018, shows that the policy has been extended to every nonimmigrant whose status will expire more than 30 days before the F-1 and M-1 program start date. There is no specific mention of B-1/B-2 status holders. The full relevant language from the website is pasted here:

What if I Have a Gap in Status?

If your current nonimmigrant status will expire more than 30 days before your F-1 or M-1 program start date and you wish to remain in the United States until your start date, you must find a way to obtain status all the way up to the date that is 30 days before your program start date ("bridge the gap"). For most people, you will need to file a separate Form I-539 to request to extend your current status or change to another nonimmigrant status, in addition to your other Form I-539 application to change to student status. If you do not file this separate request prior to the expiration of your status, USCIS will deny your Form I-539 request to change to F-1 or M-1 status. Please continue to check the USCIS processing times while your Form I-539 change of status request is pending to determine if you need to file a request to extend or change your nonimmigrant status.

- Note that because of processing times, your F-1 or M-1 program start date may be deferred to the following academic term or semester because USCIS did not make a decision on your Form I-539 change of status application before your originally intended F-1 or M-1 program start date. In that instance, you will need to obtain status all the way up to the date which is **30 days before yournew program start**

> **date**. If you had already filed an I-539 to bridge the original gap, you may need to file another I-539 to bridge the new gap.
>
> Because extending or changing nonimmigrant status to bridge the gap and changing to F-1 or M-1 status are two distinct benefits, you must pay a separate filing fee for each request. See the User Fee Statute, 31 U.S.C. § 9701.

How does this expanded policy look in practice? Let's say that an H-4 child of an H-1B worker is going to age out because she is turning 21. Meanwhile her parents intend to maintain their H-1B and H-4 statuses, extending them in 3-year increments, so that they can remain long-term in the U.S. until the H-1B parent's I-140 priority date is current and they can adjust status to lawful permanent residents. It bears noting that the reason why our H-4 applicant's parents are still in H-1B and H-4 statuses and need to extend them in 3-year increments under §104(c) of the American Competitiveness in the 21st Century Act is because they are caught in the never-ending green card backlogs under the employment-based second (EB-2) or employment-based third (EB-3) preferences and by virtue of being born in India or China. Otherwise, the parents, along with our H-4 applicant who was their minor child, would have long ago obtained their green cards and the H-4 student would not have had to go through this ordeal. Our H-4 student has already been enrolled in college and has been otherwise maintaining her valid H-4 status. Following prior USCIS guidance and the guidance of her DSO, she decides to timely file a change of status application to F-1 so that she does not have to interrupt her studies by applying for an F-1 abroad and then returning to the U.S. As most stakeholders know, I-539 applications for a change of status notoriously take a long time for USCIS to process. So she waits, even after her H-4 has expired, thinking that she is in a "period of stay authorized by the Attorney General" as she had timely filed her change of status application. And then bam! She is hit with a **denial**. Why? Because she did not maintain her status or seek a change of status to another nonimmigrant category so that she could be "in status" within 30 days of the program start date indicated on the I-20. Yes, folks. USCIS now requires even H-4 nonimmigrants applying to change status to F-1 to **apply to change status to B-1/B-2** in order to stay "in status" until 30 days within the program start date. And USCIS does not even bother with issuing RFEs requesting proof that the applicant has maintained status until within 30 days of the program start date. The Service will simply issue a denial and it's up to the applicant now

to determine whether she can stay in the U.S. as her unlawful presence started tolling when the denial was issued, and whether it is even possible to appeal this nonsensical decision.

What is particularly irksome about USCIS's policy changes is that the usual notice and comment period would have, even if brief, provided *some* notice to stakeholders. But here, USCIS simply changed a bit of language on its website and everyone is expected to know the new requirements, abide by them, and live with harsh results for failing to follow them. Empirically, we are aware that school DSOs were not given any notice or guidance by USCIS on this new policy and its expansion to other nonimmigrant categories. Thus, our lowly applicant who relied on the advice of the DSO would not have known to request a change of status to B-2 to bridge the gap until her change of status to F-1 is approved. She is instead punished with a harsh denial, the inability to continue her studies, and potentially having to leave the U.S. in order to apply for an F-1 abroad which comes with its own set of issues, not the least of which could be questions over the applicant's nonimmigrant intent and problems with demonstrating ties to her home country if she has been living in the U.S in H-4 status since she was a young child.

There is already a brain drain occurring in the U.S. thanks to the Trump administration's xenophobic policies combined with the EB-2 and EB-3 backlogs. Fewer students want to come to study in the U.S. It's harder for companies to hire highly educated and skilled foreign workers. The backlogs in the EB-2 and EB-3 preferences are also causing skilled immigrants from India to leave the U.S. for countries like Canada in total desperation. Foreign born entrepreneurs are facing difficult challenges starting their businesses here in the U.S. One prime reason that people have upended their lives to come to the U.S. is to pursue the "American dream" for their children – to give them a chance to obtain excellent education and take advantage of the economic, social, and cultural opportunities in the U.S. This dream turns into a nightmare when the child on the H-4 visa ages out and is unable to seamlessly change status to F-1. No immigrant parent wants his child to be in a worse off situation than him because of our Byzantine immigration system. And now we will see even fewer nonimmigrants try to attend school because of USCIS's new, cumbersome, and costly policy discussed in this blog. Worse, if USCIS continues to issue new policy changes without a notice and comment period, we will likely see more confusion, more heartbreak, and more completely

nonsensical and costly requirements all without the barest minimum in explanation from our government. Beware the gap, indeed.