NAFSA Comments on SEVP Draft Policy Guidance 1311-02: F-1 and M-1 General Employment

[24 September 2015]

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Recommendations

1. More clearly distinguish student employment from practical training

Student employment, described in 8 CFR 214.2(f)(9), and practical training, described in 8 CFR 214.2(f)(10), are two separate benefit types that do not lend themselves to a single policy statement. NAFSA recommends that SEVP fine-tune its general guidance wherever F-1 and M-1 practical training benefits are treated for policy and practice purposes as "employment." NAFSA also recommends that SEVP clearly indicate that the majority of policies applicable to F-1 and M-1 practical training will be found in separate policy guidance documents that focus only on practical training, and defer guidance on the topic of OPT and CPT until those topics are adequately addressed in future policy guidance.

2. Clarify the nature of the authorization required for on-campus employment incident to status

The draft policy guidance states or implies in multiple places that an F-1 student "must receive authorization from a designated school official (DSO)" before beginning on-campus employment. NAFSA recommends that SEVP clarify the nature of a school's authorization of student employment.

Both the requirement for affirmative DSO authorization of individual on-campus employment, and the implied consequences of failing to receive such authorization, are not supported by the regulatory wording or the long-standing understanding of what employment "incident to status" means.

F-1 on-campus employment is authorized "incident to status." DHS regulations at 8 CFR 274a.12(b)(6)(i) provide that, "Part-time on-campus employment is authorized by the school and no specific endorsement by a school official or Service officer is necessary." And although F-1 regulations at 8 CFR 214.2(f)(9) set clear conditions on-campus work eligibility (e.g., limitations on the number of hours, determining whether an off-campus location can be considered on-campus under the regulation, the limits on how soon a student can start and when a student must stop vis-à-vis their program start and end dates), schools should be encouraged to develop their own internal protocols to ensure compliance with these, rather than SEVP establishing a single acceptable protocol consisting of an extra-regulatory command that DSOs authorize each individual student.

While it is helpful to remind students of the importance of obtaining a social security number (SSN) if they do not already have one, and to remind DSOs of their role in that process, this requirement set by another agency (the Social Security Administration) should not be conflated with a requirement that a student receive authorization from a DSO before beginning employment.

SEVP's draft language could also lead to the mistaken notion that a student who does not receive explicit individual "authorization" from a DSO before beginning on-campus employment would somehow be in violation of the on-campus employment regulations, and would have to have his or her SEVIS record terminated.

Policy 1. Employment Authorization (p. 2)

The *1311-02: F-1 and M-1 General Employment* draft guidance states, "For on-campus employment and curricular practical training (CPT), an F-1 student must receive authorization from a designated school official (DSO)," and that the "DSO must record the recommendation and/or authorization in the student's [SEVIS] record."

For the reasons discussed above, NAFSA recommends amending and restructuring Policy 1 as follows:

- Adding a definition of the term "incident to status" to the definitions section.
- Splitting Policy 1 into two subsections:
  - Policy 1.1: Nature of the employment authorization
  - Policy 1.2: Consequences of working without proper employment authorization

Under Policy 1.1., separate the current first bullet into two bullets, as follows:

The first bullet would be changed to read:

- F-1 on-campus employment is authorized "incident to status," and no specific endorsement in SEVIS or approval by a DSO or DHS officer is necessary. However, schools must exercise due diligence to ensure that a student meets the on-campus eligibility requirements and conditions specified at 8 CFR 214.2(f)(9) before the student starts employment and thereafter. DSOs also have an important role in facilitating the student's acquisition of a Social Security Number [see Policy 3 in this document], before the student's work begins or as soon as possible thereafter, since employment "incident to status" does not require an Employment Authorization Document from USCIS. For details on these obligations, see *Policy Guidance 1310-05: F-1 On-campus Employment*.

The second new bullet would be changed to read:

- For F-1 curricular practical training (CPT), an F-1 student must receive authorization from the DSO in SEVIS prior to the employment start date. The DSO must also provide the student with an amended Form I-20 bearing the CPT authorization, to facilitate the employer's I-9 obligations.

The final bullet would be amended to read:

- For all other F-1 employment benefits, a student must receive a recommendation from a DSO in SEVIS and authorization (i.e., a Form I-766, "Employment Authorization Document" (EAD) from U.S. Citizenship and Immigration Services (USCIS) prior to the employment start date.

Policy 2.1 Employment authorization and the Form I-515A (pp. 2-3)

Amend the first bullet to read:

- Upon initial entry to begin a new course of study, an F-1 student may begin on-campus employment up to 30 days prior to the actual start of classes, if the student has reported to the school.

Amend the second bullet to read:

- In the case of a transfer in SEVIS, the student may only engage in on-campus employment at the school having jurisdiction over the student's SEVIS record. The student may work at the transfer-out school only until the transfer release date, and after the transfer release date the student may work at the transfer-in school, if the school has created a transfer-in I-20 for the student.

