

Deciphering Ambiguous Regulations

INTERNATIONAL STUDENT AND SCHOLAR ADVISERS are well aware that parts of the F and J immigration regulations are ambiguous. Advisers working with F and J visa holders are sometimes put in the position of having to interpret the regulations. When making these interpretations, it is critical to consider not only the effect an interpretation will have on the student or exchange visitor, but also on the specific organization or institution. Given the importance of these decisions, we have developed a framework for international student and scholar advisers to use when the need arises to interpret unclear F and J regulations.

Because of the various factors involved in dealing with international students and scholars, this framework is designed to guide advisers in an evolving, pragmatic approach to navigating ambiguous regulations. This framework does not provide the only path to resolving a situation regarding regulatory gray areas. Instead, we view the framework as an important addition to the practitioner's toolbox for professional practice. Though it is separated into nine points, the framework is not intended to be applied in distinct stages, but in a way that each user will find useful. It is our hope that when encountering ambiguous regulations, this framework will allow for institutional flexibility while challenging the user to view the issue at hand from an array of perspectives.

Let's implement the framework in a common, real-life situation. Take the example of a student who submits an application for curricular practical training (CPT). The student and his or her academic adviser have arranged for him to work at a company for the summer months and register for a one-credit independent study course as part of a full course of study during the following fall semester. Should a designated school official (DSO) authorize the CPT? Let's apply the framework to this scenario.

1. Review the Regulations and the *NAFSA Adviser's Manual Online*

Section 3.35.1 of the *NAFSA Adviser's Manual Online* (2007) cites 8 C.F.R. § 214.2(f)(10)(i), which indicates CPT must be "an integral part of an established curriculum," and defines CPT as "alternative work/study,

internship, cooperative education, or any other type of required internship or practicum that is offered by sponsoring employers through cooperative agreements with the school." This regulation begs the question, "What is an 'integral part' of an established curriculum?"

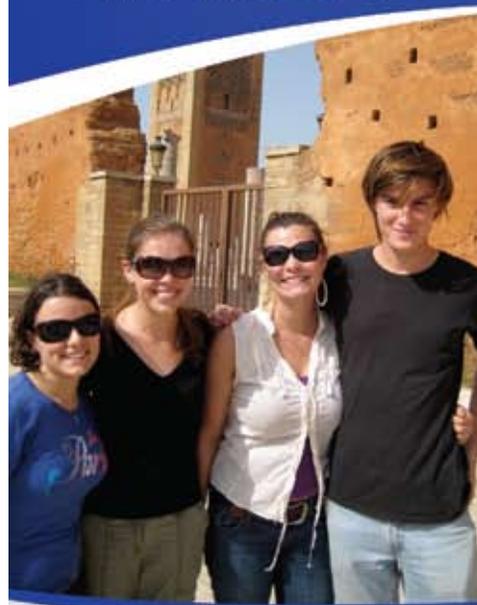
2. Refer to Additional Resources

To gain a more complete understanding of this CPT regulation and to address the question posed above, we consult Immigration and Naturalization Service (INS) memorandum CO 214.2F-C, May 4, 1992 [reported in Interpreter Releases, Vol. 69, No. 6, p. 587], which indicates, "When offered through course work, curricular training must be either for credit (in the case of an elective course) or required." While this quote, referred to in the INS memo as "a clarification of curricular practical training," does little to assist DSOs when trying to answer, "What is an 'integral part' of an established curriculum?," the memo does explicitly affirm that CPT may be offered through an elective course. Therefore, it seems reasonable to conclude that authorizing CPT through a one-credit independent study course, even though it is not a course required for graduation, is within the limits of the regulations.

For additional information regarding the criteria of the independent study course in our CPT example, we review INS memorandum CO 243.69-C, January 22, 1992 [reported in Interpreter Releases, Vol. 69, No. 6, pp. 187-188] that indicates, "The training program must be listed in the school's course catalog with the assigned number of credits and the name of the faculty member teaching the course clearly indicated. There

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should also be a description of the course with the course objectives clearly defined. Students enrolled in such a course may work out the details of their specific projects within the established course objectives under the supervision of the instructor.”

