CYRUS D. MEHTA & PARTNERS PLLC
US IMMIGRATION & NATIONALITY LAW

STATE DEPARTMENT TOUGHENS STANDARD FOR ASSESSING A FOREIGN STUDENT'S TIES WITH HOME COUNTRY

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By Cyrus D. Mehta and Sophia Genovese-Halvorson

Similar to many other nonimmigrant admission requirements, under INA § 101(a)(15)(F), a foreign national must show that they have a foreign residence which they do not intend on abandoning in order to be admitted in F-1 nonimmigrant student status. As explained below, this requirement has been applied to students in various ways over the years, from strictly applying the requirement in the 1990s to a loosening of the standards under the 2005 State Department Cable.

In August 2017, the State Department yet again changed the ways in which F-1 visas are adjudicated by amending 9 FAM 402.505(E)(1) "Residence Abroad Required", to now include the following provision:

> **b. Examining Residence Abroad**: General rules for examining residence abroad are outlined in 9 FAM 401.1-3(F)(2). If you are not satisfied that the applicant's present intent is to depart the United States at the conclusion of his or her study or OPT, you must refuse the visa under INA 214(b). To evaluate this, you should assess the applicant's current plans following completion of his or her study or OPT. The hypothetical possibility that the applicant may apply to change or adjust status in the United States in the future is not a basis to refuse a visa application if you are satisfied that the applicant's present intent is to depart at the conclusion of his or her study or OPT.

The previous language provided, in relevant part,

> b. The context of the residence abroad requirement for student visas inherently differs from the context for B visitor visas or other short-term visas. The statute clearly presupposes that the natural circumstances and conditions of being a student do not disqualify that applicant from obtaining a student visa. It is natural that the student does not possess ties of property, employment, family obligation, and continuity of life typical of B visa applicants. These ties are typically weakly held by student applicants, as the student is often single, unemployed, without property, and is at the stage in life of deciding and developing his or her future plans. Student visa adjudication is made more complex by the fact that students typically stay in the United States longer than do many other nonimmigrant visitors.
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> c. The residence abroad requirement for a student should therefore not be exclusively connected to ties. You must focus on the student applicant's immediate intent. Another aspect to consider: students' typical youth often means they do not necessarily have a long-range plan, and hence are relatively less likely to have formed an intent to abandon their homes. Nonetheless, you must be satisfied at the time of application for a visa that the visa applicant possesses the present intent to depart the United States at the conclusion of his or her approved activities. That this intention is subject to change or even likely to change is not a sufficient reason to deny a visa.

It has yet to be seen how this update will affect future adjudications of the F-1 student visa. Given that the previous relaxed language provided above came out of the 2005 State Department Cable, it is likely that the corresponding guidance in the Cable is void. Still, the fact that 9 FAM 402.505(E)(1) retains language that the "hypothetical possibility that the applicant may apply to change or adjust status in the United States in the future is not a basis to refuse a visa application" gives some room to argue for a favorable adjudication despite the elimination of the prior language. At the same time, students seeking to study in the United States should be prepared to yet again overcome stringent foreign residence requirements.

Background

The number of foreign students travelling to the United States to study has grown dramatically over the past thirty years. With the FY 2016 coming to an end, over 471,000 F-1 visas thus far have been granted; whereas in FY 1987, only 139,241 were granted. Asia by far sends the largest number of students, sending in a total 335,934 students (Chinese students constitute the vast majority of these visa holders, totaling to over 150,000 students, followed by Indian students who account for 62,537 of the visas). This large influx of foreign students has been shown to positively benefit the US education system and US economy, where foreign students add value and diversity to the classroom and also offer diverse skills that keep the US economy competitive.

Before 1952, a foreign student had to prove that the "sole purpose in coming to the United States is for study; and that he intends to leave the United States and can enter some foreign country when his studies are completed." 22 C.F.R. § 42.228 (1949). After the enactment of the 1952 Immigration and Nationality Act, nonimmigrants are now "presumed to be an immigrant until he establishes to the satisfaction of the consular officer, at the time of application for a visa, that he is entitled to a nonimmigrant status under section 101(a)(15)." INA § 214(b). As explained, under § 101(a)(15), a foreign national must show that they have a foreign residence which they do not intend on abandoning.

Not surprisingly, young students seeking to study in the United States could not meet this strict standard because, as young students still at the beginning of their adult lives, many lacked financial assets and strong family ties to definitively prove that they would return upon completion of their studies. For example, in FY 2001, approximately 293,000 F-1 visas were granted, and nearly 112,000 were denied. Over two-thirds of the visa refusals were denied under INA § 214(b). Many foreign students seeking to study in the United Stated simply could not meet the onerous burdens set forth under INA § 214(b) and 101(a)(15).

In 2005, in response to these § 214(b) denials that became increasingly frequent especially after the September 11 terrorist attacks, the foreign residence requirement was relaxed for students. Under the Department of State cable (No.2005State274068), consular officers were directed to "evaluate the applicant's requirement to maintain a residence abroad in the context of the student's present circumstances… the residence requirement for a student… in a broader light, focusing on the student applicants' immediate intent." The cable effectively relaxed the foreign residence requirement for students, noting that students are typically "young, without employment, without family dependents, and without substantial personal assets." The cable rationalizes that due to their relative youthfulness, students do not necessarily have long-term plans and are therefore "less likely to have formed an intent to abandon their homes." The presumption, according to the Cable, was that students lacked a present immigrant intent because they were young and likely incapable of creating long-term plans, and therefore could be admitted as nonimmigrant students. The Cable was authored by the late Stephen Fischel, then a high-level State Department official in the Visa Office, who was respected for his fairness and integrity and who sought to ameliorate some of the hardships faced by foreign students after September 11, 2001.

