Message

From:

Sent:
To:

CC:

(b)(6), (b)(7)(C)

Subject: Buffalo FO Response: Urgent Complaint
Attachments: New Passport.jpg; F-1 Visa.pdf; Refusal of Admission into the US.pdf; (b)(6), (b)(7)(C) 213.pdf; SIR 15-0901-020515000047

Good Afternoon (b)(6), (b)(7)(C)

The Buffalo Field Office would like to provide the following background information pertaining to the refusal of (b)(6), (b)(7)(C), at the (b)(7)(E) or (b)(6), (b)(7)(C)

Per the attached sitroom and I-213, Record of Deportable/Inadmissible Alien (b)(6), (b)(7)(C) was refused admission as it appeared that the subject has no clear foreign domicile, no clear intent to depart the U.S. and has been predominantly residing in the U.S. for the past several years.

(b)(5), (b)(6), (b)(7)(C), (b)(7)(E)

In addition, on the same day, (b)(6), (b)(7)(C) Public Affairs Liaison (PAL) (b)(6), (b)(7)(C) from the Boston Field Office contacted the Buffalo Field Office Public Affairs Liaison (b)(6), (b)(7)(C) regarding (b)(6), (b)(7)(C) (b)(6), (b)(7)(C) refusal and requested additional information on what had occurred. (b)(6), (b)(7)(C) advised that a third party representative had reached out to the Boston Field Office via the Massachusetts BRIDGES group requesting assistance with this matter. Information on the refusal was provided.

On Friday, (b)(6), (b)(7)(C) advised PAL (b)(6), (b)(7)(C) that Boston DFOs (b)(6), (b)(7)(C) had held a conference call with members of the Islamic Society of Boston Cultural Center (ISBCC) and would like to brief the Buffalo Field Office. A conference call was held with the Boston ADFO Border Security and PAL and the Buffalo Field Office Acting DFO, Supervisory Border Security Officer and PAL. A path forward was discussed and the Boston Field Office advised that they would speak to the (b)(7)(E) (b)(7)(E)

On Tuesday, (b)(6), (b)(7)(C), PAL (b)(6), (b)(7)(C) contacted PAL (b)(6), (b)(7)(C) and asked if the Buffalo Field Office would speak to the applicant, (b)(6), (b)(7)(C) about how he can proceed. The Buffalo Field Office agreed to take the call.

On Wednesday, (b)(6), (b)(7)(C) PAL (b)(6), (b)(7)(C) received a message from (b)(6), (b)(7)(C) requesting a return call. PAL (b)(6), (b)(7)(C) contacted (b)(6), (b)(7)(C) telephonically (under the guidance of local Chief Counsel) to address his concerns and resolve the issue.

Below are highlights from the call:

- (b)(6), (b)(7)(C) is a Canadian citizen and currently an F1 in Massachusetts
- He was formerly an L1B as an Electrical Engineer
- He has been in the US for 5 years and recently traveled back to Canada to visit family
- He initially attempted to re-enter the US via Toronto but was refused boarding by the airlines (b)(7)(E)
- Upon attempting to re-enter the US at the Lewiston Bridge he was allowed to withdraw his application for admission (7A1) and instructed to provide documentation of residence abroad
- He stated he was interviewed for over 6 hours at the Lewiston Bridge and was cooperative
- Subject stated he is due to graduate in (b)(6), (b)(7)(C)

The Buffalo Field Office PAL advised (b)(6), (b)(7)(C) that after gathering the documents he was advised to retrieve, he was allowed to re-apply for admission at any port of entry. He was also advised that he should contact that port to notify them of his pending arrival since he was previously refused. (b)(6), (b)(7)(C) thanked us for the assistance and ended the call.

(b)(7)(E)

Please let me know if you need any additional information at this time.

Thank you,

(b)(6), (b)(7)(C)
Border Security Program Manager
Buffalo Field Office
(b)(7)(E)

From: (b)(6), (b)(7)(C)
Sent:
To:
Cc: (b)(6), (b)(7)(C)
Subject: FW: Urgent Complaint

Good afternoon Buffalo,

Please see complaint from DHS CRCL via US Council of Muslim Organizations regarding (b)(6), (b)(7)(C) (b)(6), (b)(7)(C) COC: Canada), who was refused admission at (b)(7)(E) on (b)(6), (b)(7)(C)

The subject appears to have a valid I-20 and a Canadian passport. The concern is that the gentleman is due to obtain his degree in June and now appears to be unable to return to school at (b)(6), (b)(7)(C) in Boston, MA for his last semester before graduating.

Please advise of the status and reason for refusal.

Respectfully requested.

Thank you,

(b)(6), (b)(7)(C)
Field Liaison Division
Office of Field Operations
U.S. Customs and Border Protection
(b)(7)(E)

From: (b)(6), (b)(7)(C)
Sent:
To
Cc (b)(6), (b)(7)(C)
Subject: RFI: Urgent Complaint

Good Morning Sir,
May we please request OPS assistance in providing additional information regarding the complaint below? Limited information was provided by CRCL but is attached for your staffs' convenience.
Respectfully,
(b)(6), (b)(7)(C)

From
Sent: (b)(6), (b)(7)(C)
To
Cc (b)(6), (b)(7)(C)
Subject: FW: Urgent Complaint

Please see complaint fro (b)(6), (b)(7)(C) that was forwarded to DHS CRCL by an NGO. The concern is that the gentleman is due to obtain his degree in June and now seems to be stuck in Canada unable to return to school for his last semester before graduating. Don't know if OFO can assist. Thanks

From
Sent: (b)(6)
To: (b)(6)
Subject: FW: Urgent Complaint

Dear (b)(6), (b)(7)(C)

First of all, I would like to thank you for speaking at the Community Forum on CVE organized by USCMO last week. It was excellent presentation and greatly contributed to our discussion. Sorry for not getting back to you earlier. As you know, the next day we had to interrupt our meeting and leave to Raleigh, NC in order to attend the funeral of the three young students who were shot and killed. It was truly a sad and worrisome incident.

Per our conversation, please see below the case of (b)(6), (b)(7)(C) and his ordeal in re-entering the USA. He needs to finish his studies. Please try to help and keep me informed. Documents attached.

On a second matter, I will prepare a letter requesting a meeting of USCMO leaders with Secretary Johnson. I may need your guidance on this. Will be in contact with you as soon as we finish the WH Summit this week. As I shared with you, I will be attending both days the 17th and the 18th.

Thanks again and will stay in touch.

(b)(6)

Secretary General

US Council of Muslim Organizations

1155 F Street, NW
Suite 1050
Washington, DC 20004

(b)(6)

USCMO.ORG

---------- Forwarded message ----------
From: (b)(6)
Date: (b)(6)
Subject: Urgent Complaint

To Whoever it May Concern,

My name is (b)(6), (b)(7)(C) a. I am a Canadian citizen. Currently I am working towards my Master's degree at (b)(6), (b)(7)(C) in Boston, MA as a full time student . I am in my second and last year in school and plan on graduating in (b)(6), (b)(7)(C) I have been living in the United States since 2011. To begin with, I came to the US with an L-1B visa, working as an Electrical Engineer for *Invensys Operations Management*. In (b)(6), (b)(7)(C) (b)(6), (b)(7)(C), I changed my status to F-1 visa as a full time student seeking a Masters degree.

This week, I was visiting my family in Canada for a couple of days. When I was heading back to the US, I was astonished with how the officers at the borders treated me. I was locked in a room for approximately 6 hours. They had several interviews with me including special agent investigation. Finally, they informed me that they refused my admission to the US as they are not convinced that my status in the US is considered "Non Immigrant". According to the officer, he said "the address you have in Canada belongs to your sister and the one you have in Egypt is for your parents. Accordingly, we do not believe that you have any real residency except in the US which is against what it is supposed to be Non immigrant status". I tried to explain to him that I am about to graduate and I have work, an apartment, a car and many other things in the US that I will need to sort out, but he responded saying that what I am just saying supports the argument that I consider the US my "home."

I want to file a complaint about what happened to me today, seek assistance regarding my entry to the US, and figure out how can I fix my status and my name as I have been selected, singled out and inspected heavily.

Attached is a copy of my passport, My F-1 visa, and the refusal of Admission into the United States document.

Regards,

(b)(6), (b)(7)(C)

(b)(6), (b)(7)(C)

(b)(6), (b)(7)(C)

(b)(6), (b)(7)(C)

(b)(6), (b)(7)(C)

(b)(6), (b)(7)(C)

(b)(6), (b)(7)(C)

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(b)(6), (b)(7)(C)

(b)(6), (b)(7)(C)

(b)(6), (b)(7)(C)

(b)(6), (b)(7)(C)

(b)(6), (b)(7)(C)

U.S. Department of Homeland Security

Notice of Refusal of Admission/Parole into the United States

TO: Department of Manpower and Immigration
Immigration Division, Canada
LEWISTON BRIDGE, NY
Location

(b)(7)(E)
(b)(7)(E)
(b)(6), (b)(7)(C)
Date and Time of Inspection

FROM: U.S. Department of Homeland Security
LEWISTON, NY (QUEENSTONE BRIDGE), POE
Location

(b)(6), (b)(7)(C)
CBPO
Preparing Officer (Print)

SUBJECT: The alien(s) named below has (have) been:

☒ Refused admission into the United States

☐ Refused admission and paroled into the United States

Family Name (Capital Letters)	First Name	Initial	Date of Birth	Nationality
# (b)(6), (b)(7)(C)				CANADA
#2.				
#3.				
#4.				
#5.				

Form I-160A (Rev. 08/01/07)

U.S. Department of Homeland Security

SIGMA Event: (b)(7)(E)
Subject ID : (b)(7)(E)

Record of Deportable/Inadmissible Alien

Family Name (C.A.P.S.)	First	Middle
(b)(6), (b)(7)(C)		

Sex	Hair	Eyes	Cmplxn
(b)(7)(E)			

Country of Citizenship	Passport Number and Country of Issue	File Number
EGYPT	(b)(6), (b)(7)(C)	Case No (b)(7)(E) A

U.S. Address

Scars and Marks

Date, Place, Time, and Manner of Last Entry	Passenger Boarded at
(b)(6), (b)(7)(C) LEW, 0940, LAND	

F.B.I. Number

☒ Single ☐ Divorced ☐ Married ☐ Widower ☐ Separated

Number, Street, City, Province (State) and Country of Permanent Residence

Method of Location/Apprehension: ISP

Date of Birth	Age	Date of Action	Location Code
(b)(6), (b)(7)(C)	(b)(6), (b)(7)(C)	(b)(6), (b)(7)(C)	BUF/(b)(7)(E)

At/Near	Date/Hour
LEW	(b)(6), (b)(7)(C)

City, Province (State) and Country of Birth	AR ☐	Form : (Type and No.) Lifted ☐ Not Lifted ☐
N/A, SAUDI ARABIA		

By: (b)(6), (b)(7)(C)

NIV Issuing Post and NIV Number	Social Security Account Name
None	None

Status at Entry	Status When Found
Non-Immigrant	IN TRAVEL

Date Visa Issued	Social Security Number
None	None

Length of Time Illegally in U.S.: AT ENTRY

Immigration Record	Criminal Record
(b)(7)(E)	None Known

Name , Address, and Nationality of Spouse (Maiden Name, if Appropriate)

Number and Nationality of Minor Children

Father's Name, Nationality, and Address, if Known

Mother's Present and Maiden Names, Nationality, and Address, if Known

Monies Due/Property in U.S. Not in Immediate Possession	Fingerprinted? ☐ Yes ☐ No	Systems Checks	Charge Code Words(s)
None Claimed			I7A1

Name and Address of (Last)(Current) U.S. Employer	Type of Employment	Salary / Hr	Employed from/to

Narrative (Outline particulars under which alien was located/apprehended. Include details not shown above regarding time, place and manner of last entry, attempted entry, or any other entry, and elements which establish administrative and/or criminal violation. Indicate means and route of travel to interior.)

(b)(6), (b)(7)(C)

(b)(6), (b)(7)(C)

(b)(6), (b)(7)(C)

SECTION CODES

212a7AiI

ENCOUNTER/APPREHENSION: The subject was an applicant for admission at th (b)(7)(E) in...(CONTINUED ON I-831)

(b)(6), (b)(7)(C)
CBPO

Alien has been advised of communication privileges _____ (Date/Initials)

(Signature and Title of Immigration Officer)

Distribution:

Received: (Subject and Documents) (Report of Interview)

Offi (b)(6), (b)(7)(C)

on: _____ (time)

Disposition: Withdrawal (I-275)

Examining Officer: (b)(6), (b)(7)(C)

Form I-213 (Rev. 08/01/07)

Alien's Name	File Number	Date
(b)(6), (b)(7)(C)	(b)(7)(E)	(b)(6), (b)(7)(C)

(b)(7)(E) on (b)(6), (b)(7)(C) The subject claimed to be returning to (b)(6), (b)(7)(C) (b)(6), (b)(7)(C) in Boston, MA to continue his Master's program. Subject was referred for further inspection (b)(7)(E)

PRIMARY OFFICER: CBPO (b)(6), (b)(7)(C)

CRIMINAL RECORD: None.

(b)(7)(E)

INTEL/OTHER:
Subject was returning to school in Boston, MA after visiting his sister in Canada. Subject presented valid F1 SEVIS. After interview, subject was determined to be lacking a foreign domicile. Subject admitted that his life has been in the United States for the past several years, and verbally stated this in those words to SCBPO (b)(6), (b)(7)(C) upon being informed of our determination that he is inadmissible. Subject was living with his parents in Egypt and now uses his sister's address in Canada. (b)(7)(E)
12/23/2010 valid for three years. Subejct then changed to F1 status.

(b)(7)(E)

HEALTH: Good.
Medical issues: None.
Current condition: Good.

(b)(6), (b)(7)(C), (b)(7)(E)

FORMS: I-213, I-160a, (b)(7)(E)

AUTHORIZING OFFICER: SCBPO (b)(6), (b)(7)(C)

DISPOSITION: The subject was advised of his inadmissibility into the U.S. pursuant to section 212(a)(7)(A)(i)(I) . The subject was permitted to withdraw his application for admission and return to Canada.

Signature	Title
(b)(6), (b)(7)(C)	CBPO

Message

From:

Sent:

To:

(b)(6), (b)(7)(C)

CC: (b)(6), (b)(7)(C)

Subject: Memo/Muster: Calculating Unlawful Presence for Nonimmigrant Aliens
Attachments: (b)(7)(E) 1-Accrual-of-Unlawful-Presence-and-F-J-and-M-Nonimmigrants.pdf; Muster - Calculating Unlawful Presence for Nonimmigrant Aliens.pdf; Memo - Calculating Unlawful Presence for Nonimmigrant Aliens.pdf

Good Morning:

Attached is a memorandum and muster on the topic of calculating unlawful presence for nonimmigrant aliens. These serve to reinforce previous CBP guidance and are in response to recent U.S. Citizenship and

Immigration Services (USCIS) updated policy on the calculation of unlawful presence for F, J, and M nonimmigrants. This USCIS policy is also attached for reference.

At this time CBP will maintain status quo and will not be implementing or pursuing USCIS policy related to unlawful presence determinations of F/J/M nonimmigrants. See *Guilford College et al v. Nielsen*, MD NC 1:18-cv-0891 which challenges USCIS' August 9, 2018 policy memorandum on this topic.

Please ensure that this memorandum and muster are disseminated to all ports of entry within your jurisdiction. The FOA muster tracking number is 19-043.

