My Friend Told Me:

Dispelling Immigration Myths through Law and Regulations

Christina Luther – Portland State University
lutherc@pdx.edu

Steve Springer – NAFSA
steves@nafsa.com

NAFSA Region I Conference

October 27, 2010

"My Friend"

- **Some observations**
  - Although MF is not a DSO, RO, attorney, or immigration specialist of any kind, his/her uninformed opinion is extremely potent among our students and scholars
  - MF may be someone who posted an uninformed message anonymously on a discussion forum
  - When we carefully dissect MF's advice, we often find a kernel of fact, along with a gross over-generalization, misapplication, or misunderstanding

Myths and MFTMs You've Heard

- After we review some myths and MFTMs we've heard, we'll ask you to tell us some that you've heard

Arriving Early for F-1 Program

- MFTM: It's fine for me to enter the country as a tourist two months before school begins, because I want to see the country, and then become an F-1
- Actually: This strategy is likely to result in a denied change of status application (due to "preconceived intent") and/or delay the start of your studies and/or require that you leave the U.S., obtain an F-1 visa and re-enter to begin your studies

What MF Didn't Know

- Persons who enter the U.S. through the Visa Waiver Program are not eligible for a change of status (COS) (8 CFR 248.2(f))
- Persons admitted to the U.S. in B classification may not pursue a course of study unless/until a COS to F-1 or M-1 has been granted (8 CFR 248.1(c)(3))
- USCIS will generally deny a COS application if it determines that the applicant had "preconceived intent" to study and misrepresented that intent at the consulate or the port of entry
  - USCIS often applies the Dept. of State's "30/60 day rule" (9 FAM 40.63, N4.8)
    - Inconsistent action within 30 days of arrival raises rebuttable presumption of fraud in NIV application
    - Inconsistent action 30-60 days after arrival "may be presumed to be fraudulent" depending on the facts
    - Inconsistent action after 60 days are not generally viewed as fraudulent
  - In this case, the fact that the student probably had an I-20 before entry (and maybe even before the B visa application) could indicate "preconceived intent" even if the COS application comes more than 60 days after arrival
  - The longer the "tourist" waits to file the COS application the greater its likelihood of approval, but also the greater the likelihood that start of studies will be delayed

"Volunteering" while Awaiting COS

- MFTM: Since my OPT ends next week, but it's likely to be a few months before the university's H-1B petition for me is approved, I should get my boss, the university bursar, to let me continue as a volunteer Accountant, and then get paid for the volunteer activity once I'm an H-1B

- Actually: There are several problems with this strategy, and probably both the employer and the employee/volunteer would be in violation of the law

What MF Didn't Know

- Ad hoc volunteer arrangements are fraught with risk (not well-established and carefully-planned ones)
  - An employer may violate the law by placing someone in a normally paid position and failing to pay that person, even if it calls her/him a "volunteer" or "trainee"
    - The Fair Labor Standards Act (FSLA), a federal statute that applies to most U.S. employers, provides a very broad definition of employment and narrow definitions of the kinds of activities that might properly be considered volunteering and training (and, therefore, be unpaid).
    - Having an accountant volunteer in her normally paid job while she lacks work authorization would not be considered a proper volunteer or training situation.
  - The problem of unauthorized employment is not avoided simply by deferring the compensation until the H-1B is approved. That would still constitute—though deferred—compensation for services performed, and since the employee lacked work authorization, both the employer and employee would probably be in violation of the law.
  - Even in an what otherwise seems like a bona fide volunteer situation, any kind of compensation can cause DHS to consider it unauthorized employment.
    - In *Matter of Hall* (18 I & N Dec. 203 (BIA 1982)), the Board of Immigration Appeals (BIA) found a church fund-raiser who was given "pocket money" of less than $25.00 per month to have been employed without authorization (primarily because this is not a standard volunteer activity but rather a kind of activity for which a person is often employed and receives compensation).

