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US IMMIGRATION & NATIONALITY LAW

USCIS DENYING CHANGE OF STATUS FOR F-1 STUDENTS WITH OVER 12 MONTHS OF CURRICULAR PRACTICAL TRAINING

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An F-1 student who has received more than 12 months of Curricular Practical Training (CPT) may be found by United States Citizenship & Immigration Services (USCIS), to have violated F-1 status and thus ineligible to be granted a change of status in the US. This is yet another disturbing trend that we first mentioned in an earlier blog where we indicated that USCIS had started challenging F-1 maintenance of status through CPT by issuing Requests for Evidence on pending H-1B petitions requesting a change of status in the US.

Essentially, 8 CFR § 214.2(f)(10) provides that a student may be authorized a total of 12 months of practical training, and becomes eligible for another 12 months when the student changes to a higher educational level. Under 8 CFR § 214.2(f)(10)(i), however, "students who have received one year or more of full time curricular practical training are ineligible for post-completion academic training." Note that the inclusion of "academic training" appears to be an obvious typographical error, and it ought to have been "practical training" when the rule was last promulgated on 12/11/2002. This could clearly be interpreted to mean that a student can receive more than one year of CPT and, if so granted, this student would simply become ineligible to receive any practical training after graduation. This appears to have been the prevailing interpretation by all government agencies and CPT has continued to be routinely granted by Designated Student Officers (DSO) through the Student and Exchange Visitor Information System (SEVIS) that is administered by Immigration and Customs Enforcement (ICE). Enter the new USCIS in the era of Trump. Suddenly, USCIS has begun to interpret the regulations to mean that a student may only be granted a *total* of 12 months of any type of practical

training. This, despite the fact that ICE, its sister agency, authorized more than 12 months of CPT. USCIS is choosing to completely disregard the unmistakable indication in 8 CFR § 214.2(f)(10)(i) that students may legitimately receive "one year or more" of CPT.

It is painfully obvious that the intent behind the regulation was only to prohibit students who had received more than 12 months of CPT from then also receiving Optional Practical Training (OPT) after graduation. The intent was not to penalize a student for receiving more than 12 months of CPT. First, the student could not receive more than 12 months of CPT if the CPT weren't actually granted by a school DSO and entered into SEVIS. Accordingly, if there were any violation, it should be on the part of the school and not the student. The student should not be punished for failure to maintain status when that student followed all the appropriate steps to maintain status. Second, why is USCIS making a determination that such a student failed to maintain status when ICE is the agency that administers the Student and Exchange Visitor Program (SEVP)? If ICE has not determined that a student failed to maintain status and if SEVIS indicates that the student is currently in status, then USCIS ought to acknowledge that. If there had truly been a violation of status then SEVIS would have so indicated. And third, the regulations at 8 CFR § 214.2(f)(10) are simply outdated. In March 2016, the Department of Homeland Security (DHS) amended its F-1 student visa regulations on OPT for certain students with degrees in science, technology, engineering, or mathematics (STEM) from SEVP-certified and accredited U.S. colleges and universities. Specifically, the final rule allows such F-1 STEM students who have elected to pursue 12 months of OPT in the U.S. to extend the OPT period by 24 months (STEM OPT extension). *See* 8 CFR § 214.2(f)(10)(ii)(C). Perhaps DHS could have also amended the regulations and removed all outdated sentences. Unfortunately, USCIS is now seizing upon such a sentence and using it to launch another attack on F-1 students.

In the case of the H-1B petition, USCIS can approve the underlying H-1B but deny the request for a change of status. In order to obtain H-1B status, the student would need to leave the US and apply for an H-1B visa at a US Consulate or Embassy abroad. At this point in time, upon receipt of a USCIS denial of a request for a change of status on an H-1B petition, the F-1 student would only have accrued unlawful presence from August 9, 2018 under USCIS' unlawful presence policy for F, J and M nonimmigrants. Individuals who have accrued more than 180 days of unlawful presence during a single stay, and

then depart, may be subject to 3-year or 10-year bars to admission, depending on how much unlawful presence they accrued before they departed the United States. *See* INA § 212(a)(9)(B)(i)(I) & (II). Individuals who have accrued a total period of more than one year of unlawful presence, whether in a single stay or during multiple stays in the United States, and who then reenter or attempt to reenter the United States without being admitted or paroled, are permanently inadmissible. *See* INA § 212(a)(9)(C)(i)(1). Very few students will trigger the permanent bar as they generally do not try to reenter the US without being admitted or paroled. Students in receipt of a denial of a change of status can take advantage of the current grace period until February 5, 2019. However, if the student departs the US later than February 5, 2019, he or she will be barred from re-entering for 3 or 10 years.

So what can be done? More so than ever before, F-1 students really need to be proactive about their maintenance of status and need to seek legal advice in the event that any rules are unclear or even just to ensure that they are on the right track. It will not be enough to rely on the DSO's advice as the student will be the one punished in the end. But the bottom line is that this USCIS policy must be challenged in federal court! It is simply unconscionable to inflict the 3 and 10 year bars on a student who has diligently sought to maintain status in the US.