Thank you,

(b)(6), (b)(7)(C)
Program Manager
Atlanta Field Office
(b)(7)(E)

From: (b)(6), (b)(7)(C)
Sent: Friday, February 22, 2019 2:34 PM
To: Many
Subject: Memo/Muster: Calculating Unlawful Presence for Nonimmigrant Aliens

Good afternoon,

Attached are a memorandum and muster on the topic of calculating unlawful presence for nonimmigrant aliens. These serve to reinforce previous CBP guidance and are in response to recent U.S. Citizenship and Immigration Services (USCIS) updated policy on the calculation of unlawful presence for F, J, and M nonimmigrants. This USCIS policy is also attached for reference.

After consultation with Office of Chief Counsel, at this time CBP will maintain status quo and will not be implementing or pursuing USCIS policy related to unlawful presence determinations of F/J/M nonimmigrants. See *Guilford College et al v. Nielsen*, MD NC 1:18-cv-0891 which challenges USCIS' August 9, 2018 policy memorandum on this topic.

Please ensure that this memorandum and muster are disseminated to all ports of entry within your jurisdiction. Should you have any questions or require additional information, please contact (b)(6), (b)(7)(C) Director, Enforcement Programs Division (EPD) at (b)(7)(E)

Thank you for your time,

Systems Enforcement Admissibility Liaison (SEAL)
(b)(6), (b)(7)(C)@cbp.dhs.gov

U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of the Director (MS 2000)
Washington, DC 20529-2000

U.S. Citizenship and Immigration Services

August 9, 2018 **PM-602-1060.1**

Policy Memorandum

SUBJECT: Accrual of Unlawful Presence and F, J, and M Nonimmigrants

Purpose

This Policy Memorandum (PM) provides guidance to U.S. Citizenship and Immigration Services (USCIS) officers and assists USCIS officers in the calculation of unlawful presence of those in student (F nonimmigrant), exchange visitor (J nonimmigrant), or vocational student (M nonimmigrant) status and their dependents while in the United States. The PM also revises previous policy guidance in the USCIS Adjudicator's Field Manual (AFM) relating to this issue.

Authority

- INA 212(a)(9)(B)
- INA 212(a)(9)(C)

Background

Since the creation of the U.S. Department of Homeland Security (DHS), USCIS has followed the former Immigration and Naturalization Service's (INS) various policies on the accrual of unlawful presence. In 2009, USCIS consolidated its prior policy guidance in AFM Chapter 40.9.2.[1]

According to that policy—to be superseded by this policy memorandum—foreign students and exchange visitors (F and J nonimmigrants, respectively) who were admitted for, or present in the United States in, duration of status (D/S) started accruing unlawful presence on the day after USCIS formally found a nonimmigrant status violation while adjudicating a request for another immigration benefit or on the day after an immigration judge ordered the applicant excluded, deported, or removed (whether or not the decision is appealed), whichever came first. F and J nonimmigrants, and foreign vocational students (M nonimmigrants), who were admitted until a specific date (date certain) accrued unlawful presence on the day after their Form I-94 expired, on the day after USCIS formally found a nonimmigrant status violation while adjudicating a request for another immigration benefit, or on the day after an immigration judge ordered the

[1] See USCIS Interoffice Memorandum, "Consolidation of Guidance Concerning Unlawful Presence for Purposes of Sections 212(a)(9)(B)(i) and 212(a)(9)(C)(i)(I) of the Act" (May 6, 2009).

applicant excluded, deported, or removed (whether or not the decision was appealed), whichever came first.[2]

The former INS policy, as consolidated in the AFM, went into effect in 1997, prior to the creation of some of the technologies and systems currently used by DHS to monitor nonimmigrants who are admitted to the United States in or otherwise acquire F, J, or M nonimmigrant status. Over the years, DHS also has made significant progress in its ability to identify and calculate the number of nonimmigrants who have failed to maintain status, including certain F, J, and M nonimmigrants.[3]

For example, since the creation of the policy, the Student and Exchange Visitor Information System (SEVIS)—the DHS system used to monitor F, J, and M nonimmigrants—has provided USCIS officers additional information about an alien's immigration history, including information that indicates that an alien in F, J, or M nonimmigrant status may have completed or ceased to pursue his or her course of study or activity, as outlined in Form I-20, Certificate of Eligibility for Nonimmigrant Student Status, and related forms, or Form DS-2019, Certificate of Eligibility for Exchange Visitor (J-1) Status. For FY 2016, DHS calculated that a total of 1,457,556 aliens admitted in F, J, and M nonimmigrant status were either expected to change status or depart the United States. Of this population, it was estimated that the total overstay rate was 6.19 percent for F nonimmigrants, 3.80 percent for J nonimmigrants, and 11.60 percent for M nonimmigrants.[4][5]

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[2] Under the former policy, an alien admitted for duration of status who overstayed or violated such status did not immediately begin accruing a period of unlawful presence for purposes of INA 212(a)(9)(B). Nevertheless, such alien was illegally present in the United States and would be amenable to removal proceedings under INA 237(a)(1)(C), which renders deportable aliens who violate their nonimmigrant status or any condition of their entry. Moreover, such aliens could be charged and ultimately convicted of any criminal offense requiring the alien to be illegally or unlawfully present in the United States as an element of the offense. For example, aliens who were admitted for duration of status and either violated or overstayed such status were treated as being illegally or unlawfully present in the United States for purposes of criminal culpability under the firearms provisions at 18 U.S.C. §§ 922(a)(6) and 922(g)(5). See *United States v. Rehaif*, 888 F.3d 1138 (11th Cir. 2018) (holding that a student who was academically dismissed, failed to depart the United States immediately, and therefore violated the terms of his F-1 status was unlawfully present for purposes of 18 U.S.C. § 922(g)(5)(A)); *United States v. Atandi*, 376 F.3d 1186, 1188 (10th Cir. 2004) ("Rather, we hold that an alien who is only permitted to remain in the United States for the duration of his or her status (as a student, for example) becomes 'illegally or unlawfully in the United States' for purposes of § 922(g)(5)(A) upon commission of a status violation."); *United States v. Bazargan*, 992 F.2d 844, 847 (8th Cir. 1993) ("A nonimmigrant alien F-1 student becomes an illegal alien subject to deportation by failing to comply with the transfer procedures set forth in the INS regulations."); *United States v. Igbatayo*, 764 F.2d 1039, 1040 (5th Cir. 1985) (per curiam) ("After failing to maintain the student status required by his visa, Igbatayo was without authorization to remain in this country.").

[3] See Fiscal Year 2016 Entry/Exit Overstay Report, Department of Homeland Security, *available at* https://www.dhs.gov/publication/entryexit-overstay-report.

[4] See Fiscal Year 2016 Entry/Exit Overstay Report, Department of Homeland Security, page 12, *available at* https://www.dhs.gov/publication/entryexit-overstay-report.

[5] On August 7, 2018, DHS issued the Fiscal Year 2017 Entry/Exit Overstay Report as this memorandum was being finalized for publication. For FY2017, DHS calculated that a total of 1,662,369 aliens admitted in F, J, and M nonimmigrant status were expected either to change status or depart the United States, and estimated that the total overstay rate was 4.07 percent for F nonimmigrants, 4.17 percent for J nonimmigrants, and 9.54 percent for M nonimmigrants. These figures continue to be significantly higher than those for other nonimmigrant categories. See Fiscal Year 2017 Entry/Exit Overstay Report, Department of Homeland Security, page 11, available at

To reduce the number of overstays and to improve how USCIS implements the unlawful presence ground of inadmissibility under INA 212(a)(9)(B) and INA 212(a)(9)(C)(i)(I), USCIS is now changing its policy on how to calculate unlawful presence for F-1, J-1, and M-1 nonimmigrants, and their dependents (F-2, J-2, and M-2).

Effective Date

This new guidance on the accrual of unlawful presence with respect to F, J, and M nonimmigrants will take effect on August 9, 2018. The policy for determining unlawful presence for aliens present in the United States who are not in F, J, or M nonimmigrant status remains unchanged.

This guidance supersedes any prior guidance on this topic, including in its entirety the May 10, 2018 PM titled "Unlawful Presence and F, J, and M Nonimmigrants."

Policy

The new policy clarifies that F, J, and M nonimmigrants, and their dependents, admitted or otherwise authorized to be present in the United States in duration of status (D/S) or admitted until a specific date (date certain), start accruing unlawful presence as outlined below.[6]

F, J, or M nonimmigrants who failed to maintain nonimmigrant status before August 9, 2018.

F, J, or M nonimmigrants who failed to maintain their nonimmigrant status[7] before August 9, 2018 start accruing unlawful presence based on that failure on August 9, 2018,[8] unless the alien had already started accruing unlawful presence on the earliest of the following:

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https://www.dhs.gov/publication/fiscal-year-2017-entryexit-overstay-report. Accordingly, USCIS believes that the data presented in the FY2017 report continues to support this policy change.

[6] Unless the nonimmigrant is otherwise protected from accruing unlawful presence, as outlined in AFM Chapter 40.9.2.

[7] The day the alien failed to maintain status may be determined by a DHS officer. For example, an F, J, or M nonimmigrant may fail to maintain status if he or she no longer is pursuing the course of study or the authorized activity before completing his or her course of study or program, or engages in an unauthorized activity. An F, J, or M nonimmigrant also may fail to maintain his or her status if the alien remains in the United States after having completed the course of study or program (including any authorized practical training plus any authorized grace period, as outlined in 8 CFR 214.2). Additionally, an F, J, or M nonimmigrant who is admitted for a date certain on his or her Form I-94, Arrival/Departure Record and remains in the United States beyond that date may fail to maintain his or her status. In accordance with 8 CFR 103.2(b)(16), if an adverse decision will result from a DHS officer's inadmissibility determination under INA 212(a)(9)(B) or INA 212(a)(9)(C)(i)(I), and that determination is based on derogatory information of which the alien is unaware, the officer generally will give the alien an opportunity to rebut that derogatory information.

[8] An F, J, or M nonimmigrant who failed to maintain status before the effective date of this memorandum and remains in the United States without maintaining lawful status is generally present in violation of U.S. immigration laws. Nevertheless, if DHS makes the inadmissibility determination under INA 212(a)(9)(B) or INA 212(a)(9)(C)(i)(I) on or after August 9, 2018, unlawful presence for such an alien begins accruing on August 9, 2018 and may continue to accrue for as long as the alien remains in unlawful status in the United States, unless the alien is or becomes otherwise protected from accruing unlawful presence, as outlined in this AFM Chapter 40.9.2.

- The day after DHS denied the request for an immigration benefit, if DHS made a formal finding that the alien violated his or her nonimmigrant status while adjudicating a request for another immigration benefit;[9]

- The day after the Form I-94, Arrival/Departure Record, expired, if the F, J, or M nonimmigrant was admitted for a date certain; or

- The day after an immigration judge ordered the alien excluded, deported, or removed (whether or not the decision is appealed).

F, J, or M nonimmigrants who failed to maintain nonimmigrant status on or after August 9, 2018

An F, J, or M nonimmigrant begins accruing unlawful presence, due to a failure to maintain his or her status[10] **on or after** August 9, 2018, on the earliest of any of the following:

- The day after the F, J, or M nonimmigrant no longer pursues the course of study or the authorized activity, or the day after he or she engages in an unauthorized activity;

- The day after completing the course of study or program (including any authorized practical training plus any authorized grace period, as outlined in 8 CFR 214.2);

- The day after the Form I-94 expires, if the F, J, or M nonimmigrant was admitted for a date certain; or

- The day after an immigration judge orders the alien excluded, deported, or removed (whether or not the decision is appealed).

When assessing whether an F, J, or M nonimmigrant accrued unlawful presence and was no longer in a period of stay authorized, the USCIS officer should consider information relating to the alien's immigration history, including but not limited to:

- Information contained in the systems available to USCIS;

- Information contained in the alien's record;[11] and

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[9] Note that the policy for determining when unlawful presence begins to accrue remains unchanged for F, J, and M nonimmigrants for whom DHS made a formal finding of violation of nonimmigrant status before August 9, 2018.
[10] The day the alien failed to maintain his or her status may be determined by a DHS officer. In accordance with 8 CFR 103.2(b)(16), if an adverse decision will result from a DHS officer's inadmissibility determination under INA 212(a)(9)(B) or INA 212(a)(9)(C)(i)(I) and that determination is based on derogatory information of which the alien is unaware, the officer, shall give the alien an opportunity to rebut that derogatory information.
[11] This includes the alien's admissions regarding his or her immigration history or other information discovered during the adjudication.

- Information obtained through a Request for Evidence (RFE) or Notice of Intent to Deny (NOID), if any. The officer should follow current USCIS guidance on the issuance of RFEs or NOIDs.[12]

The period of stay authorized for an F-2, J-2, or M-2 nonimmigrant dependent (spouse or child) admitted for D/S or for a date certain is contingent on the F-1, J-1, or M-1 nonimmigrant remaining in a period of stay authorized. An F-2, J-2, or M-2 nonimmigrant's period of stay authorized ends when the F-1, J-1, or M-1 nonimmigrant's period of stay authorized ends. In addition, an F-2, J-2, or M-2 nonimmigrant's period of stay authorized may end due to the F-2, J-2, or M-2 nonimmigrant dependent's own conduct or circumstances.

This new guidance on the accrual of unlawful presence with respect to F, J, and M nonimmigrants will take effect on August 9, 2018. The policy for determining unlawful presence for aliens present in the United States who are not in F, J, or M nonimmigrant status remains unchanged.

This guidance supersedes any prior guidance on this topic.

Implementation

Chapter 40.9.2 of the AFM is revised by:

- Adding "Other than F, J, or M Nonimmigrants" to the heading of section 40.9.2(b)(1)(E)(i);
- Adding "Other Than F or J Nonimmigrants" to the heading of section 40.9.2(b)(1)(E)(ii);
- Creating a new section 40.9.2(b)(1)(E)(iii);
- Redesignating current section 40.9.2(b)(1)(E)(iii) as section 40.9.2(b)(1)(E)(iv) and amending the text; and
- Revising the text of section 40.9.2(b)(3)(D).

These revised AFM Chapter 40.9.2 sections, as amended, read as follows:

* * *

(b) Determining When an Alien Accrues Unlawful Presence

* * *

(1) Aliens Present in Lawful Status or as Parolees

[12] The USCIS assessment is made under the preponderance of the evidence standard. See *Matter of Chawathe*, 25 I&N Dec. 369, 375-376 (AAO 2010).