"Automatic Revalidation" and I-94

- MFTM: I am not eligible for automatic revalidation for two reasons: (1) I changed status from B to F, so there's no F visa to "revalidate," and (2) I lost my I-94

- Actually: The prior visa classification does not matter, and while it is certainly not advisable to seek automatic revalidation without a valid I-94, Dept. of State regulations indicate that it may be possible for a student to enter with a valid I-20 in lieu of a valid I-94

What MF Didn't Know

- Automatic revalidation applies even if DHS has granted the applicant a change of status
  - The visa may be considered "converted as necessary to the changed classification" and automatically extended to the date of application for readmission" to the U.S. (22 CFR 41.112(d)(1)(ii))
- In order to be eligible for automatic revalidation, an applicant must:
  - Be "in possession of a Form I-94, Arrival-Departure Record, endorsed by DHS to show an unexpired period of initial admission or extension of stay, ***or***, in the case of a qualified F or J student or exchange visitor or the accompanying spouse or child of such an alien, is in possession of a current Form I-20 . . . Or Form DS-2019 . . . endorsed by the issuing school official or program sponsor to indicate the period of initial admission or extension of stay authorized by DHS" (41.112(d)(2)(i))
  - Be applying for re-admission to U.S. after absence of 30 days or less solely in Canada, Mexico, or "adjacent islands other than Cuba" (if F, J, M) or Canada or Mexico (if other status) (22 CFR 41.112(d)(2)(ii))

What MF Didn't Know, ctd.

- Have maintained and intend to resume nonimmigrant status (22 CFR 41.112 (d)(2)(iii))
- Apply for readmission within the authorized period of admission (22 CFR 41.112(d)(2)(iv))
- Be in possession of a valid passport (22 CFR 41.112(d)(2)(v))
- Not be inadmissible (see INA 212(d)(3)) to U.S. (22 CFR 41.112(d)(2)(vi))
- Not have applied for a new visa while abroad (22 CFR 41.112(d)(2)(vii))
- Not a be national of a country identified as supporting terrorism in DOS annual report to Congress entitled "Patterns of Global Terrorism" (currently Cuba, Iran, Syria, North Korea?) (22 CFR 41.112(d)(2)(vii))

- Two caveats:
  - Best *NOT* to attempt automatic revalidation without a valid I-94
  - Counterpart regs. at 8 CFR 214.1(b) vary slightly, not as clear on re-entry without I-94

H-1B "Grace Period"

- MFTM: I lost my job, so after my 10-day "grace period" I'm in violation of my H-1B status and unlawfully present in the U.S.
- Actually: H-1Bs have a "grace period" only if granted it at the port of entry (or, in theory, by USCIS)

What MF Didn't Know

- There's the regulation
  - 8 CFR 214.2(h)(13)(i)(A) "A beneficiary shall be admitted to the United States for the validity period of the petition, plus a period of up to 10 days before the validity period begins and 10 days after the validity period ends. The beneficiary may not work except during the validity period of the petition."
- . . . And there's USCIS' reading of the regulation
  - USCIS reads "shall" as "may" and only occasionally grants a grace period

OPT and Travel

- MFTM: Since I'm not in F-1 status (I'm in OPT visa status), I can't travel outside the U.S. or obtain a visa
- Actually: If you're properly engaged in OPT you are in F-1 status and it is possible to travel and even obtain a new visa, but careful advice from your DSO is necessary

What MF Didn't Know

- OPT is not a nonimmigrant status; it's a benefit of F-1 status
- As an F-1 student, someone engaged in OPT generally remains eligible for a visa and for admission to the U.S. after travel abroad
  - The regulation: (8 CFR 214.2(f)(13)(ii)) Temporary absence from the United States of F-1 student granted employment authorization)
    - F-1 student who has an unexpired EAD issued for post-completion practical training and who is otherwise admissible may return to the U.S. to resume employment after a period of temporary absence. The EAD must be used in combination with an I-20 ID endorsed for reentry by the DSO within the last six months.
  - Travel and visa applications may be slightly more complicated than for F-1 students in school, so careful advice from DSO is necessary
    - Need proof of employment in field of study, valid EAD, travel endorsement on I-20, valid visa (or plan to apply for one), and valid passport
    - Possible added difficulty establishing temp. intent/unabandoned residence abroad, esp. if H-1B petition approved
    - Don't travel during cap-gap extension or if EAD expired (awaiting STEM EAD)