3. Your Institution’s General Attitude Toward the Regulations

When interpreting ambiguous regulations, it can be helpful for the DSO to know the college or university’s general stance regarding institutional policy. Martha Wailes, senior immigration specialist at Indiana University, asserts that some schools take the stance, “If not prohibited by the regs, it’s allowed,” while others take a more conservative approach, such as, “If not specifically allowed in the regs, it’s prohibited.” Going back to our CPT case, the regs do not specify the amount of academic credit to be earned or the semester during which the student must register for the independent study. Therefore, if the institution’s general stance is “If not prohibited, it’s allowed,” the student’s registration for a one-credit independent study course during the following fall semester would be consistent with the school’s history regarding institutional policy.

4. The Spirit of the Law

It’s essential to take a holistic view of the regulation(s) in question by asking oneself, “What is the spirit of the law?” In this case, the essence of F-1 practical training is for students to gain practical experience in their respective major fields of study—not to make money or to position themselves for long-term employment in the United States. But how can even the most discerning DSO ensure that CPT jobs from a myriad of academic majors are intended to provide students with training that is within the spirit of the law? We believe most DSOs cannot effectively do this alone. Instead, it makes sense to request each student’s academic adviser, as the person most knowledgeable about the student’s academic program, to verify that the prospective employment is in the student’s field of study.

5. Further Analysis

We have demonstrated that there is room for interpretation regarding what is an “integral part” of an established curriculum, but it’s important to determine whether the chosen interpretation is defensible. If the DSO decides to authorize the student’s CPT through an academic adviser-recommended, one-credit, independent study, the interpretation is defensible because (a) an authority regarding the student’s academic program is recommending the employment as an element of the student’s education, and (b) the course is part of the academic department’s established curriculum.

If institutional policies are more restrictive than the regulations, it can be helpful to know why. For example, Mary Idzior, director of visa services at Princeton University, indicates that since the vast majority of graduate students at Princeton have their degrees fully funded by the university, it’s the institution’s expectation that students will complete a Ph.D. in four to five years. Idzior points out that completion of a Ph.D. in this amount of time is not likely to happen unless students are working on their degrees full-time. Because of this expectation of students, Princeton limits the opportunities for work under CPT. An awareness of why such an institutional policy is in place is useful when students, faculty, and staff ask why the policy is different from that of other schools.

If a particular interpretation of an ambiguous regulation is chosen, DSOs should have an understanding of any risk to the individuals involved, the F or J visa programs, and the school, as well as any potential issues if questioned by the Departments of State or Homeland Security. William Stock, a partner at Klasko, Rulon, Stock & Seltzer, LLP, asserts that each school has to decide what level of risk it’s going to take. Stock prefers to provide options when advising clients on policy issues, for example,

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the safest choice, the riskiest, etc. Risk can be minimized by establishing institutional policies and consistently following them. The Practice Note Discussion in Section 3.35.1 of the *NAFSA Adviser's Manual Online* (2007) advises, "If policy and procedures are clearly established and followed consistently, if a question ever arises about the legitimacy of a curricular practical training authorization, then the student, the DSO, and the institution will be able to demonstrate that they acted in good faith." Furthermore, if there is a risk in adopting a particular interpretation of an ambiguous regulation, the DSO should assess how likely the risk will become reality. Finally, it's imperative to determine (a) whether a decision based on the interpretation of an ambiguous regulation will set a precedent for a benefit for which others will ask, and (b) if it does, will that be a problem.

6. Consult Knowledgeable Colleagues

There are many good options for consultation with colleagues outside the DSO's department. With our CPT example, if questions remain about whether the interpretation and resulting policy are defensible, consult campus legal counsel about the interpretation as well as the potential risk to the institution and the student. Consulting a DHS official could also be helpful. It is preferable to consult an official known by the DSO's department or other NAFSA colleagues to be knowledgeable about student regulations. Remember that the response might only be an *opinion* of what that individual officer believes the regulation to mean, and an opinion is not the same as a regulation.

Additional resources for consultation are NAFSA's colleague-to-colleague Knowledge Community online network forums, or listservs of local or regional networking groups. They can be used to ascertain how advisers at other schools interpret ambiguous regulations. When using these networks, we recommend proposing the case as a question rather than asking for feedback on an interpretation or policy. This encourages a more objective response from network participants,

A Framework for Analyzing Ambiguous Regulations

1. Review the Code of Federal Regulations and the *NAFSA Adviser's Manual Online* for the regulations and interpretive notes.
2. Review additional written resources, such as those listed on NAFSA's Regulatory Information Web page: www.nafsa.org/iresources.
3. Know your institution's general attitude toward the regulations (e.g., if not prohibited, it is allowed).
4. Ask "What is the spirit of the law?"
5. Further analyze the issue:

Is there room for interpretation of the associated regulations, and if "yes," is it defensible?