* * *

(E) Lawful Nonimmigrants

The period of stay authorized for a nonimmigrant may end on a specific date or may continue for "duration of status (D/S)." Under current USCIS policy, nonimmigrants begin to accrue unlawful presence as follows:

(i) Nonimmigrants Admitted Until a Specific Date (Date Certain) Other Than F, J, or M Nonimmigrants

* * *

(ii) Nonimmigrants Admitted for Duration of Status (D/S) Other Than F or J Nonimmigrants

* * *

(iii) F or J Nonimmigrants Admitted for Duration of Status (D/S) or F, J, or M Nonimmigrants Admitted Until a Specific Date (Date Certain)

Background

Since the creation of the U.S. Department of Homeland Security (DHS), USCIS has followed the former Immigration and Naturalization Service's (INS) various policies on the accrual of unlawful presence. In 2009, USCIS consolidated its prior policy guidance in this AFM chapter.[13]

According to that policy—now superseded by this guidance—foreign students and exchange visitors (F and J nonimmigrants, respectively) admitted for, or present in the United States in, duration of status (D/S) started accruing unlawful presence on the day after USCIS formally found a nonimmigrant status violation while adjudicating a request for another immigration benefit or on the day after an immigration judge ordered the applicant excluded, deported, or removed (whether or not the decision is appealed), whichever came first. F and J nonimmigrants, and foreign vocational students (M nonimmigrants), admitted until a specific date (date certain) accrued unlawful presence on the day after their Form I-94 expired, or on the day after USCIS formally found a nonimmigrant status violation while adjudicating a request for another immigration benefit, or on the day after an immigration judge ordered the applicant excluded, deported, or removed (whether or not the decision was appealed), whichever came

[13] See USCIS Interoffice Memorandum, "Consolidation of Guidance Concerning Unlawful Presence for Purposes of Sections 212(a)(9)(B)(i) and 212(a)(9)(C)(i)(I) of the Act" (May 6, 2009).

first. [14]

The former INS policy, as consolidated in the AFM, went into effect in 1997 prior to the creation of some of the technologies and systems currently used by DHS to monitor nonimmigrants who are admitted to the United States in or otherwise acquire F, J, or M nonimmigrant status. Over the years, DHS has also made significant progress in its ability to identify and calculate the number of nonimmigrants who have failed to maintain status, including certain F, J, or M nonimmigrants.[15]

For example, since the creation of the policy, the Student and Exchange Visitor Information System (SEVIS)—the DHS system used to monitor F, J, and M nonimmigrants—has provided USCIS officers additional information about an alien's immigration history, including information that indicates that an alien in F, J, or M nonimmigrant status may have completed or ceased to pursue his or her course of study or activity, as outlined in Form I-20, Certificate of Eligibility for Nonimmigrant Student Status, and related forms, or Form DS-2019, Certificate of Eligibility for Exchange Visitor (J-1) Status. For FY 2016, DHS calculated that a total of 1,457,556 aliens admitted in F, J, and M nonimmigrant status were either expected to change status or depart the United States. Of this population, it was estimated that the total overstay rate was 6.19 percent for F nonimmigrants, 3.80 percent for J nonimmigrants, and 11.60 percent for M nonimmigrants.[16]

To reduce the number of overstays and to improve how USCIS implements the unlawful presence ground of inadmissibility under INA 212(a)(9)(B) and INA 212(a)(9)(C)(i)(I), USCIS changed its policy on how to calculate unlawful presence for F-1, J-1, and M-1 nonimmigrants, and their dependents (F-2, J-2, and M-2) effective on August 9, 2018.

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[14] Under the former policy, an alien admitted for duration of status who overstayed or violated such status did not immediately begin accruing unlawful presence for purposes of INA 212(a)(9)(B). Nevertheless, such alien was illegally present in the United States and would be amenable to removal proceedings under INA 237(a)(1)(C), which renders deportable aliens who violate their nonimmigrant status or any condition of their entry. Moreover, such aliens could be charged and ultimately convicted of any criminal offense requiring the alien to be illegally or unlawfully present in the United States as an element of the offense. For example, aliens who were admitted for duration of status and either violated or overstayed such status were treated as being illegally or unlawfully present in the United States for purposes of criminal culpability under the firearms provisions at 18 U.S.C. §§ 922(a)(6) and 922(g)(5). *See United States v. Rehaif*, 888 F.3d 1138 (11th Cir. 2018) (holding that a student who was academically dismissed, failed to depart the United States immediately, and therefore violated the terms of his F-1 status was unlawfully present for purposes of 18 U.S.C. § 922(g)(5)(A)); *United States v. Atandi*, 376 F.3d 1186, 1188 (10th Cir. 2004) ("Rather, we hold that an alien who is only permitted to remain in the United States for the duration of his or her status (as a student, for example) becomes 'illegally or unlawfully in the United States' for purposes of § 922(g)(5)(A) upon commission of a status violation."); *United States v. Bazargan*, 992 F.2d 844, 847 (8th Cir. 1993) ("A nonimmigrant alien F-1 student becomes an illegal alien subject to deportation by failing to comply with the transfer procedures set forth in the INS regulations."); *United States v. Igbatayo*, 764 F.2d 1039, 1040 (5th Cir. 1985) (per curiam) ("After failing to maintain the student status required by his visa, Igbatayo was without authorization to remain in this country.").

[15] See Fiscal Year 2016 Entry/Exit Overstay Report, Department of Homeland Security, available at https://www.dhs.gov/publication/entryexit-overstay-report.

[16] See Fiscal Year 2016 Entry/Exit Overstay Report, Department of Homeland Security, page 12, available at https://www.dhs.gov/publication/entryexit-overstay-report.

Policy

Foreign students (F-1 nonimmigrants), exchange visitors (J-1 nonimmigrants), and vocational students (M-1 nonimmigrants), and their dependents, admitted or otherwise authorized to be present in the United States in duration of status (D/S) or admitted until a specific date (date certain) (in accordance with 8 CFR 214.2(f), 8 CFR 214.2(j), or 8 CFR 214.2(m)) start accruing unlawful presence as outlined below.[17]

When assessing whether an F, J, or M nonimmigrant accrued unlawful presence and was no longer in a period of stay authorized, the USCIS officer should consider information relating to the alien's immigration history, including but not limited to:

- Information contained in the systems available to USCIS;
- Information contained in the alien's record;[18] and
- Information obtained through a Request for Evidence (RFE) or Notice of Intent to Deny (NOID), if any. The officer should follow current USCIS guidance on the issuance of RFEs or NOIDs.[19]

F, J, or M nonimmigrants who failed to maintain nonimmigrant status before August 9, 2018

F, J, or M nonimmigrants who failed to maintain their nonimmigrant status[20] before August 9, 2018 start accruing unlawful presence based on that failure on August 9, 2018, [21] unless the alien had already started accruing unlawful presence on the earliest of the following:

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[17] Unless the nonimmigrant is otherwise protected from accruing unlawful presence, as outlined in AFM Chapter 40.9.2.

[18] This includes the alien's admissions regarding his or her immigration history or other information discovered during the adjudication.

[19] The assessment is made under the preponderance of the evidence standard. See *Matter of Chawathe*, 25 I&N Dec. 369, 375-376 (AAO 2010).

[20] The day the alien failed to maintain status may be determined by a DHS officer. For example, an F, J, or M nonimmigrant may fail to maintain status if he or she no longer is pursuing the course of study or the authorized activity before completing his or her course of study or program, or engages in unauthorized activity. An F, J, or M nonimmigrant also may fail to maintain his or her status if the alien remains in the United States after having completed the course of study or program (including any authorized practical training plus authorized grace period, as outlined in 8 CFR 214.2). Additionally, an F, J, or M nonimmigrant who is admitted for a date certain on his or her Form I-94, Arrival/Departure Record and remains in the United States beyond that date may fail to maintain his or her status. In accordance with 8 CFR 103.2(b)(16), if an adverse decision will result from a DHS officer's inadmissibility determination under INA 212(a)(9)(B) or INA 212(a)(9)(C)(i)(I) and that determination is based on derogatory information of which the alien is unaware, the officer generally will give the alien an opportunity to rebut that derogatory information.

[21] An F, J, or M nonimmigrant who failed to maintain status before the effective date of this memorandum and remains in the United States without maintaining lawful status is generally present in violation of U.S. immigration

- The day after DHS denied the request for the immigration benefit, if DHS made a formal finding that the alien violated his or her nonimmigrant status while adjudicating a request for another immigration benefit;[22]

- The day after the Form I-94, Arrival/Departure Record expired, if the F, J, or M nonimmigrant was admitted for a date certain; or

- The day after an immigration judge ordered the alien excluded, deported, or removed (whether or not the decision is appealed).

F, J, or M nonimmigrants who failed to maintain nonimmigrant status on or after August 9, 2018

An F, J, or M nonimmigrant begins accruing unlawful presence, due to a failure to maintain his or her status[23] **on or after** August 9, 2018, on the earliest of any of the following:

- The day after the F, J, or M nonimmigrant no longer pursues the course of study or the authorized activity, or the day after he or she engages in an unauthorized activity;

- The day after completing the course of study or program (including any authorized practical training plus any authorized grace period, as outlined in 8 CFR 214.2);

- The day after the Form I-94 expires, if the F, J, or M nonimmigrant was admitted for a date certain; or

- The day after an immigration judge orders the alien excluded, deported, or removed (whether or not the decision is appealed).

Foreign students (F nonimmigrant) generally do not accrue unlawful presence in certain situations, including but not limited to:

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laws. Nevertheless, if DHS makes the inadmissibility determination under INA 212(a)(9)(B) or INA 212(a)(9)(C)(i)(I) on or after August 9, 2018, unlawful presence for such an alien begins accruing on August 9, 2018 and may continue to accrue for as long as the alien remains in unlawful status in the United States, unless the alien is or becomes otherwise protected from accruing unlawful presence, as outlined in this AFM Chapter 40.9.2.

[22] Note that the policy for determining when unlawful presence begins to accrue remains unchanged for F, J, and M nonimmigrants for whom DHS made a formal finding of violation of nonimmigrant status before August 9, 2018.

[23] The day the alien failed to maintain his or her status may be determined by a DHS officer. In accordance with 8 CFR 103.2(b)(16), if an adverse decision will result from a DHS officer's inadmissibility determination under INA 212(a)(9)(B) or INA 212(a)(9)(C)(i)(I) and that determination is based on derogatory information of which the alien is unaware, the officer shall give the alien an opportunity to rebut that derogatory information.

- During the period permitted under 8 CFR 214.2(f)(5)(i) (period of up to 30 days before the program start date listed on the F-1 nonimmigrant's Form I-20);

- While the F-1 nonimmigrant is pursuing a full course of study at an educational institution approved by DHS for attendance by foreign students, and any additional periods of authorized pre- or post-completion practical training, including authorized periods of unemployment under 8 CFR 214.2(f)(10)(ii)(E);

- During a change in educational levels as outlined in 8 CFR 214.2(f)(5)(ii), provided the F-1 nonimmigrant transitions to the new educational level according to transfer procedures outlined in 8 CFR 214.2(f)(8);

- While the F-1 nonimmigrant is in a cap gap period under 8 CFR 214.2(f)(5)(vi), that is, during an automatic extension of an F-1 nonimmigrant's D/S and employment authorization as provided under 8 CFR 214.2(f)(5)(vi) for a beneficiary of an H-1B petition and request for a change of status that has been timely filed and states that the employment start date for the F-1 nonimmigrant is October 1 of the following fiscal year;

- While the F-1 nonimmigrant's application for post-completion Optional Practical Training (OPT) remains pending under 8 CFR 214.2(f)(10)(ii)(D);

- While the F-1 nonimmigrant is pursuing a school transfer provided that he or she has maintained status as provided in 8 CFR 214.2(f)(8);

- The period of time a timely-filed[24] reinstatement application under 8 CFR 214.2(f)(16) is pending with USCIS;

- The period of time an F-1 nonimmigrant was out of status if he or she applies for reinstatement under 8 CFR 214.2(f)(16), provided that the application is ultimately approved;

- During annual vacation permitted under 8 CFR 214.2(f)(5)(iii) if the F-1 nonimmigrant is eligible and intends to register for the next term;

- During any additional grace period as permitted under 8 CFR 214.2(f)(5)(iv) to prepare for departure:

    - 60 days following completion of a course of study and any authorized practical training;

[24] For purposes of tolling unlawful presence, a reinstatement application will be considered to be timely-filed if the applicant has not been out of status for more than 5 months at the time of filing the request for reinstatement.

  - 15 days if the designated school official (DSO) authorized the withdrawal from classes (SEVIS termination reason: authorized early withdrawal); or

  - No grace period if the F-1 nonimmigrant failed to maintain a full course of study without the approval of the DSO or otherwise failed to maintain status.

- Emergent circumstances as outlined in 8 CFR 214.2(f)(5)(v), in which any or all of the requirements for on-campus or off-campus employment are suspended by a *Federal Register* notice and the student reduces his or her full course of study as a result of accepting employment based on the *Federal Register* notice; and

- During a period of reduced course load, as authorized by the DSO under 8 CFR 214.2(f)(6)(H)(iii).

Foreign exchange visitors (J nonimmigrants) generally do not accrue unlawful presence in certain situations, including but not limited to:

- The period of time annotated on Form DS-2019 as the approved program time plus any grace period, either before the program start date or after the conclusion of the program as outlined in 8 CFR 214.2(j)(1)(ii);

- Any extension of program time annotated on Form DS-2019 as outlined in 8 CFR 214.2(j)(1)(iv);

- While the J-1 nonimmigrant is in a cap gap period as outlined in 8 CFR 214.2(j)(1)(vi);[25] and

- The period of time a J-1 nonimmigrant was out of status, if he or she is granted reinstatement under 22 CFR 62.45.

Foreign vocational students (M nonimmigrants) generally do not accrue unlawful presence in certain situations, including but not limited to:

- The period of admission as indicated on Form I-94, plus up to 30 days before the report or start date of the course of study listed on the Form I-20 as outlined in 8 CFR 214.2(m)(5);

- Any authorized grace period as outlined in 8 CFR 214.2(m)(5);

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[25] This is a discretionary provision in which the USCIS Director may, by notice in the *Federal Register*, bridge the gap for J-1 nonimmigrants.

- During the time the M-1 nonimmigrant completes authorized practical training as outlined in 8 CFR 214.2(m)(14);

- The period of time a timely-filed[26] reinstatement application under 8 CFR 214.2(m)(16) is pending with USCIS; and,

- The period of time an M-1 nonimmigrant was out of status if he or she applies for reinstatement under 8 CFR 214.2(m)(16), provided that the application is ultimately approved.

The period of stay authorized for an F-2, J-2, or M-2 nonimmigrant dependent (spouse or child) admitted for D/S or for a date certain is contingent on the F-1, J-1, or M-1 nonimmigrant remaining in a period of stay authorized. An F-2, J-2, or M-2 nonimmigrant's period of stay authorized ends when the F-1, J-1, or M-1 nonimmigrant's period of stay authorized ends. In addition, an F-2, J-2, or M-2 nonimmigrant's period of stay authorized may end due to the F-2, J-2, or M-2 nonimmigrant dependent's own conduct or circumstances.

An alien under 18 years of age does not accrue unlawful presence.[27] Therefore, any F, J, or M nonimmigrant who is under 18 years of age does not accrue unlawful presence. Additionally, the F, J, or M nonimmigrant may be otherwise protected from accruing unlawful presence, as outlined in this chapter.

(iv) Non-Controlled Nonimmigrants (for example, Canadian B-1/B-2)

Nonimmigrants who are not issued a Form I-94, Arrival/Departure Record, are treated as nonimmigrants admitted for D/S (as addressed in Chapter 40.9.2(b)(1)(E)(ii)) for purposes of determining unlawful presence.

(F) Other Types of Lawful Status

* * *

(2) Aliens Present in Unlawful Status Who Do Not Accrue Unlawful Presence by Statute for Purposes of Section 212(a)(9)(B) of the Act (Statutory Exceptions)

* * *

(3) Aliens Present in Unlawful Status Who Do Not Accrue Unlawful Presence by Virtue of USCIS Policy for Purposes of Sections 212(a)(9)(B) and (C)(i)(I) of the Act

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[26] For purposes of tolling unlawful presence, a reinstatement application will be considered to be timely-filed if the applicant has not been out of status for more than 5 months at the time of filing the request for reinstatement.
[27] See INA 212(a)(9)(B)(iii)(I).

* * *

(D) Nonimmigrants – Effect of a Decision on the Request for Extension of Status (EOS) or Change of Status (COS) on Unlawful Presence

The following information pertains to applications requesting EOS or COS, or petitions that include requests for EOS or COS.