3. Clarify how obtaining a SSN relates to F-1 and M-1 employment

Policy 3. Obtaining a Social Security Number (SSN) (p. 4)

NAFSA suggests that SEVP clarify the role that obtaining a Social Security Number [which is governed by Social Security Administration and Internal Revenue Service regulations and policies] has on authorization to begin F-1 employment. Although these agencies do require employees in lawful status to obtain an SSN, doing so is not a condition of starting employment. This could be addressed by amending the first paragraph to read:

Obtaining a Social Security number (SSN). Social Security Administration and Internal Revenue Service regulations and policies require individuals who are lawfully employed in the United States to obtain an SSN. An F-1 student who wants to apply for an SSN in connection with work

authorization evidenced by an EAD issued by USCIS must present the EAD to the Social Security Administration with his or her SSN application. An F-1 student who wants to apply for an SSN in connection with on-campus work authorization, which is not evidenced by an EAD, will need both of the following: …

4. Clarify how the different types of employment do (or do not) relate to one another
Policy 4. Combining different forms of employment (p. 4)

NAFSA disagrees with SEVP's interpretation that an F-1 student may not have concurrent employment in more than one of the listed employment types. The regulations at 8 CFR 214.2(f)(9) contain no such restriction on the different types of student employment within paragraphs (i) [on-campus], (ii) [off-campus] and (iv) [internships with an international organization]. Paragraphs (i), (ii), and (iv) do reference limits, but they are limits on the number of hours permitted in the specific employment described within the specific paragraph, are not in any sense limits on "combining" different forms of employment housed in other paragraphs.

For example, paragraph (i) of 8 CFR 214.2(f)(9), governing on-campus employment, states that,

> "Employment authorized **under this paragraph** must not exceed 20 hours a week while school is in session, unless the Commissioner suspends the applicability of this limitation due to emergent circumstances, as determined by the Commissioner, by means of notice in the Federal Register, the student demonstrates to the DSO that the employment is necessary to avoid severe economic hardship resulting from the emergent circumstances, and the DSO notates the Form I-20 in accordance with the Federal Register document. An F-1 student may, however, work **on campus** full-time when school is not in session or during the annual vacation."

Paragraph (ii) of 8 CFR 214.2(f)(9), governing off-campus employment, states that,

> "Part-time **off-campus employment** authorized under this section is limited to no more than twenty hours a week when school is in session. A student who is granted **off-campus employment authorization** may work full-time during holidays or school vacation. The employment authorization is automatically terminated whenever the student fails to maintain status. In emergent circumstances as determined by the Commissioner, the Commissioner may suspend the applicability of any or all of the requirements of **paragraph (f)(9)(ii)** of this section by notice in the Federal Register."

Paragraph (iii) of 8 CFR 214.2(f)(9), governing internships with an international organization, mentions no restrictions of number of hours, and is appropriate for both part- and full-time employment.

Linking student employment described in 8 CFR 214.2(f)(9) to practical training described in 8 CFR 214.2(f)(10) is an even further stretch.

None of these paragraphs is linked in any way in the regulations, and the regulations prohibit neither concurrently engaging in the various types of employment described in those paragraphs, nor restricting the aggregate number of hours between them. Instituting such restrictions would require a regulatory change.

We understand that student employment must not interfere with a student making normal progress towards completing his or her educational objective. But ensuring that is a function of good advising rather than regulatory restriction. NAFSA does recognize, however, that there is a legitimate interest in ensuring that a student or a school does not fall into the practice of cobbling together different part-time F-1 work authorization sources to work full-time in the same job, e.g., working as a full-time researcher.

Because of the above, NAFSA recommends that Policy 4 be amended to read:

> **Combining different forms of employment**. An F-1 student may be concurrently employed in more than one of the following, provided that the hour limits of each respective type of employment are not exceeded, and that they not be used in connection with the same job while school is in session:
>
> - On-campus employment
> - Off-campus employment
> - Internship with an international organization
> - Curricular practical training
> - Pre-completion OPT
>
> In advising on employment, DSOs should remind students that the primary purpose for being in the United States and maintaining status is enrollment in a full course of study, and that employment cannot interfere with making normal progress towards completing that full course of study. Also, some schools may have institutional limits on the number of hours students can work.

5.   Defer detailed guidance on OPT
Policy 6.2 and 6.3 – temporary absence and OPT

The guidance in sections 6.2 and 6.3 regarding OPT is a bit fractured. Since these two sections deal entirely with practical training, NAFSA recommends that they be removed and deferred until SEVP develops new or updated guidance on OPT and M-1 practical training, or until SEVP has obtained definitive input from CBP and USCIS regarding the impact of travel on EAD cards and applications for practical training.

6.   Clarify what kinds of employment authorization support self-employment
Policy 8.1. - Alternative income and employment – Starting a business (p. 7)

NAFSA agrees that OPT is appropriate for starting a business (self-employment). However, we do not see any reason why off-campus work authorization could not also be used for self-employment. Likewise, there may be some circumstances where CPT might be appropriate, for example, if a business student is required to start a business as an integral part of entrepreneurship coursework.

7.   Remove references to as yet unpublished guidance documents

This draft policy guidance document refers to other policy guidance documents that have not yet been published even in draft form. For example, footnotes 15 and 19 reference "SEVP Policy Guidance 1306-07: F-1 Student Absence;" "SEVP Policy Guidance 14-101: M-1 Student Absence." These documents are assumedly based on the 2013 draft policy guidance document which the Study in the States website notes is "still in review by SEVP." Footnote 24 references "SEVP Policy guidance 1307-05: F-1 Optional

Practical Training," which has not yet been published even in draft form. These are all key policy documents. To adequately comment on the present document, readers will have to first see the contents of the referenced unpublished or unfinalized documents. In the meantime, NAFSA recommends that SEVP remove policy provisions that are based on unavailable documents or documents that have not been finalized.