Are institutional policies more restrictive than the regulations? If "yes," why?

If a certain path is taken, what are potential risks to the individuals involved, the F or J program, and the school?

Are there any potential issues if questioned by the DOS or DHS?

Will this decision set a precedent that others will ask for, and will that be a problem or not?

If there is a risk, how likely will the risk become reality?

6. If further input is needed, consult with knowledgeable colleagues on and off campus. Possible resource people include campus legal counsel, mentors, NAFSA colleagues (including those via NAFSA's Knowledge Community resources), external immigration attorneys, and U.S. government officials with whom you have a good working relationship.
7. Discuss the issue within the office to make sure there is consensus on the approach.
8. Make some kind of written record regarding the policy.
9. Be willing to reexamine the policy.

rather than comments about your interpretation or policy. In our CPT case, we would pose the following item: "An F-1 student has been offered a summer internship and is requesting CPT authorization. With the academic adviser's permission and recommendation, the student would register for a one-credit independent study course for the following fall semester. Would you grant CPT? Why or why not?" Network participants usually provide a variety of perspectives. Some contributors not only impart their opinions and experiences, but also cite regulations and other resources.

7. Consensus Within the DSO's Office

It is essential for the DSO's office to provide a consistent interpretation of regulations and policies in advising situations and in written materials. At the University of Minnesota's International Student and Scholar Services (ISSS), we have regular meetings with advising staff to examine cases in which an interpretation of the regs or a policy decision needs to be made. Divergent perspectives are encouraged and discussed. Through this process a consensus can usually be reached regarding the policy or interpretation that will be put into place. In the few instances when we cannot come to agreement on the interpretation, our staff is still able to agree on one consistent way of handling the situation in question. Consistency will help the DSO's department provide fair and equitable business while decreasing "adviser-shopping" by clientele.

8. Keep a Written Record

When new policies and interpretations of regulations are made, keep a written record of how the decision was made and provide evidence that supports this conclusion. Keep these records secure in one central place so F and J advisers can access them for future reference. At the University of Minnesota's ISSS, notes are taken at meetings where F and J visa policy decisions are made. The notes are posted to a departmental server.

9. Be Willing to Reexamine Policy

History tells us that the regulations and some interpretations of them evolve over time because of new information, critical events, and changes in political climate and technology. To maintain effective practice, we must be open to making policy changes as time goes on. Again, it's helpful to consult with knowledgeable colleagues. Regarding policy changes, William Stock challenges us by asking, "Who argues convincingly enough to make you change your mind?"

Negotiating governmental regulations is perhaps the most paradoxical—and yet

interesting—aspect of advising international students and scholars on immigration issues. This craft requires meticulous precision in completing forms and traversing SEVIS while simultaneously maintaining flexibility and openness to regulatory changes and subsequent policy. In a certain way, we are fortunate that the regs are sometimes ambiguous. It's the flexibility offered by ambiguous regulations that allows our diverse colleges and universities to create visa policies that are specific to the unique needs of their institutions. We would argue that it's also diversity that has led many of us to this challenging yet rewarding work. **IE**

Authors' Note: The framework for deciphering ambiguous regulations described in this article is the result of a collaborative effort by several seasoned colleagues, and was crafted for a presentation at the 2007 NAFSA national conference. In addition to the authors of this article, the following individuals

contributed to developing the framework in preparation for that presentation: Mary Idzior, director of the Princeton University Office of Visa Services; William Stock; and William A. Stock, partner with Klasko, Rulon, Stock & Seltzer LLP; and Martha Wailes, senior immigration specialist at Indiana University. As a working document, the framework is neither NAFSA sanctioned nor official in any capacity.

ERIC KROETSCH is a counselor and adviser with International Student and Scholar Services at the University of Minnesota where he is a Ph.D. candidate in the Comparative and International Development Education Program.

ALISA ELAND is assistant director for counseling and advising at International Student and Scholar Services at the University of Minnesota. She helped create the curriculum for the original NAFSA Foundations of International Education workshop for international student advisers, and is coauthor of *U.S. Classroom Culture*, one of NAFSA's very popular U.S. Culture Series booklets.

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