(i) Approved Requests

* * *

(ii) Denials Based on Frivolous Filings or Unauthorized Employment

If a request for EOS or COS is denied because it was frivolous or because the alien engaged in unauthorized employment, the EOS or COS application does not protect the alien from accruing unlawful presence. The alien accrues unlawful presence as outlined in Chapter 40.9.2(b)(1)(E), Lawful Nonimmigrants.

(iii) Denials of Untimely Applications

If a request for EOS or COS is denied because it was not timely filed, the EOS or COS application does not protect the alien from accruing unlawful presence. The alien accrues unlawful presence as outlined in Chapter 40.9.2(b)(1)(E), Lawful Nonimmigrants.

(iv) Denials for Cause of Timely Filed, Non-Frivolous Applications for EOS or COS

* * *

Use

This PM is intended solely for the guidance of USCIS personnel in the performance of their official duties. It is not intended to, does not, and may not be relied upon to create any right or benefit, substantive or procedural, enforceable at law or by any individual or other party in removal proceedings, in litigation with the United States, or in any other form or manner.

Contact Information

If USCIS officers have questions or suggestions regarding this PM, they should direct them through their appropriate chains of command to the Office of Policy and Strategy.

Muster

Date: Week of October 15, 2018

Topic: Calculating Unlawful Presence for Nonimmigrant Aliens

Headquarters POCs: (b)(6), (b)(7)(C), (b)(7)(E)

Office: Admissibility and Passenger Programs (APP)

General Discussion:

- On August 9, 2018, U.S. Citizenship and Immigration Services (USCIS) issued updated guidance regarding the calculation of unlawful presence for F, J, and M nonimmigrants.
- The USCIS guidance to its adjudicators aligns with previously issued CBP guidance; and does not change how CBP calculates unlawful presence.

Determining Unlawful Presence:

- CBP determines unlawful presence occurs in the following manner for nonimmigrant aliens admitted to the United States:
  - When a nonimmigrant alien remains in the United States beyond the date listed on Form I-94, unlawful presence begins to accrue as of the date the I-94 expired. A nonimmigrant alien who is placed in removal proceedings will not begin to accrue time unlawfully present until the date noted on Form I-94 has been reached or the immigration judge orders the alien to be removed, whichever is earlier.
  - When a nonimmigrant alien is admitted with Duration of Status (D/S), unlawful presence begins to accrue on the date USCIS finds a status violation of the terms of admission during adjudication of a request for a benefit, or on the date an immigration judge finds a status violation in the course of removal proceedings. In cases where the immigration judge finds there was a status violation, unlawful presence begins to accrue as of the date of the order of the immigration judge, whether or not the decision is appealed.

Applying Unlawful Presence:

- If the term of unlawful presence is between 180 days and less than one (1) year, then Section 212(a)(9)(B)(I)(i) of the Immigration and Nationality Act (INA) applies with a three (3) year bar from re-entering the United States after the date of departure from the United States.
- If the term of unlawful presence is greater than one (1) year, then Section 212(a)(9)(B)(I)(ii) of the INA applies with a ten (10) year bar from re-entering the United States after the date of departure from the United States.
- There are five (5) statutory exceptions to the unlawful presence grounds of inadmissibility, which are:
  - Minors
  - Asylees
  - Family Unity
  - Battered women and children
  - Victims of a severe form of trafficking in persons

- CBP officers are reminded that applicants for admission must overcome all grounds of inadmissibility. If an alien cannot overcome the unlawful presence inadmissibility, the alien may also be inadmissible as an immigrant without an immigrant visa; and may be processed accordingly.
- CBP officers who encounter a removable alien during enforcement operations that may be amenable to the unlawful presence grounds of inadmissibility, the alien may be charged under Section 237(a)(1)(C)(i) of the INA if the alien is referred for removal proceedings before an immigration judge.

Future Applications for Admission:

- If a nonimmigrant alien who is inadmissible with the statutory bar for unlawful presence desires to re-enter the United States prior to the expiration of the statutory bar, the alien must apply with the CBP Admissibility Review Office (ARO) for a waiver of the inadmissibility prior to an application for admission.

MEMORANDUM FOR: Directors, Field Operations
Office of Field Operations

Director, Field Operations Academy
Office of Training and Development

FROM: Todd A. Hoffman
Executive Director
Admissibility and Passenger Programs
Office of Field Operations

SUBJECT: Calculating Unlawful Presence for Nonimmigrant Aliens

U.S. Customs and Border Protection (CBP) is reinforcing guidance on determining when a nonimmigrant alien begins to accrue unlawful presence. On August 9, 2018, U.S. Citizenship and Immigration Services (USCIS) issued updated guidance regarding the calculation of unlawful presence for F, J, and M nonimmigrants. The recently issued USCIS guidance to its adjudicators aligns with guidance that CBP issued in February 2013 regarding the calculation of unlawful presence for nonimmigrant aliens.

CBP determines unlawful presence occurs in the following manner for nonimmigrant aliens admitted to the United States:

- When a nonimmigrant alien remains in the United States beyond the date listed on Form I-94, unlawful presence begins to accrue as of the date the I-94 expired. A nonimmigrant alien who is placed in removal proceedings will not begin to accrue time unlawfully present until the date noted on Form I-94 has been reached or the immigration judge orders the alien to be removed, whichever is earlier.

- When a nonimmigrant alien is admitted with Duration of Status (D/S), unlawful presence begins to accrue on the date USCIS finds a status violation of the terms of admission during adjudication of a request for a benefit, or on the date an immigration judge finds a status violation in the course of removal proceedings. In cases where the immigration judge finds there was a status violation, unlawful presence begins to accrue as of the date of the order of the immigration judge, whether or not the decision is appealed.

To apply the grounds of inadmissibility for unlawful presence, if the term of unlawful presence is between 180 days and less than one (1) year, then Section 212(a)(9)(B)(i)(I) of the Immigration

and Nationality Act (INA) applies with a three (3) year bar from re-entering the United States after the date of departure from the United States. If the term of unlawful presence is greater than one (1) year, then Section 212(a)(9)(B)(i)(II) of the INA applies with a ten (10) year bar from re-entering the United States. If a nonimmigrant alien who is inadmissible with the statutory bar for unlawful presence desires to re-enter the United States prior to the expiration of the statutory bar, the alien must apply with the CBP Admissibility Review Office (ARO) for a waiver of the inadmissibility prior to an application for admission.

Please ensure that this memorandum and muster are disseminated to all ports of entry within your jurisdiction. Should you have any questions or require additional information, please contact (b)(6), (b)(7)(C) Director, Enforcement Programs Division (EPD) at (b)(7)(E)

Attachments

Message

From: (b)(6), (b)(7)(C)

Sent: 8/9/2018 2:25:07 PM

To: (b)(6), (b)(7)(C)

Subject: RE: F1 op

Ok

(b)(6), (b)(7)(C)
Assistant Port Director
Logan Airport
Area Port Of Boston
(b)(7)(E)

From: (b)(6), (b)(7)(C)
Sent: Thursday, August 09, 2018 3:20:22 PM
To: (b)(6), (b)(7)(C)
Subject: F1 op

Can you hav(b)(6), (b)(7)(C)review the F1 op and send it

(b)(7)(E)

Message

From:

Sent:

To:

(b)(6), (b)(7)(C)

CC:

Subject: FW: Memo/Muster - (b)(7)(E) Students, Exchange Visitors, and their Dependents (Fall 2018)

Attachments: Memo - (b)(7)(E) Students, Exchange Visitors, and their Depen....pdf; Muster - Enhanced Scrutiny of Students, Exchange Visitors, and their Dep....pdf

All,

Please see the attached muster.

We will need a (b)(7)(E) submitted.

From: (b)(6), (b)(7)(C)
Sent: Tuesday, July 31, 2018 9:54:17 PM
To: DIRECTORS FIELD OPS
Cc: BORDER SECURITY ASST DIRECTORS; TRADE OPERATIONS ASST DIRECTORS; MISSION SUPPORT ASST DIRECTORS; (b)(7)(E) MGMT
Subject: Memo/Muster - (b)(7)(E) Students, Exchange Visitors, and their Dependents (Fall 2018)

Directors,

MEMORANDUM FOR: Executive Directors
Directors, Field Operations

FROM: Todd C. Owen
Executive Assistant Commissioner
Office of Field Operations

SUBJECT: (b)(7)(E) Students, Exchange Visitors, and their Dependents

(b)(7)(E)

(b)(7)(E)

(b)(7)(E)

(b)(7)(E)

The attached muster provides guidance and recommendations relating to the continuing concerns regarding students, exchange visitors, and their dependents. Thank you for your continued hard work and contribution to securing the United States. Should you have any questions, please have a member of your staff contact (b)(6), (b)(7)(C) (b)(6), (b)(7)(C), (b)(7)(E)

Respectfully,

(b)(6), (b)(7)(C)
Assistant Director
(b)(7)(E)

1300 Pennsylvania Avenue NW
Washington, DC 20229

U.S. Customs and Border Protection

MEMORANDUM FOR: Executive Directors
Directors, Field Operations

FROM: (b)(6), (b)(7)(C)
Todd C. Owen
Executive Assistant Commissioner
Office of Field Operations

SUBJECT: (b)(7)(E) Students, Exchange Visitors, and their Dependents

(b)(7)(E)

(b)(7)(E)

(b)(7)(E)

(b)(7)(E)

The attached muster provides guidance and recommendations relating to the continuing concerns regarding students, exchange visitors, and their dependents. Thank you for your continued hard work and contribution to securing the United States. Should you have any questions, please have a member of your staff contact (b)(6), (b)(7)(C), (b)(7)(E) (b)(7)(E)

Muster

Week of Muster: Upon Receipt

Headquarters POC: (b)(7)(E)
Division

Subject: (b)(7)(E) Students, Exchange Visitors, and their Dependents

The Office of Field Operations (OFO), (b)(7)(E) is issuing this muster to reinforce the ongoing need for all U.S. Customs and Border Protection (CBP), OFO personnel to maintain situational awareness regarding (b)(7)(E)

(b)(7)(E)

Muster Points

(b)(7)(E)

- (b)(6), (b)(7)(C), (b)(7)(E)
- (b)(6), (b)(7)(C), (b)(7)(E)

(b)(6), (b)(7)(C), (b)(7)(E)

- (b)(6), (b)(7)(C), (b)(7)(E)
- (b)(6), (b)(7)(C), (b)(7)(E)

(b)(7)(E)

(b)(7)(E)

(b)(7)(E)

(b)(7)(E)

Recommendations:

Ports and officers shall:

- (b)(7)(E)

(b)(7)(E)

Message

From: (b)(6), (b)(7)(C)
Sent:
To:
Subject: RE: Admissibility referrals and F1 activities

Ok thanks, I think the numbers indicate work was being done.

(b)(6), (b)(7)(C)
Assistant Port Director
Logan Airport
Area Port of Boston
(b)(7)(E)

From: (b)(6), (b)(7)(C)
Sent:
To: (b)(6), (b)(7)(C)@CBP.DHS.GOV>
Subject: RE: Admissibility referrals and F1 activities

36% of all Referrals were F1 students
14% of all pax were F1

(b)(6), (b)(7)(C)
Watch Commander
Passanger Operations
Boston Logan Airport
(b)(7)(E)

From: (b)(6), (b)(7)(C)
Sent:
To: (b)(6), (b)(7)(C)
(b)(6), (b)(7)(C)
Subject: RE: Admissibility referrals and F1 activities

Thank you

(b)(6), (b)(7)(C)
Assistant Port Director
Logan Airport
Area Port of Boston
(b)(7)(E)

From: (b)(6), (b)(7)(C)
Sent:
To (b)(6), (b)(7)(C)

(b)(6), (b)(7)(C)

Subject: Admissibility referrals and F1 activities

All,

As requested see below. Let me know if you have any questions. Data extracted from (b)(7)(E)

	2018-01-05	2018-01-06	2018-01-07	Total:
Total number of Admissibility Referrals	(b)(7)(E)			
Total number of F1 pax referred to Admissibility				
Total Number of F1 admitted on Primary				
Total Number of Passengers				

Regards,

(b)(6), (b)(7)(C)
Chief CBP Officer
Area Port of Boston
Boston Logan International Airport
(b)(7)(E)

Message

From: (b)(6), (b)(7)(C)

Sent: 12/1/2018 12:10:42 AM

To: (b)(6), (b)(7)(C)

Subject: Re: Memo/Muster: (b)(7)(E) for Students, Exchange Visitors, and Their Dependents

10-4

(b)(6), (b)(7)(C)
Assistant Port Director (A)- Logan Airport
U.S. Customs and Border Protection
(b)(7)(E)

Sent from mobile device

On Nov 30, 2018, at 3:41 PM, (b)(6), (b)(7)(C) wrote:

> Lets make sure we are focused on this again this december
>
> (b)(6), (b)(7)(C)
> Area Port Director
> Area Port of Boston
> (b)(7)(E)
>
> **From:** (b)(6), (b)(7)(C)
> **Sent:** Friday, November 30, 2018 3:33 PM
> **To:** Boston Field Office Leadership (b)(6), (b)(7)(C) cbp.dhs.gov>; Boston Field Office Port Directors < (b)(6), (b)(7)(C) cbp.dhs.gov>; BOSTON FIELD OFFICE - BORDER SECURITY EMPLOYEES (b)(6), (b)(7)(C) cbp.dhs.gov>; (b)(6), (b)(7)(C)
>
> (b)(6), (b)(7)(C)
>
> **Subject:** FW: Memo/Muster: (b)(7)(E) for Students, Exchange Visitors, and Their Dependents
>
> All,
>
> Please see the attached memo from the EAC mandating the conducting of enforcement operations on international students, exchange visitors and their dependents in conjunction with their outbound travel at the end of the fall semester and their return travel for the start of the spring semester.

(b)(7)(E)

Please let me know if you have any questions or need more information.

(b)(6), (b)(7)(C)
(a)Assistant Director Border Security
Boston Field Office
Customs and Border Protection
Office of Field Operations
(b)(7)(E)

From: (b)(6), (b)(7)(C)
Sent: Friday, November 30, 2018 3:04 PM
To: DIRECTORS FIELD OPS (b)(7)(E)bp.dhs.gov>
Cc: BORDER SECURITY ASST DIRECTORS (b)(7)(E)@cbp.dhs.gov>; TRADE OPERATIONS ASST DIRECTORS (b)(7)(E)@cbp.dhs.gov>; MISSION SUPPORT ASST DIRECTORS (b)(7)(E)cbp.dhs.gov>(b)(6), (b)(7)(C)

(b)(6), (b)(7)(C)

Subject: Memo/Muster (b)(7)(E) for Students, Exchange Visitors, and Their Dependents

DFOs-

Please see the attached memorandum from Executive Assistant Commissioner Owen and accompanying muster regarding (b)(7)(E) for students, exchange visitors and their dependents. The memo is pasted below for ease of reading on your mobile devices. Thank you and let me know if you have any questions.