Family-Based Green Card Sponsor

- MFTM: My baby, who was born in the U.S. can sponsor me for a green card
- Actually: Yes, in about 21 years

What MF Didn't Know

- A USC child must be 21 to sponsor a parent
  - INA § 201(2)(A)(i) Immediate relatives.
  - For purposes of this subsection, the term ``immediate relatives'' means the children, spouses, and parents of a citizen of the United States, ***except that, in the case of parents, such citizens shall be at least 21 years of age***.

"Third Country National" Visa Application

- MFTM: That I'll have a better chance of getting a new visa in Canada or Mexico than at home

- Actually: It's usually best to apply at the U.S. embassy/consulate in your home country rather than apply as a Third Country National in another country

What MF Didn't Know

- A variety of factors can complicate TCN visa applications
  - Consular officer may decide that the consulate in your home country might be better able to assess eligibility (ties, etc.), deny application, and suggest that you apply at home
  - May not use "automatic revalidation" to enter after visa application, so if no new visa, trip to home country from Canada or Mexico
    - So, if denied, usually necessary travel straight to home country – expensive/burdensome
    - Have your "plan b" ready before you leave the U.S.
  - If security check delay, you'll be stuck in Canada or Mexico (rather than at home)
  - Need a visa to get into Canada/Mexico and, if so, can you get it without a valid U.S. visa?
  - Why apply in Canada or Mexico? Usually only if you're there for another purpose
  - Visas are pretty rarely denied for continuing students who are maintaining status, making good progress, have necessary docs., etc., so the idea that it's "easier" to get a visa in Canada or Mexico is generally false
  - Review consulate's policies and wait times, gather docs., make appt., plan for delay/ denial (http://www.travel.state.gov/visa/temp/wait/tempvisitors_wait.php)

What MF Didn't Know, ctd.

- For example, TCN Visa Processing in Mexico
  - All Posts in Mexico Now Process TCNs (appts. online/by phone)
  - Who Can Apply in Mexico
    - Applicants seeking to *renew* their visa in any category, except B1/B2, *if the initial visa was issued in the applicant's home country or at a post in Mexico*
  - TCNs Who Cannot Apply in Mexico
    - Granted change of status in U.S., seeking visa for the new class.
    - Entered U.S in one category, seek to re-enter in different category
    - B1/B2 visa applicants
    - Out of status or overstayed
    - Entered the U.S. under the Visa Waiver Program
    - Obtained prior visa in a country other than that of legal residence
  - Notice states: "If you were informed when you obtained the original visa in your home country that you are subject to National Security Entry Exit Registrations (NSEERs) or are a national of North Korea, Cuba, Syria, Sudan or Iran, you are not eligible to renew your visa in Mexico."

Getting Un-Undocumented

- MFTM: Even though I'm "undocumented," I can get an I-20 from a school, obtain an F-1 visa in my home country, and return to the U.S. to start my studies

- Actually: Depending on what we mean by "undocumented," this will be extremely difficult or impossible, and careful legal advice is required

What MF Didn't Know

- "Undocumented" probably ineligible for F-1 visa/barred from re-entering the U.S.
  - Usually refers to those who entered without inspection or with fraudulent docs.
  - Those who have long-overstayed date-specific status (e.g., B-1/B-2) included?
  - NIV application asks several questions that would raise the issue
  - Most (over 18) have accrued at least a year of unlawful presence so subject to 10-year bar on returning to U.S.
  - If unlawfully present, left, and returned without inspection, may face "permanent bar"
  - Some face other issues of inadmissibility for claiming to be a USC, fraud/misrep., previously ordered removed, assisted others to enter illegally, etc.
  - Possible waiver for immigrant visa if extreme hardship to USC or LPR spouse, parent, or child (discretionary and very difficult)
  - Possible waiver for nonimmigrant visa (also discretionary and very difficult)
    - How to establish nonimmigrant intent for F or J visa?
- Remember Fs and Js don't accrue unlawful presence unless a judge or DHS (such as denial of reinstatement), so would not face bar on returning to U.S.