August 2017 Update to 9 FAM 402.505(E)(1)

The State Department's recent amendment to 9 FAM 402.505(E)(1) eliminates this favorable presumption thus reversing Fischel's beneficial guidance, and instead directs consular officers to look at 9 FAM 401.1-3(F)(2) to evaluate the foreign student's intent. Specifically, 9 FAM 401.1-3(F)(2) provides:

> a. The term "residence" is defined in INA 101(a)(33)as the place of general abode; the place of general abode of a person means his principal, actual dwelling place in fact, without regard to intent. This does not mean that an alien must maintain an independent household in order to qualify as an alien who has a residence in a foreign country and has no intention of abandoning. If the alien customarily resides in the household of another, that household is the residence in fact…
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> b. The applicant must demonstrate permanent employment, meaningful business or financial connections, close family ties, or social or cultural associations, which will indicate a strong inducement to return to the country of origin.
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> c. The residence in a foreign country need not be the alien's former residence. For example, an alien who has been living in Germany may meet the residence abroad requirement by showing a clear intention to establish a residence in Canada after a temporary visit in the United States.
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> d. `Suspicion that an alien, after admission, may be swayed to remain in the United States because of more favorable living conditions is not a sufficient ground to refuse a visa as long as the alien's current intent is to return to a foreign residence.

9 FAM 402.505(E)(1) continues that the consular officer must assess the applicant's "current plans following completion of his or her study or OPT," and that the mere "hypothetical possibility that the applicant may apply to change or adjust status in the United States in the future is not a basis to refuse a visa application" if the present intent is to depart after study. The more generous language in the 2005 cable, and the prior FAM note, that gives the benefit of the doubt to the student has been eliminated. It remains to be seen whether portions of the Cable that were not incorporated in the FAM that got repealed in 2017 could still be applicable. The DOS Cable noted that even if the student was intending to undertake a course of study for which there was little opportunity in the home country, that in itself was not a basis for denying a visa. Conversely, a student visa applicant could not be denied a visa even if the country of residence can provide the equivalent quality courses in the subject matter. "The student has the right to choose where she/he will obtain an education if accepted by the school," noted the Cable. Moreover, many students in the US dread to visit their home countries during vacations as they believe that they may encounter difficulties while applying for a new student visa stamp at the US Consulate. The Cable reassured that consular posts should facilitate the reissuance of the student visa so that students can travel freely back and forth between the US and their home countries. Such a policy makes sense since it encourages students to continue to keep ties with their home countries if they can freely go there on a regular basis.

The effects of this amendment will likely be of less concern to traditional students (i.e. students who attend college or a graduate degree program straight after high school or their undergraduate degree) who have resided with their parents or guardian throughout their studies and whose parents still reside abroad at the time of the F-1 visa application. Specifically, under 9 FAM 401.1-3(F)(2)(a), the State Department notes that one does not need to maintain an actual household to meet the foreign residence requirement. If the foreign national primarily resides in another's dwelling, then that residence will suffice as the foreign national's residence. Clearly these students can satisfy this requirement if they have been living with their parents or guardians, and their parents or guardians remain at the residence at the time of the F-1 application. These same students would likely also easily meet the "close family ties" provision under 401.1-3(F)(2)(b), as their close family members are still abroad at the time of the application.

Non-traditional students, or students who have been living independently and have few or no family ties abroad, may not appear to satisfy this amendment with as much ease. The 2005 Cable guidance was intended to address these very students who are "young, without employment, without family dependents, and without substantial personal assets." The new language under 9 FAM 402.505(E)(1) provides no contemplation or acknowledgement of these youthful traits when adjudicating F-1 student visas, and instead subjects students to the general foreign residence rules under 9 FAM 401.1-3(F)(2). This revision requires the Consular Officer to "assess the applicant's *current* plans following completion of his or her study or OPT." As rationalized in the 2005 Cable, students have yet to make any formalized long-term plans, and "hence are relatively less likely to have formed an intent to abandon their homes." This presumption appears to no longer matter in the revised F-1 adjudication process. However, the revision does state that the mere "hypothetical possibility that the applicant may apply to change or adjust status in the United States in the future **is not a basis** to refuse a visa application if you are satisfied that the applicant's present intent is to depart at the conclusion of his or her study or OPT," thus preserving the future opportunity of such a change.

These students will need to make the strongest case possible that they presently possess no intent to remain in the US after the completion of their studies or OPT, and seek to provide as much evidence as possible of their ties abroad. Such evidence, in the absence of any family ties or business connections, can include evidence of the distinct possibility of future employment in the home country, their participation in social groups or organizations, romantic relationships, or cultural, religious or ethnic affiliations, as evidence of ties abroad. The most important element to emphasize is the applicant's intent to depart the US at the end of their studies or OPT.

There is no doubt that this Administration is seeking to curtail any and all legal immigration to the United States. This most recent revision to F-1 student visa adjudication is part of this trend. More recently, the State Department has also made it easier to deny foreign nationals immigration benefits based on fraud or misrepresentation if they undertook activities inconsistent with their visa within 90 days of their admission. Practitioners and those seeking to be admitted to the US in F-1 nonimmigrant status should therefore proceed with an abundance of caution when applying for this visa. As stated above, traditional students with guardians and parents abroad will likely be less affected by this amendment. However, non-traditional students with few ties abroad will have a more onerous presumption to overcome when applying for an F-1 visa.

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