MEMORANDUM FOR: Executive Directors
Directors, Field Operations

FROM: Todd C. Owen
Executive Assistant Commissioner
Office of Field Operations

SUBJECT: Enforcement Operation for Students, Exchange Visitors, and Their Dependents

(b)(7)(E)

(b)(7)(E)

(b)(7)(E)

(b)(7)(E)

(b)(7)(E)

The attached muster provides guidance relating to the (b)(7)(E) regarding students, exchange visitors, and their dependents. Thank you for your continued hard work and contribution to securing the United States. Should you have any questions, please have a member of your staff contact (b)(6), (b)(7)(C) Director, (b)(7)(E) (b)(7)(E)

(b)(6), (b)(7)(C)
Director, (b)(7)(E)
National Targeting Center
U.S. Customs and Border Protection
(b)(7)(E)

(b)(7)(E) n for Students, Exchange Visitors, and Their Dependents - signed.pdf>
n for Students, Exchange Visitors, and Their Dependents - Muster.pdf>

Message

From:

Sent:

To:

CC:

(b)(6), (b)(7)(C)

Subject: (b)(7)(E) - Boston (b)(7)(E) Officers Refuse Admission to a male Citizen of Qatar Applying for Admission as a F1 Student

Attachments: (b)(7)(E) refusal 09042018.docx

U.S. Customs and Border Protection

Office of Field Operations

Boston Logan International Airport

September 4, 2018

Subject: (b)(7)(E) - Boston (b)(7)(E) Officers Refuse Admission to a male Citizen of Qatar Applying for Admission as a F1 Student

Executive Summary:

On (b)(6), (b)(7)(C) U.S. Customs and Border Protection (CBP) officers assigned to the (b)(7)(E) (b)(7)(E) at Boston Logan International Airport (BOS) encountered a 19-year-old male citizen of Qatar who arrived on board Qatar Airways flight 743 from Doha, Qatar. (b)(7)(E) (b)(7)(E) secondary inspection revealed derogatory information based on direct association with a subject of interest. Subject was also in possession of ISIS propaganda material on his phone. At the conclusion of the secondary exam, subject was determined to be inadmissible to the U.S. pursuant to

Section 212(a)(7)(A)(i)(I) of the INA and was expeditiously removed from the US. He was returned to Qatar on board Qatar Airways flight 744.

Details:

On Tuesday, (b)(6), (b)(7)(C), a returning F1 student from Qatar arrived at Boston Logan International Airport. He was traveling from Qatar on board Qatar Airways flight 743 from Doha, Qatar.

(b)(7)(E)

(b)(7)(E)

(b)(7)(E)

(b)(7)(E)

Subject (b)(6), (b)(7)(C) applied for admission as a F1 student returning to resume his studies at the (b)(6), (b)(7)(C)

Manual review of the subject's electronics which consisted of 2 cell phones, a laptop computer and an iPad revealed that most of the contents were deleted, however one cell phone contained, ISIS propaganda material as well as contact information for the person of interest (b)(6), (b)(7)(C) (b)(6), (b)(7)(C)

Subject (b)(6), (b)(7)(C) was placed under oath and a sworn statement was obtained. During his inspection, subject indicated that his brother was recently arrested by the Qatari government and was currently in a Qatari prison. He also indicated that he believes that his brother was associated and communicating with ISIS.

(b)(7)(E)

(b)(7)(E) media exam was completed and uploaded to the event. All electronics were detained for further forensic analysis.

Subject was determined to be inadmissible to the U.S. pursuant to Section 212(a)(7)(A)(i)(I) of the INA and was expeditiously removed from the US.

He was returned to Qatar on board Qatar Airways flight 744 on 09/04/2018

Traveler Information:

Name: (b)(6), (b)(7)(C)

DOB:

POB: Qatar

COC: Qatar

PPN: (b)(6), (b)(7)(C)

A# (b)(6), (b)(7)(C)

US F1 Visa: (b)(6), (b)(7)(C)

FIN: (b)(6), (b)(7)(C)

(b)(7)(E)

Travel Itinerary:

(b)(6), (b)(7)(C)

Cell Photo Media:

Submitted by: Chief CBPO (b)(6), (b)(7)(C)

Date / Time (b)(6), (b)(7)(C) 2150 hours

Regards,

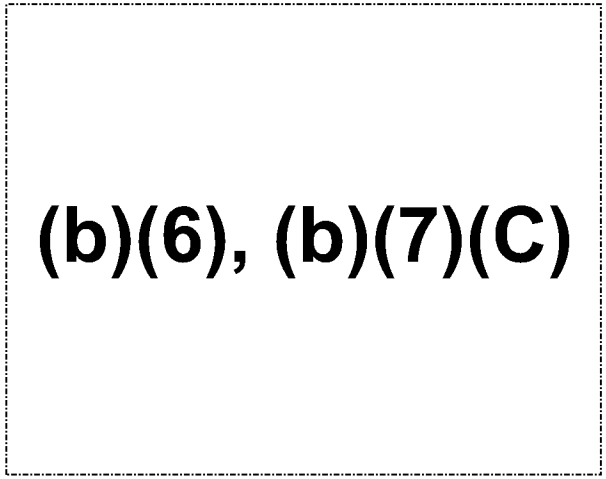
(b)(6), (b)(7)(C)

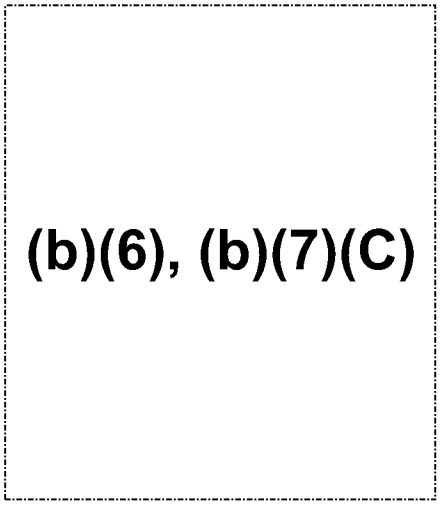
Chief CBP Officer

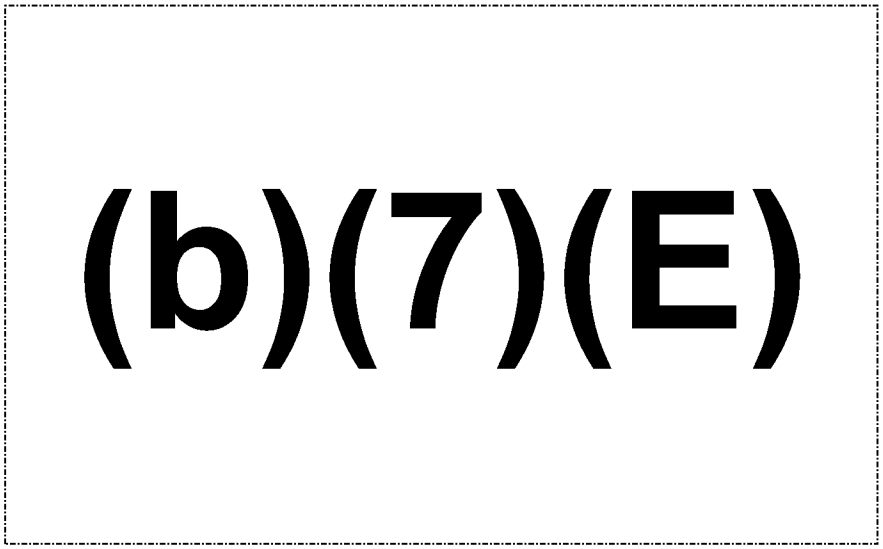
Area Port of Boston

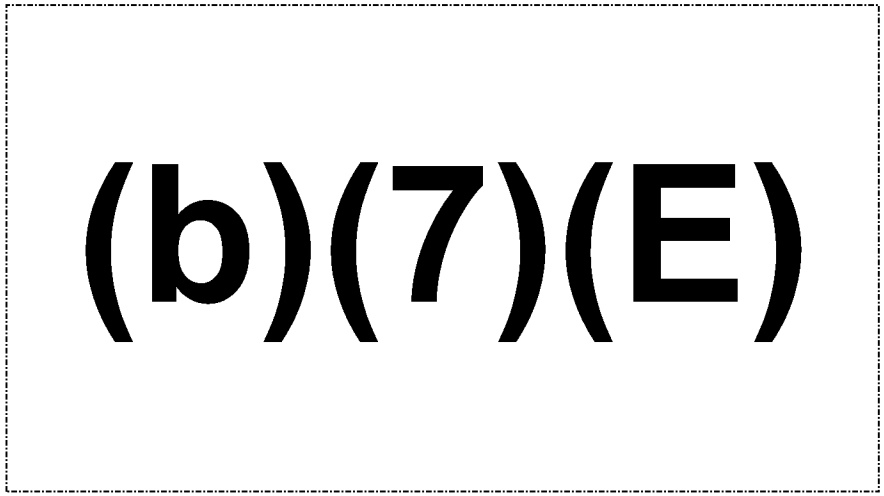
Boston Logan International Airport

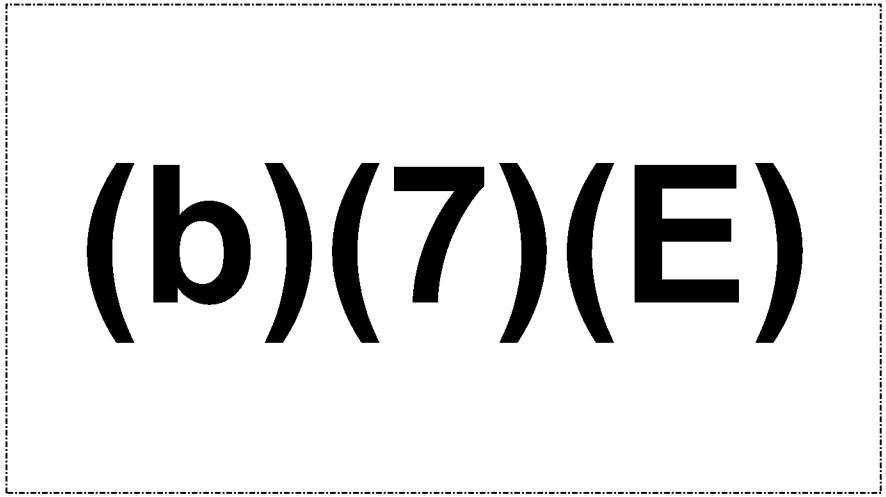
o:
c: (b)(7)(E)

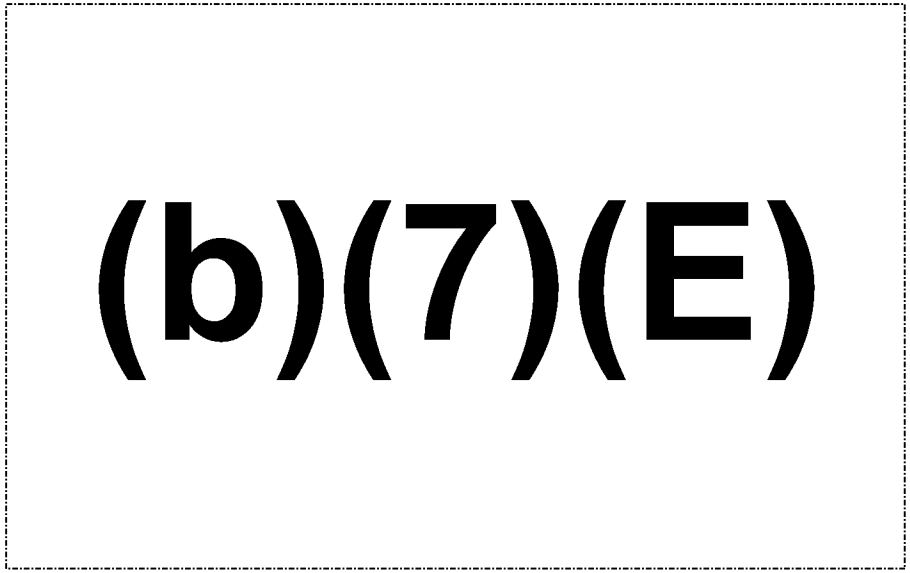

(b)(6), (b)(7)(C)


(b)(6), (b)(7)(C)


(b)(7)(E)


(b)(7)(E)


(b)(7)(E)


(b)(7)(E)

Message

From: (b)(6), (b)(7)(C)
Sent:
To:
Subject: FW: F1 students
Attachments: Updating F-1 Students Processing at Ports of Entry.pdf

(b)(6), (b)(7)(C)

This is the F1 policy. Should speed up your process a bit.

From: (b)(6), (b)(7)(C)
Sent:
To: (b)(6), (b)(7)(C)
Subject: RE: F1 students

This is what I found. It was put out in the muster data base and in musters to the troops around (b)(6), (b)(7)(C) Is the what you were looking for?

(b)(6), (b)(7)(C)
Watch Commander
Honor Guard Commander
U.S. Customs and Border Protection
Port of Atlanta
(b)(6), (b)(7)(C), (b)(7)(E)

From: (b)(6), (b)(7)(C)
Sent: Tuesday, July 25, 2017 7:26 PM
To: (b)(6), (b)(7)(C)>
Subject: F1 students

(b)(6), (b)(7)(C)

I reformatted a policy memo last year about processing F1 students and not having to look at the i20. Can you see if you can find my email and forward it to me?

Thanks

1300 Pennsylvania Avenue NW
Washington, DC 20229

U.S. Customs and Border Protection

OCT - 6 2015

MEMORANDUM FOR: Directors, Field Operations
Director, Preclearance Operations
Office of Field Operations

FROM: Todd A. Hoffman (b)(6), (b)(7)(C)
Executive Director
Admissibility and Passenger Programs

SUBJECT: Updating F-1 Students Processing at ports of entry

This memorandum is to further clarify guidance previously issued on August 10, 2012 titled: Placing an Admission Stamps on Form I-20 A-B and I-20 M-N, on July 6, 2015 titled: SEVIS (b)(7)(E) and on July 21, 2015 titled: SEVIS (b)(7)(E) (b)(7)(E) at Seaports.

The SEVIS Query functionality is a (b)(7)(E) responses when a F-1or M-1 SEVIS numbe (b)(7)(E) in the (b)(7)(E)) and the (b)(7)(E). This has enhanced Customs and Border Protection's (CBP) ability to identify travelers who may be in violation of the SEVIS program and may be subject to further inspection or adverse action.

To avoid confusion and to maintain consistent student processing, CBP officers are no longer required to open the sealed envelope that foreign students normally present unless the inspecting CBP officer discovers or believes that a violation exist. If a violation exist, the CBP officer must refer the student applicant to secondary for further processing. In cases where the CBP officer has no indication of any type of violation, all other processing requirements for F-1 and M-1 applicants for admission remain the same.

Please ensure that this memorandum and muster are disseminated to all ports of entry within your jurisdiction. Should you have any questions or require additional information, please contact (b)(6), (b)(7)(C) Director, Enforcement Programs Division (EPD) at (b)(7)(E) or (b)(6), (b)(7)(C) Branch Chief at (b)(7)(E)

Attachment

Weekly Muster

Week of Muster: Immediate

HQ POC: (b)(6), (b)(7)(C) (b)(7)(E)

Subject: Updating F-1 Students Processing at ports of entry

- This memorandum is being issued to clarify the following field guidance:
  - August 10, 2012 titled: Placing an Admission Stamp on Form I-20 A-B and I-20 M-N,
  - July 6, 2015 titled: SEVIS Number Query Enhancement Activation, and
  - July 21, 2015 titled: SEVIS Number Query Activation at Seaports.

- The SEVIS query functionality is a real time query that provides rapid responses when a F-1or M-1 SEVIS number (b)(7)(E) (b)(7)(E)

- This has enhanced Customs and Border Protection's (CBP) ability to identify travelers who may be in violation of the SEVIS program and may be subject to further inspection or adverse action.

- To avoid confusion and to maintain consistent student processing, CBP officers are no longer required to open the sealed envelope normally presented by F-1 and M-1 students seeking entry into the United States.