Visa Denial / Wrong Classification

- MFTM: If I don't get my F-1 visa renewed, I can return using the visa waiver to do my OPT
- Actually: (1) Entering the U.S. through the visa waiver program would make you a "visitor," ineligible to engage in OPT, and (2) "automatic revalidation"—if that's what MF had in mind—isn't available if you apply for a visa

What MF Didn't Know

- More than an EAD is required for OPT
  - Clearly the EAD allows an F-1 who is otherwise maintaining status and authorized for OPT to engage in OPT, so someone who entered through the visa waiver program would not have F-1 status and could not engage in OPT, even with an apparently valid EAD
  - Automatic revalidation of the visa (after a trip to Canada, Mexico, "adjacent islands") is not available if one applied for a new visa during the visit (22 CFR 41.112, 8 CFR 214.1), so don't expect to be coming back at all if you apply for a new visa and it's denied

Benefits of the Green Card Process

- MFTM: I can drop out of school with no worries since my brother filed a "green card" petition (I-130) for me
- Actually: The I-130, even if approved, provides no immediate benefits, no right to stay in the U.S., so dropping out of school is not a good idea

What MF Didn't Know

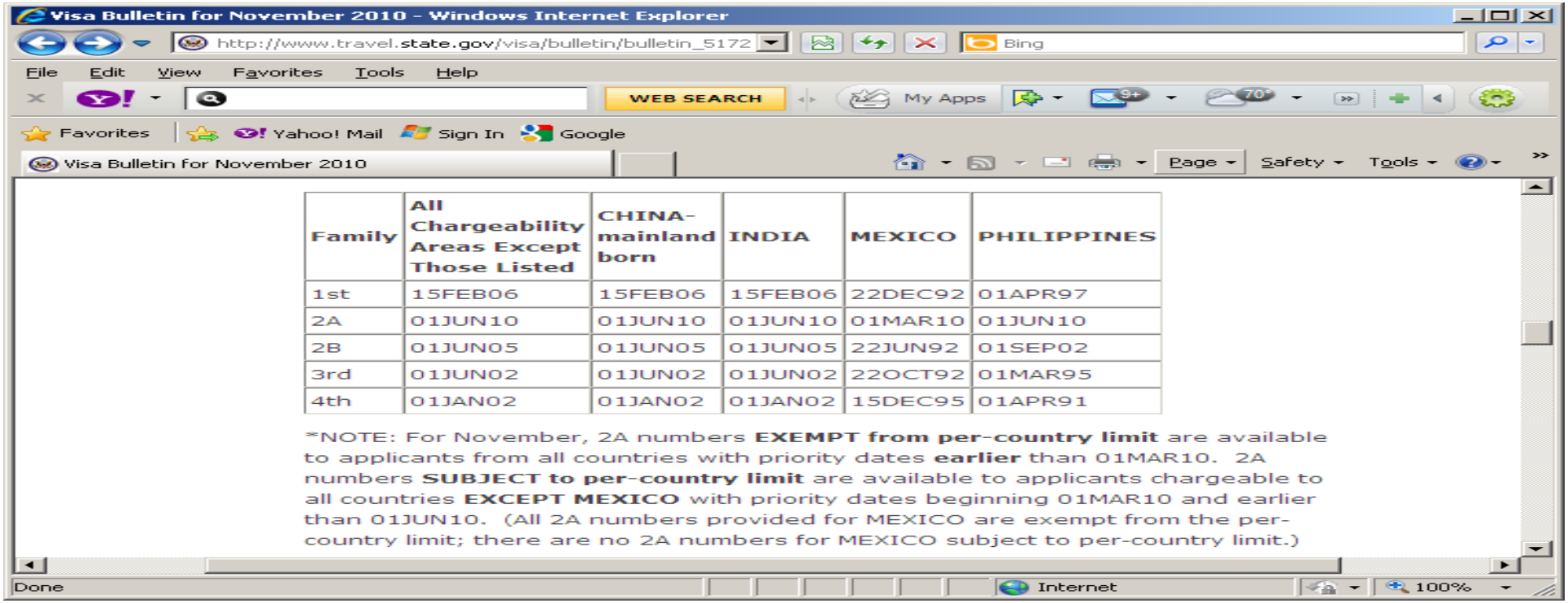
- Only filing an I-485 provides benefits
  - Pending I-130 immigrant petition provides no benefit
  - Approved I-130 provides a FUTURE right to permanent residency
  - Applicant may remain in the U.S. once I-485 is filed
- . . . And there are green card queues
  - It may be many years before the I-485 can be filed
    - I-485 may be filed once priority date, established by filing of I-130, becomes "current" on Visa Bulletin