- If any violations are discovered or suspected, the student applicant must be referred to secondary for further processing.

- If no violations are discovered or suspected, all other requirements for F-1 and M-1 applicants for admission remain the same.

1300 Pennsylvania Avenue NW
Washington, DC 20229

U.S. Customs and Border Protection

NOV 29 2018

MEMORANDUM FOR: Executive Directors
Directors, Field Operations

FROM: Todd C. Ow (b)(6), (b)(7)(C)
Executive Assistant Commissioner
Office of Field Operations

SUBJECT: Enforcement Operation for Students, Exchange Visitors, and Their Dependents

This winter I am directing all ports of entry to conduct an outbound and inbound enforcement operation for students (F1 and M1), exchange visitors (J1), and their dependents (F2, M2, and J2) in December and January, to coincide with the end of the fall semester and the start of the spring semester. Over the last three years, the enforcement operation was inbound only, and we have seen the number of inadmissible applicants for admission with a nexus to national security decline, mainly because they are wiping their electronic devices before arrival.

During the last enforcement operation in August and September, you inspected over 780,000 students, exchange visitors, and their dependents, and denied admission to 416 individuals, 11 of whom had a national security nexus. Compared to the same time period in 2017, this fall's enforcement operation had a 14 percent decrease in the number of individuals found inadmissible, and a 62 percent decrease for those found with derogatory media on their electronic devices. To address the tactic of sanitizing electronic devices upon arrival, ports of entry shall conduct locally-driven targeted outbound enforcement operations during December.

(b)(7)(E)

(b)(7)(E)

The attached muster provides guidance relating to the continuing concerns regarding students, exchange visitors, and their dependents. Thank you for your continued hard work and contribution to securing the United States. Should you have any questions, please have a member of your staff contact (b)(6), (b)(7)(C) Director, (b)(7)(E) (b)(7)(E)

Message

From:

Sent:

To:

CC:

(b)(6), (b)(7)(C)

Subject:

Attachments:

(b)(7)(E)

DFOs/XDs-

Please see the attached memorandum from Executive Assistant Commissioner Owen and accompanying muster regarding the need for thorough examinations of returning students as we approach the new school year. ~~The muster is considered sensitive and should not be disseminated in either hard or electronic format to any CBP personnel below the GS-13 supervisory CBP Officer level. Hard copies should be secured as per Department of Homeland Security policy relating to the safeguarding of "FOR OFFICIAL USE ONLY/LAW ENFORCEMENT SENSITIVE" materials.~~

(b)(7)(E)

The content of the memo is pasted below for ease of reading on your Smartphone. Let me know if you have any questions.

July 26, 2016

MEMORANDUM FOR: Executive Directors
Directors, Field Operations

FROM: Todd C. Owen
Executive Assistant Commissioner
Office of Field Operations

SUBJECT: Need for Thorough Examinations of Returning Students

The Office of Field Operations (OFO) is issuing this muster to reinforce the ongoing need for all U.S. Customs and Border Protection (CBP) OFO personnel to maintain situational awareness and remain vigilant (b)(7)(E)

(b)(7)(E)

(b)(7)(E)

With the end of summer approaching, many students will be returning to school. (b)(7)(E)

(b)(7)(E)

(b)(7)(E)

(b)(7)(E)

Thank you for your continued assistance. Should you have any questions, please have a member of your staff contact (b)(6), (b)(7)(C) Director, (b)(7)(E)

This module is considered sensitive and should not be disseminated in either hard or electronic format to any CBP personnel below the GS-13 Supervisory CBP Officer level. Hard Copies should be secured as per Department of Homeland Security policy relating to the safeguarding of (b)(6), (b)(7)(C) **FOR OFFICIAL USE ONLY LAW ENFORCEMENT SENSITIVE materials.**

(b)(6), (b)(7)(C)
Director, (b)(7)(E)
(b)(7)(E)
U.S. Customs and Border Protection
(b)(7)(E)

1300 Pennsylvania Avenue NW
Washington, DC 20229

U.S. Customs and Border Protection

JUL 2 6 2016

MEMORANDUM FOR: Executive Directors
Directors, Field Operations

FROM: Todd C. Owen (b)(6), (b)(7)(C)
Executive Assistant Commissioner
Office of Field Operations

SUBJECT: Need for Thorough Examinations of Returning Students

The Office of Field Operations (OFO) is issuing this muster to reinforce the ongoing need for all U.S. Customs and Border Protection (CBP) OFO personnel to maintain situational awareness and remain vigilan (b)(7)(E)

(b)(7)(E)

(b)(7)(E)

With the end of summer approaching, many students will be returning to school. (b)(7)(E)

(b)(7)(E)

(b)(7)(E)

Thank you for your continued assistance. Should you have any questions, please have a member of your staff contac (b)(6), (b)(7)(C), Director, (b)(7)(E)

This module is considered sensitive and should not be disseminated in either hard or electronic format to any CBP personnel below the GS-13 Supervisory CBP Officer level. Hard Copies should be secured as per Department of Homeland Security policy relating to the safeguarding of FOR OFFICIAL USE ONLY/LAW ENFORCEMENT SENSITIVE information.

Unclassified//FOR OFFICIAL USE ONLY/Law Enforcement Sensitive

Muster

Week of Muster: Upon Receipt

Headquarters POC: (b)(7)(E)

Subject: Need for Thorough Examinations of Returning Student

The Office of Field Operations (OFO) (b)(7)(E) is issuing this muster to reinforce the ongoing need for all U.S. Customs and Border Protection (CBP), OFO personnel to maintain situational awareness. OFO personnel are to be reminded (b)(7)(E)

(b)(7)(E)

Muster Points

Recent encounters highlight the need for thorough examinations of returning students:

- (b)(7)(E)

(b)(7)(E)

(b)(7)(E)

(b)(7)(E)

Recommendations:
All personnel are reminded that many students will be returning to school after the summer break.

(b)(7)(E)

CBP officers are reminded to:

- (b)(7)(E)

Message

From: (b)(6), (b)(7)(C)

Sent:

To:

Subject: FW: F-1 Visa Holder Immigrant Intent

Attachments: F-1 Immigrant Intel Analysis - 12.3.2018.pdf

XD (b)(6), (b)(7)(C)

I met with (b)(7)(E) last year on F-1 visas holder intent. They've circled back to see whether OFO would be willing to meet and discuss the issue. I've attached a brief white paper on the issue which outlines their concerns.

Please advise whether you (or the appropriate designee) would be willing to meet and I'll circle back with Intel to facilitate. Thank you sir,

(b)(6), (b)(7)(C)
Executive Director | Office of Trade Relations
Office of the Commissioner
U.S. Customs & Border Protection
(b)(7)(E)

For scheduling needs, please contact (b)(6), (b)(7)(C) cbp.dhs.gov

---

From: (b)(6)

Sent: (b)(6), (b)(7)(C)

To: (b)(6), (b)(7)(C)

Subject: F-1 Visa Holder Immigrant Intent

(b)(6), (b)(7)(C)

Thank you for meeting with (b)(6), (b)(7)(C), and me on (b)(6), (b)(7)(C) to discuss a current misinterpretation of the law for evaluating an F-1 visa holder's immigrant intent. We are hopeful that soon the misinterpretation will be corrected. Attached is an analysis with an executive summary that specifically addresses CBP practices rather than reference the issues with the Department of State Foreign Affairs Manual (FAM). The underlying paper includes a discussion of the FAM, so the CBP Field Operations officials can see the issues we have tried to address with the Department of State. We appreciate your willingness to share our analysis with the Field Operations Division at CBP. Please let the Field Operations officials know that we are happy to meet with him to discuss the paper and answer any questions they may have.

Thank you again for meeting with us and your assistance.

(b)(6)
Senior Counsel | Director of Government Relations
Intel Corporation

CORRECTING IMPROPER ANALYSES OF WHETHER A F-1 FOREIGN STUDENT REBUTS THE PRESUMPTION OF IMMIGRANT INTENT DURING VISA RENEWAL OR ADMISSION

Executive Summary:

Notwithstanding the immigrant intent presumption of INA § 214(b), the law is settled that F-1 visa holders remain eligible for F-1 nonimmigrant status when they intend to return to their place of residence while simultaneously intending to take advantage of future legal opportunities for other lawful status, including permanent residence, should that opportunity present itself. Precedent from the D.C. Circuit and the Board of Immigration Appeals confirms that a desire to permanently remain in the U.S. in accordance with the law, should the opportunity present itself, is not inconsistent with nonimmigrant intent. A pending or approved I-140 with respect to an F-1 visa holder does not inherently deprive the individual of nonimmigrant intent. Where F-1 holders who are also I-140 beneficiaries maintain an unabandoned residence abroad and intend to depart the U.S. at the end of the F-1 period of stay, they remain eligible for the F-1 classification and should not be denied renewal of an F-1 visa or admission to the U.S. in F-1 status at a port of entry.

Unfortunately, Customs and Border Protection (CBP) and the Department of State (DOS) have increasingly created uncertainty and disruption to employers and F-1 individuals by interpreting intent to immigrate so that F-1 persons on Optional Practical Training (OPT) are either stranded in the U.S. for years or are barred from returning after a trip abroad. In practice, CBP and DOS officers often treat a pending or approved I-140 immigrant petition for alien worker as conclusive evidence that the F-1 applicant cannot overcome the immigrant intent presumption. This categorical approach fails to analyze whether the applicant remains eligible for the F-1 nonimmigrant classification and disregards the case law's holding that the presence of an I-140 petition is not necessarily inconsistent with demonstrating nonimmigrant intent.

CBP and DOS cannot properly conclude that an intending F-1 lacks nonimmigrant intent merely because the person is an I-140 beneficiary. The proper legal analysis for intending F-1 students is that they must have a home residence in any foreign country that is practical to return to and that they not plan to overstay illegally the period of nonimmigrant admission. F-1 visa holders certainly can intend to pursue permanent resident status or move to another nonimmigrant status, if the legal opportunity arises, provided they do not unlawfully overstay their F-1 period of study or OPT period. This interpretation is consistent with the legal authority and the reality that students applying for visas or admission routinely intend to remain in the U.S. after graduation through an employer that will sponsor them for an employment-based visa and for permanent resident status. Such intent is permissible should that immigrant-visa application process prove successful, provided that such persons also intend to depart the U.S.: (1) when their foreign student status terminates, and (2) if any applications for employment-based status are unsuccessful.

This paper discusses the federal court and BIA precedent that apply to CBP and the Foreign Affairs Manual (FAM) used by DOS when each agency interprets nonimmigrant intent. Clarifying the standard that should be applied to F-1/OPT visa holders applying for admission at ports of entry will prevent CBP inspectors from categorically finding immigrant intent simply because a company filed an I-140 petition on behalf of an F-1 student working in OPT status. Instead, the more thorough analysis required by the case law should be applied.

A clarified interpretation will allow many companies to begin sponsorship for permanent residence while the high skilled beneficiary is still in F status rather than wait until the employee wins the H-1B lottery. Consequently, the permanent residence process could begin on average one to two years earlier and as much as three years earlier for employees with STEM OPT who repeatedly lose the H-1B lottery. OPT employees with current priority dates would likely complete the permanent residence process in one to two years. These individuals would be able to bypass the H-1B lottery, thereby reducing H-1B demand by tens of thousands each year. Clarifying the proper analysis also will reduce the need for STEM OPT extensions for priority-date current individuals. Moreover, employers would avoid the cost of H-1B extensions for beneficiaries with non-current priority dates who obtain an earlier priority date due to the employer initiating the permanent residence process while the individual is still in F-1 status.

CORRECTING IMPROPER ANALYSES OF WHETHER A F-1 FOREIGN STUDENT REBUTS THE PRESUMPTION OF IMMIGRANT INTENT DURING VISA RENEWAL OR ADMISSION

Employers regularly begin employing high skilled F visa students for a period of Optional Practical Training (OPT) after their graduation from U.S. universities. Many of those students eventually transition to an H-1B or other nonimmigrant visa before their employer sponsors them for permanent residence. Increasingly employers are finding it desirable to begin the years-long green card process while those individuals are still in the OPT period. The Department of State (DOS) and Customs and Border Protection (CBP), however, have increasingly created uncertainty and disruption to employers and F-1 individuals by interpreting intent to immigrate such that students are either stranded in U.S. for years or are barred from returning after a trip abroad.

This proposal outlines this "dual intent" problem concerning F-1 individuals in OPT periods and proposes a solution. Part I explains the basis for the problem. Part II outlines recent DOS Foreign Affairs Manual (FAM) changes that exacerbated the confusion over this issue. Part III explains why DOS and CBP cannot properly reach the conclusion that an F-1 visa holder lacks nonimmigrant intent because mere engagement in the permanent residence process does not violate nonimmigrant intent. Part IV explains why the current reading by DOS and CBP fails as a matter of law and policy. Part V sets forth the proper analysis for F-1 students in OPT who seek a visa renewal or admission into the U.S. in F-1 OPT status. Finally, Part VI explains the time and cost savings that would result from the proper approach.

I. The Misperception that Students in OPT who are Pursuing a Green Card Cannot Travel.

The ongoing disruption and uncertainty stems from the interaction between visa duration, student status, and the intent necessary to maintain valid F status. As with other "nonimmigrant" visa categories, an F visa recipient must overcome the presumption of immigrant intent in INA § 214(b). In particular for F status, the foreign national must have (1) "a residence in a foreign country he has no intention of abandoning" and (2) be coming to the U.S. "temporarily" for the particular nonimmigrant purpose. *See, e.g.,* INA § 101(a)(15)(B), (F), (J), (O)(ii), (P). In the case of an F student, the alien must have the purpose of coming "temporarily and solely for the purpose of pursuing [a] course of study" at a college, university, or other learning institution. INA § 101(a)(15)(F)(i). By regulation, students may continue in F status for a period of on-the-job training if it is "directly related to the student's major area of study." 8 CFR § 214.2(f)(10(ii)(A). This "OPT" time can run for up to 36 months for graduates holding STEM degrees. 8 CFR § 214.2(f)(10(ii)(C).

As a practical matter, OPT involves the F-1 student working full time for a U.S. employer. Many high skilled students in OPT eventually transition to another non-immigrant visa type such as the H-1B visa which is more amenable to seeking lawful permanent residence. The numerical limitations on the H-1B category unfortunately preclude some students from transitioning from OPT to another nonimmigrant visa category due to demand exceeding the supply of H-1B visas. Employers increasingly begin the permanent residence process for

employees in F-1 OPT status because of the backlogs in the green card process for certain nationalities—most notably Chinese and Indian nationals.

Problems have arisen, however, concerning whether F-1 OPT individuals who started the green card process can demonstrate the necessary "nonimmigrant intent" for the F category. Individuals can remain in valid F status indefinitely if they refrain from traveling abroad during the length of their OPT period. Problems can arise with CBP or U.S. Consulates, however, if work or family commitments require the F-1 OPT individual to travel abroad. First, CBP officers at ports of entry have started using a pending green card application to refuse entry to F-1 OPT individuals on intent grounds. Second, F-1 OPT employees who travel abroad sometimes must renew their visas before coming back to the U.S.[1] US Consulates abroad have begun denying F-1 visa renewals for F-1 OPT persons working for U.S. employers reasoning that these students do not have the requisite nonimmigrant intent due to pending applications filed on their behalf by their U.S. employers for employment-based immigrant visas.

The inconsistent approach taken by government agencies creates further confusion about the right of an F-1 OPT employee to have a permanent residence case initiated on his behalf by his employer. Other immigration agencies do not share the concerns of DOS and CBP regarding immigrant intent in this context. The Department of Labor (DOL) does not reject Labor Certifications for beneficiaries who are in F-1 OPT status, nor would it have a legal basis to do so.[2] Moreover, U.S. Consulates continue to issue F-1 visas and CBP continues to admit F-1 OPT individuals at the port of entry where the individual is a beneficiary of an approved labor certification application. Thus, some steps in the green card process apparently do not trigger intent concerns on behalf of the DOS or CBP.[3]

The second stage of the green card process after approval of the labor certification application involves the filing of the I-140 petition to immigrate a foreign worker. The third stage is the filing of the I-485 application to adjust the status from a nonimmigrant to a permanent resident. The I-485 is often filed concurrently with the I-140 if the priority date is current (*i.e.*, a quota number is available); however, it is many years until the priority date becomes current and the I-485 can be filed for nationals of backlogged countries. The U.S. Citizenship and Immigration Services (USCIS) is the agency responsible for this phase of the permanent resident process. USCIS only rarely rejects I-140 petitions or I-485 adjustment of status applications for F-1 OPT individuals.[4] The mere presence of a pending or approved I-140

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[1] The most common reason an F-1 student will need to renew his visa at the Consulate is due to visa validity limits under diplomatic reciprocity rules. For example, a Chinese or Indian student can receive only a 5-year F-1 visa, even if the course of study and OPT time will run longer, because that is the visa eligibility period provided to U.S. students studying in China or India.

[2] The Labor Certification process administered by DOL is the typical first step in the permanent residence process. Employers must demonstrated there is a shortage of qualified and available U.S. Workers for the job position for which the F-1 OPT employee holds.

[3] It is possible the inconsistent approach by DOS and CBP stems in part because the DS-160 form used to obtain a student visa asks specifically about immigrant petitions instead of labor certification applications.

[4] The adjustment of status filing does not have as large of an impact as the I-140 stage. While applicants may be stuck at the I-140 stage for years, adjustment of status applicants can avoid the 90-day presumption by not filing the application until 90 days have passed since their most recent admission and then need only wait for few months more before they can travel freely using advance parole. See Section IIA for a discussion of the 90-presumption.

petition ; however, has caused CBP and DOS to incorrectly conclude that the student now possesses immigrant intent and that such intent is in violation of the F visa category.

One consequence of the actions of CBP and DOS is that immigration lawyers routinely counsel clients not to apply for an F visa renewal once an I-140 petition has been filed. Moreover, the typical advice is that F-1 individuals should not to seek admission to the U.S. even with an existing F visa because of many experiences in which CBP denied entry on a valid visa when an I-140 has been filed.

In addition to practical concerns relating to travel, the approach by CBP and DOS have a chilling effect on the green card process with respect to OPT employees, despite the benefits to employers, priority-date-current employees, and USCIS of bypassing the need for an H-1B thereby reducing demand on the H-1B visas lottery. Among these effects are:

- Delays in the application for permanent residence, or abandonment of that process, for OPT employees who must travel in factual scenarios that Consulates and/or CBP often find problematic;
- Refusal to begin the green card process until after an OPT employee can obtain an H-1B, which can result in years-long delays;
- Termination of otherwise highly-qualified employees who run out of OPT status before they can obtain an H-1B visa, even though those employees might otherwise have achieved permanent residence;
- Restrictions on travel for OPT employees whom Consulates or CBP consider to have immigrant intent, even though this interpretation is unnecessarily strict and formalistic.
- Unnecessarily increasing demand for the H-1B visa, as some beneficiaries need an H-1B simply because of the supposed immigrant intent problem alone.
- In the case of aliens subject to quota backlogs (notably Chinese and Indian nationals), refusal to sponsor otherwise qualified OPT students at all because of the risks.

In short, the current system for obtaining permanent residence for OPT individuals has tremendous flaws. Immigration agencies disagree amongst themselves about whether and how seeking a green card impacts an individual's ability to continue entering or obtaining an F visa. The system results in a patchwork system in which employers must engage in an elaborate tiptoeing process of completing the permanent residence process for employees by having them not travel during certain brief stages of the process where Consulates or CBP officers—but not USCIS or DOL officers—might object. As the analysis below demonstrates, however, the restrictive adjudications of nonimmigrant intent by CBP and DOS are improper as a matter of law, and if corrected, would restore clarity and functionality to the permanent residence process.

II. Recent FAM Changes Are Improper and a Principal Source of the Problem.

Changes to the DOS Foreign Affairs Manual (FAM) made in 2017 exacerbate the situation by creating further uncertainty and increasing the problems facing OPT recipients in the green card pipeline. The updated FAM provisions purport to address how pursuing permanent residence after the grant of a nonimmigrant visa indicate misrepresentation or a failure to establish nonimmigrant intent.

A. Presumptions of Misrepresentation.

If the foreign national engages in conduct inconsistent with the nonimmigrant status less than 90 days after admission, a presumption of willful misrepresentation arises. The FAM is inconsistent regarding what activities related to pursuit of permanent residence potentially violate nonimmigrant intent. On the one hand, 9 FAM 302.9-4(B)(3)(g)(1)(a) is concerned about applying for adjustment of status:

> In determining whether a misrepresentation has been made, some of the most difficult questions arise from the cases involving aliens in the United States who conduct themselves in a manner inconsistent with representations made to the consular officers concerning their intentions at the time of visa application or to DHS when applying for admission or for an immigration benefit. Such cases occur most frequently with respect to aliens who, after having obtained visas as nonimmigrants and been admitted to the United States, either:
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> (i) *Apply for adjustment of status to lawful permanent resident*; or
> (ii) Fail to maintain their nonimmigrant status (for example by engaging in unauthorized study or employment).

9 FAM 302.9-4(B)(3)(g)(1)(a) (emphasis added). While this provision relates only to adjustment of status filing (*i.e.*, the Form I-485), immigration counsel and employers report that foreign nationals applying for a visa at the prior step—the employer's filing of the I-140 petition for employment-based immigrant visa status—face questions from consular officers about whether they intend to file an I-485 as well. In almost all cases, the answer would be "possibly yes," although approval of an I-140 petition also entitles the beneficiary to pick up the immigrant visa at a consulate abroad. Consulates, however, frequently presume that the I-485 adjustment application is inevitable, and accordingly refuse renewal of F-1/OPT visa applications. This result "assumes facts not in evidence," misreads the FAM provision emphasized above, and is inappropriate.

The problem this language presents is exacerbated by language immediately following that empowers consular officers to apply the ground of inadmissibility without a sufficient factual basis. In section (g)(1)(c) of the FAM provision cited above, consular officers are told: "To conclude there was a misrepresentation, you must have direct or circumstantial evidence sufficient to meet the ***'reason to believe' standard***, which requires more than mere suspicion but less than a preponderance of the evidence." This observation is incorrect: INA § 212(a)(6)(C) does not contain the lowered "reason to believe" standard, and consular officers may not apply it.

The next subsection, 9 FAM 302.9-4(B)(3)(g)(2)(b), lists conduct implicated by the 90-day rule; however, it does not include the mere filing of adjustment of status. Instead, it focuses on prematurely undertaking activities that require adjustment of status or change of status:

> (b) For purposes of applying the 90-day rule, conduct that violates or is otherwise inconsistent with an alien's nonimmigrant status includes, but is not limited to:
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> (i) Engaging in unauthorized employment;
> (ii) Enrolling in a course of academic study, if such study is not authorized for that nonimmigrant classification (e.g. B status);
> (iii) A nonimmigrant in B or F status, or any other status prohibiting immigrant intent, marrying a United States citizen or lawful permanent resident and taking up residence in the United States; or
> (iv) *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.*

9 FAM 302.9-4(B)(3)(g)(2)(b) (emphasis added). The objective expressed by this FAM provision is simply that the nonimmigrant alien actually obtain permanent residence before undertaking activities that require permanent residence – such as open market work authorization. Merely applying for permanent residence, however, is not inconsistent with the nonimmigrant status, nor is working in a position with an employer that is directly related to the student's major area of study. Likewise, changing status to H-1B or another nonimmigrant category is not inconsistent with F status. If consular officers refuse F-1 visa renewals for aliens in OPT status with pending green card applications based on this provision, then such refusals would be unjustified.

The "apply for adjustment of status" language in the FAM is clearly the source of the problems experienced by F-1 individuals seeking visa renewals, because some consular officers are expanding the FAM provision to ask after an I-140 filing whether the applicant "intends to apply for adjustment," even though that is not what the FAM instructs. As explained further, the mere filing of an adjustment of status application is not inconsistent with nonimmigrant status. DOS needs to clarify the FAM to prevent consular officers from misreading the provision. Another helpful change would be to clarify that there is nothing inherently inconsistent with F nonimmigrant status and being a beneficiary of an I-140 petition. While the FAM does not mention I-140s, the DS-160 question regarding the filing of an immigrant petition and years of problems at Consulates and Ports of Entry have caused a chilling effect on filing I-140s.

B. Establishing Nonimmigrant Intent.

DOS amended another section of the FAM in 2017 related to F individuals. 9 FAM 402.5-5(E)(1) now includes the following:

> (b). 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. (Emphasis added.)

This new provision is not consistent with DOS regulations, which merely state that aliens may be classified as F-1 students if the consular officer is satisfied, *inter alia*, that "[t]he alien intends, and will be able, to depart upon ***termination of student status***." 41 CFR § 41.61(b)(1)(iv) (emphasis added). The regulation imposes the requirement to depart "or ability to depart" only upon "termination of student status." The new FAM provision replaces the regulatory phrase "termination" with the new concept of "the conclusion of his or her study or OPT." The regulatory concept of "termination" of student status implies that the foreign national no longer has status and thus must depart, but the applicable regulation does not require a consular officer to perform the intent analysis if the F-1/OPT status is "changed" to H-1B status or "adjusted" to permanent residence. The new FAM provision, on the other hand, directs consular officers to perform an intent analysis for the point at which the period of student status or OPT is "concluded," even if the foreign national can then properly change to another nonimmigrant status or adjust to permanent residence. There is no statutory or regulatory basis for this change.

Furthermore, this new FAM provision appears only to insulate F-1 OPT aliens from a consular officer's intent analysis if there is a "hypothetical possibility" that the applicant may apply to change or adjust status in the U.S. in the future – implying that an actual pending I-140 or I-485 petition is in fact evidence of immigrant intent. But there is no basis in the statute or the regulations for this change, and critically, the case law is to the contrary. See discussion *infra* at Section III.

The changes to the FAM are not supported by legal authority, are internally inconsistent, and thus have introduced uneven and often improper results.

III. Filing for Lawful Permanent Residence Does Not Constitute A Violation of Nonimmigrant Intent.

The position of DOS and CBP—that making green card filings vitiates nonimmigrant intent—rests on a misunderstanding concerning intent in the context of nonimmigrant visas. This misunderstanding began after Congress expressly removed the requirement that H-1B and L visa holders maintain a foreign residence abroad to which they intend to return. *See* Immigration Act of 1990, Pub. L. No. 101-649, § 205(b)(2), 104 Stat. 4978, 5020 (1990). As a result of this change, the H-1B and L visa categories sometimes began to be referred to carelessly as the "dual intent" categories.

The removal by Congress of the requirement that H-1B and L visa holders maintain a foreign residence was not intended to have a negative effect on the analysis of immigrant intent in other nonimmigrant visa categories. Instead, the change with respect to H-1B and L visa

holders was to take the intent question off the table with respect to those categories. The intent question now simply does not arise for H-1 and L categories.

The home residence requirement with respect to other nonimmigrant categories like the F visa serves to ensure that the nonimmigrant has a country to return to and will not be stateless after the temporary period in the U.S. *See generally* Daniel Walfish, Note, Student Visas and the Illogic of the Intent Requirement, 17 Georgetown Immig. L. J. 473, 480-82 (2003). The H-1B and L the beneficiary need not have a home residence for return. F students, in contrast, must have such a residence, but they still can still establish nonimmigrant intent even if an employer has commenced an application for permanent residence on their behalf.

An F visa holder can simultaneously intend to return to his place of residence *and* intend to take advantage of future legal opportunities to seek other status, including permanent residence. Many cases have held that "a desire to remain in this country permanently in accordance with the law, should the opportunity to do so present itself, is not necessarily inconsistent with nonimmigrant status." *Matter of Hosseinpour*, 15 I &N Dec. 191, 192 (BIA 1975). *See also Lauvik v INS,* 910 F.2d, 658, 660-61 (9th Cir. 1990); *Brownell v. Carina*, 254 F.2nd 78, 80 (D.C. Cir. 1957); Charles Gordon, Stanley Mailman & Stephen Yale-Loehr, Immigration Law and Procedure § 12.03[1][c] (2005).

This doctrine that nonimmigrants simply must intend to comply with their period of admission and not overstay, but may also intend to become a permanent resident or change to another nonimmigrant status such as an H-1B should the legal opportunity arises is consistent with a demonstration of nonimmigrant intent. *See* Daniel Walfish, Note, Student Visas and the Illogic of the Intent Requirement, 17 Georgetown Immig. L. J. 473, 480-82 (2003); Charles Gordon, Stanley Mailman & Stephen Yale-Loehr, Immigration Law and Procedure § 12.03[1][c] (2005).

Indeed the H-1B and L categories maintain the usual nonimmigrant requirement that the beneficiary be coming to the U.S. "temporarily." *See* INA § 101(a)(15)(H), (L). The 1990 amendment removed *only* the home residence requirement with respect to those categories. The remaining requirement of temporary admission for the particular nonimmigrant purpose has never caused anyone to think there is an immigrant intent issue for H-1Bs or Ls. There simply needs to be no evidence that the H-1B or L beneficiary will illegally overstay the temporary admission. Likewise, the temporariness requirement should not preclude F-1 OPT individuals from establishing nonimmigrant intent simply because the permanent residence process has been initiated on their behalf, and they might desire to remain in the U.S. permanently in accordance with the law, should that process result in awarding of an immigrant visa or adjustment of status.

IV. The Consular Bureau and CBP Are Not Following the Law.

CBP is bound by precedential BIA decisions. *Matter of Housseinpour* prevents CBP Officers at ports of entry from concluding that the mere presence of a pending I-140 or I-485 petition deprives an alien in F-1 OPT status from establishing nonimmigrant intent. CBP Officers are acting contrary to binding legal authority to the extent they are making such a judgment.

DOS revised the FAM in 2017 in a manner that is not supported by the statute or its regulations, by requiring application of an immigrant intent analysis to the point at which a foreign student completes his or her course of study or OPT, as opposed to when the student's status would "terminate." The FAM provisions cited above are beyond the legal authority of DOS in general, but they are certainly unlawful in the 9th Circuit and the D.C. Circuit, where there is direct precedent to the contrary. *Lauvik v INS,* 910 F.2d, 658, 660-61 (9th Cir. 1990); *Brownell v. Carina*, 254 F.2nd 78, 80 (D.C. Cir. 1957).

In addition, the 2017 FAM revision with regard to misrepresentation and I-485 petitions is: (i) flatly improper in the 9th Circuit and D.C. Circuits; (ii) unsupported by the INA or DOS regulations; and (iii) being misread or improperly expanded by some consular officers to apply to those applicants who only have an I-140 petition pending. Thus, the 2017 revisions must be amended to avoid that result or deleted.

V. The Proper Approach.

In conclusion, the proper interpretation for F-1 individuals is that they must have a home residence in any foreign country that is practical to return to and not plan to overstay illegally the period of nonimmigrant admission. F-1 individuals certainly can intend to pursue permanent resident status or move to another nonimmigrant status if the legal opportunity arises provided they do not unlawfully overstay their F-1 OPT period. This interpretation is consistent with the legal authority and the reality that students applying for visas or admission routinely have the intent to remain in the U.S after graduation through an employer that will sponsor them for employment-based temporary or permanent status, if that application process proves successful, but will depart the U.S. (1) when their foreign student status terminates and (2) any applications for employment-based status are unsuccessful. The mere existence of a pending I-140 petition with respect to such student does not inherently deprive the student of nonimmigrant intent, and thus such a student is eligible for renewal of F-1 visa status and should not be denied admission to the U.S. in such status.

DOS could implement this proper approach with memoranda and training, but revising the FAM would be the best way. Appendix A includes a marked version of the FAM that reflects the proposed changes.

Adoption of these measures would restore the historical understanding of dual intent, create long overdue clarity, reconcile imprecision and ambiguity in the FAM, and align Consular and CBP practice with the reality that OPT employees usually have dual intent.

VI. Time and Cost Savings from the Proper Approach.

A return to the correct interpretation of dual intent would cause many companies to begin sponsorship for permanent residence while the high skilled beneficiary is still in F status rather than wait until the employee wins the H-1B lottery. Consequently, the permanent residence process would begin on average one to two years sooner, and as much as three years earlier for employees with STEM OPT who repeatedly lose the H-1B lottery.

For OPT employees with current priority dates, it would be possible to complete the permanent residence process in one to two years. This would bypass the H-1B and likely reduce H-1B demand by tens of thousands each year. It also would reduce the need for STEM OPT extensions. For OPT employees without current priority dates, there would still be the advantage that their permanent residence process would begin sooner, resulting ultimately in an earlier priority date, ultimately faster permanent residence, and often one less H-1B extension. In short, permanent residence would be achieved more quickly, reduce the demand for STEM OPT, initial H-1Bs for employees with current priority dates, and the cost of H-1B extensions for beneficiaries without current priority dates who would get in line earlier for a priority date. These actions would meet the intent of the regulatory review process under Executive Orders 13771 (Reducing Regulation and Controlling Regulatory Costs) and 13788 (Buy American Hire American) by eliminating redundancies and improving efficiency.

APPENDIX A

9 FAM 302.9-4(B)(3) (U) Interpretation of the Term Misrepresentation (CT:VISA-460; 10-17-2017)

a. **(U) "Misrepresentation" Defined:** As used in INA 212(a)(6)(C)(i), a misrepresentation is an assertion or manifestation not in accordance with the facts. Misrepresentation requires an affirmative act taken by the alien. A misrepresentation can be made in various ways, including in an oral interview or in written applications, or by submitting evidence containing false information.

b. **(U) Differentiation Between Misrepresentation and Failure to Volunteer Information:** In determining whether a misrepresentation has been made, it is necessary to distinguish between misrepresentation of information and information that was merely concealed by the alien's silence. Silence or the failure to volunteer information does not in itself constitute a misrepresentation for the purposes of INA 212(a)(6)(C)(i).

c. **(U) Misrepresentation Must Have Been Before U.S. Official:** For a misrepresentation to fall within the purview of INA 212(a)(6)(C)(i), it must have been practiced on an official of the U.S. Government, generally speaking, a consular officer or a Department of Homeland Security (DHS) officer.

d. **(U) Misrepresentation Must be Made on Alien's Own Application:** The misrepresentation must have been made by the alien with respect to the alien's own visa application. Misrepresentations made in connection with some other person's visa application do not fall within the purview of INA 212(a)(6)(C)(i). Any such misrepresentations may be considered with regard to the possible application of INA 212(a)(6)(E).

e. **(U) Misrepresentation Made by Applicant's Agent or Attorney:** The fact that an alien pursues a visa application through an attorney or travel agent does not serve to insulate the alien from liability for misrepresentations made by such agents, if it is established that the alien was aware of the action being taken in furtherance of the application. This standard would apply, for example, where a travel agent executed a visa application on an alien's behalf. Similarly, an oral misrepresentation made on behalf of an alien at the port of entry by an aider or abettor of the alien's illegal entry will not shield the alien in question from inadmissibility under INA 212(a)(6)(C)(i), irrespective of what penalties the aider or abettor might incur, if it can be established that the alien was aware at the time of the misrepresentation made on his or her behalf.

f. **(U) Timely Retraction:**

(1) ***(U) In General:*** *A retraction that is timely and voluntary may serve to purge a misrepresentation and remove it from further consideration as a ground for the INA 212(a)(6)(C)(i) and INA 212(a)(6)(C)(ii) inadmissibilities. Whether a retraction is timely depends on the circumstances of the particular case. Generally, a retraction is timely if*

it is made at the first opportunity and before the conclusion of the proceeding during which an individual made the misrepresentation. On the other hand, a retraction is not timely if it is made in response to the actual or imminent exposure of his falsehood or to having been confronted with evidence of a false statement or material omission. Thus, a determination whether a retraction is timely is made on a case-by-case basis. If the applicant has personally appeared and been interviewed, the retraction must have been made during the initial interview with the officer. If the misrepresentation has been noted in a "mail-order" application, the applicant must be called in for an interview and the retraction must be made during the course thereof. *Aliens appearing before an officer should be warned of potential ineligibility under INA 212(a)(6)(C)(i) and INA 212(a)(6)(C)(ii) at the onset of the interview and as part of the oath administered to the applicant. The applicant must correct his or her representation before being exposed by the officer or U.S. Government official or before the conclusion of the proceeding during which he or she gave false testimony. A retraction can be voluntary and timely if made in response to an officer's questions during which the officer gives the applicant a chance to explain or correct a potential misrepresentation. Once the misrepresentation is discovered, if the applicant has already had an opportunity to retract the misrepresentation and has not done so, the adjudicating officer is not then required to provide the applicant an additional opportunity to make a retraction.*

(2) ***(U) Specific Examples:*** *A retraction made before a routine primary inspection at a port of entry may be timely, depending on the nature, circumstances, and timing of the specific retraction. Generally, retractions in secondary inspection based on a misrepresentation in or before primary inspection at a port of entry would not be considered timely. Willful material misrepresentations made by the visa or adjustment of status applicant as part of a petition (such as signing a fraudulent marriage certificate that supports the petition or submitting a fraudulent degree in connection with an employment petition) used subsequently in support of an adjustment of status application filed with USCIS or an immigrant visa application cannot be considered timely retracted by the applicant at the time of the adjustment of status or visa application interview.*

g. **(U) Activities that Indicate Violation of Status or Conduct Inconsistent with Status**

(1) **(U) In General:**

(a) **(U)** 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 consular officers concerning their intentions at the time of visa application or to DHS when applying for admission or for an immigration benefit. Such cases occur most frequently with respect to aliens who, after having obtained visas as nonimmigrants and been admitted to the United States, either:

(i) **(U)** ~~Apply for adjustment of status to lawful permanent resident~~ Undertake any activity for which a change of status or an adjustment of status would be required, without the benefit of such a change or adjustment; or

(ii) **(U)** Fail to maintain their nonimmigrant status (for example, by engaging in unauthorized study or employment).

(b) **(U)** Applications for adjustment or change of status in the United States are adjudicated by U.S. Citizenship and Immigration Services (USCIS), other than in those cases where the application is made before an Immigration Judge. If you become aware of derogatory information indicating that an alien in the United States who has a valid visa, may have misrepresented his or her intentions to you at the time of visa application, or to DHS at the port of entry or in a filing for an immigration benefit, you may bring the derogatory information to the attention of the Department for potential revocation. See 9 FAM 403.11-5. If you become aware of derogatory information indicating that an alien in the United States without a valid visa but who is not a Lawful Permanent Resident may have misrepresented his or her intentions to you at the time of visa application, or to DHS at the port of entry or in a filing for an immigration benefit, then you may enter a P6C1 lookout in CLASS with the appropriate information. See 9 FAM 403.10-3(C). Do not request an advisory opinion from the Advisory Opinions Division (CA/VO/L/A) in these cases, because it would not be binding on USCIS.

(c) **(U)** With respect to the second category referred to above in subparagraph g(1)(a)(ii), nonimmigrant visa holders who fail to maintain their nonimmigrant status, the fact that an alien's subsequent actions are inconsistent with those stated at the time of visa application or admission or in a filing for an immigrant benefit does not necessarily prove that the alien's intentions were misrepresented at the time of application or entry. You should consider carefully the precise circumstances of the change in activities when determining whether the applicant made a knowing and willful misrepresentation. ~~To conclude there was a misrepresentation, you must have direct or circumstantial evidence sufficient to meet the "reason to believe" standard, which requires more than mere suspicion but less than a preponderance of the evidence.~~

(2) **(U) Inconsistent Conduct Within 90 Days of Entry:**

(a) **(U)** However, if an alien violates or engages in conduct inconsistent with his or her nonimmigrant status within 90 days of entry, as described in subparagraph (2)(b) below, you may presume that the applicant's representations about engaging in only status-compliant activity were willful misrepresentations of his or her intention in seeking a visa or entry. To make a finding of inadmissibility for misrepresentation based on conduct inconsistent with status within 90 days of entry, you must request an AO from CA/VO/L/A. As with other grounds that do not require a formal AO, the AO may be informal. See 9 FAM 304.3-2.

(b) **(U)** For purposes of applying the 90-day rule, conduct that violates or is otherwise inconsistent with an alien's nonimmigrant status includes, but is not limited to:

(i) **(U)** Engaging in unauthorized employment;

(ii) **(U)** Enrolling in a course of academic study, if such study is not authorized for that nonimmigrant classification (e.g. B status);

(iii) **(U)** A nonimmigrant in B or F status~~, or any other status prohibiting immigrant intent,~~ marrying a United States citizen or lawful permanent resident and taking up residence in the United States; or

(iv) **(U)** 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.

(3) **(U) After 90 Days:** If an alien violates or engages in conduct inconsistent with his or her nonimmigrant status more than 90 days after entry into the United States, no presumption of willful misrepresentation arises. However, if the facts in the case give you reasonable belief that the alien misrepresented his or her purpose of travel at the time of the visa application or application for admission, you must request an AO from CA/VO/L/A. (See 9 FAM 302.9-4(C)(2).)

h. **(U) Evidence of Violation of Status:**

(1) **(U)** To find an alien inadmissible under INA 212(a)(6)(C)(i) based on a violation of status, there must be evidence that, at the time of the visa application, admission into the United States or in a filing for an immigration benefit (e.g., an application to change or extend a stay in nonimmigrant status), the alien stated orally or in writing to a consular or immigration officer that the purpose of the visit or the immigration benefit was consistent with the intended nonimmigrant classification. Ordinarily, such evidence would be in the form of an admission, from information taken from the alien's nonimmigrant visa (NIV) application, or a report by an immigration officer that the alien made such a statement (e.g., as would be found on the DHS Form I-275, Withdrawal of Application/Consular Notification).

(2) **(U)** The burden of proof falls on the alien to establish that his or her true intent at the time of the presumptive willful misrepresentation was permissible in his or her nonimmigrant status. You must give the alien the opportunity to rebut the presumption of willful misrepresentation by presentation of evidence to overcome it. In the absence of any further offering of proof by the alien to rebut the presumption of willful misrepresentation based on his/her activity within 90 days after entry to the United States, a finding of ineligibility will most likely result.

(a) **(U)** If you are satisfied that the presumption is overcome, and the alien is otherwise eligible, process the case to conclusion.

(b) **Unavailable.**

(i) **Unavailable.**

(ii) **Unavailable.**

9 FAM 402.5-5(E)(1) (U) Residence Abroad Required (CT:VISA-432; 08-08-2017)

a. **(U)** *INA 101(a)(15)(F)(i)* requires that *an F-1* applicant possess a residence in a foreign country he or she has no intention of abandoning. *You* must be satisfied that the applicant *intends to depart upon completion of the approved activity. Consequently, you must be satisfied that the applicant*, at the time of visa application:

(1) **(U)** Has a residence abroad;

(2) **(U)** Has no immediate intention of abandoning that residence; and

(3) **(U)** Intends to depart from the United States upon completion of approved activities.

b. **(U*) 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 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 not to overstay illegally the period of F nonimmigrant admission.*

Message

From:

Sent:

To:

CC:

(b)(6), (b)(7)(C)

Subject: FW: (b)(7)(E)

Attachments: F1 Student Visa Fraud MUSTER .pdf

FYI and FYSA

F-1 Student Visa Fraud alert Muster attached that was generated out of JFK (b)(7)(E)

This Muster provides detailed information about the current F-1 student visa fraud that many port nationwide have been seeing.

(b)(6), (b)(7)(C)
Admissibility and Passenger Programs
Chicago Field Office
Customs and Border Protection
(b)(7)(E)

From: (b)(6), (b)(7)(C)
Sent:
To: (b)(6), (b)(7)(C) @CBP.DHS.GOV>
Subject: FW: (b)(7)(E)

(b)(6), (b)(7)(C)
Chief CBP Officer
U.S. Customs & Border Protection
Area Port of Chicago
(b)(7)(E)

From: (b)(6), (b)(7)(C)
Sent: Thursday, January 28, 2010 9:56:19 PM
To: (b)(6), (b)(7)(C)

(b)(6), (b)(7)(C)

(b)(6), (b)(7)(C)

Cc (b)(6), (b)(7)(C)

Subject: FW: (b)(7)(E)

SIU,

Interesting report from JFK regarding (b)(7)(E)

(b)(7)(E)

Thanks,

(b)(6), (b)(7)(C)

Supervisory CBP Officer
Chicago O'Hare Terminal 5

From: (b)(6), (b)(7)(C)
Sent: [illegible]
To: (b)(6), (b)(7)(C) CBP.DHS.GOV>
Subject: FW: (b)(7)(E)

(b)(6), (b)(7)(C)
Supervisory CBP Officer
Oakland Seaport A-TCET / ATU
Area Port of San Francisco
(b)(7)(E)

Office of Field Operations
Tactical Analytical Unit
New York Field Office

MUSTER

CUSTOMS AND BORDER PROTECTION
VIGILANCE ★ SERVICE ★ INTEGRITY

SITUATIONAL AWARENESS

(b)(6), (b)(7)(C)

(b)(7)(E)

(b)(7)(E)

BACKGROUND

The New York Field Office (b)(7)(E) t is alerting Office of Field Operations (OFO) personnel to ar (b)(7)(E)

(b)(6), (b)(7)(C), (b)(7)(E)

DETAILS

At multiple CBP Ports of Entry (POEs), hundreds of subjects were apprehended when they presented (b)(7)(E)

(b)(7)(E)

(b)(7)(E)

(b)(7)(E)

(b)(7)(E)

Method of Fraud:

Abroad:

The fraud begins with a facilitator (vendor/consultant) providing a (b)(7)(E) which may include:

- (b)(7)(E)

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fraudulent documents.

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(b)(7)(E)

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(b)(7)(E)

Airlines involved:

(b)(7)(E)

CONCLUSION

- (b)(7)(E)
- (b)(7)(E)
- (b)(7)(E)

Information contained in this document is law enforcement sensitive and intended for official use only. No portion of this document should be released to the media, general public or foreign nationals without prior approval from the originator. Recipients of this document are authorized to disseminate this document to appropriate CBP officers and approved Law Enforcement personnel on a need-to-know basis. Requests to disseminate this report outside of these entities should be directed to the New York Field Office (b)(7)(E)

If the information contained in this report helps to achieve a successful enforcement action, and in an attempt to track the use of (b)(7)(E) *information, please list* (b)(7)(E) (b)(7)(E)