November 2010 Visa Bulletin

http://www.travel.state.gov/visa/bulletin/bulletin_5172.html

FAMILY-SPONSORED PREFERENCES

- First: Unmarried Sons and Daughters of Citizens
- Second: Spouses and Children, and Unmarried Sons and Daughters of Permanent Residents
- Third: Married Sons and Daughters of Citizens
- **Fourth: Brothers and Sisters of Adult Citizens**



Family	All Chargeability Areas Except Those Listed	CHINA-mainland born	INDIA	MEXICO	PHILIPPINES
1st	15FEB06	15FEB06	15FEB06	22DEC92	01APR97
2A	01JUN10	01JUN10	01JUN10	01MAR10	01JUN10
2B	01JUN05	01JUN05	01JUN05	22JUN92	01SEP02
3rd	01JUN02	01JUN02	01JUN02	22OCT92	01MAR95
4th	01JAN02	01JAN02	01JAN02	15DEC95	01APR91

*NOTE: For November, 2A numbers **EXEMPT from per-country limit** are available to applicants from all countries with priority dates **earlier** than 01MAR10. 2A numbers **SUBJECT to per-country limit** are available to applicants chargeable to all countries **EXCEPT MEXICO** with priority dates beginning 01MAR10 and earlier than 01JUN10. (All 2A numbers provided for MEXICO are exempt from the per-country limit; there are no 2A numbers for MEXICO subject to per-country limit.)

New Visa after "Break in Studies"

- MFTM: That my DSO is nuts to recommend that I apply for a new visa after a five-month break in studies since my visa has not expired

- Actually: The DSO is following U. S. Department of State guidance which—given the uncertainty surrounding this issue—is probably wise

What MF Didn't Know

- There are situations in which apparently valid visa is or might be considered invalid
  - DOS considers a visa invalid when student remains outside U.S. for five + months for activity unrelated to course of study or has not started classes within 5 months of "transfer out" date, but note that CBP decides to grant admission to U.S.
    - http://www.travel.state.gov/visa/laws/telegrams/telegrams_2780.html
    - http://www.travel.state.gov/visa/laws/telegrams/telegrams_4237.html
  - 9 FAM 41.61 N17.4 F And M Visa Invalidation after Five Months Abroad

    A. "Students admitted to the U.S. in F-1 or M-1 status may lose that status if they do not resume studies within five months for transferring schools or programs. Unless USCIS reinstates the student's status, the student's F-1 or M-1 visa would also be invalid for future travel.

    B. In addition, students who leave the U.S. for a break in studies of five months or more may lose their F-1 or M-1 status unless their activities overseas are related to their course of study. When presented a previously used, unexpired F-1 or M-1 visa by a returning student who has been outside the U.S. and out of student status for more than five months, a USCBP immigration inspector at a port of entry may find the student inadmissible under INIA 212(a)(7)(B)(i)(ii) for not possessing a valid nonimmigrant visa. CBP may also cancel the visa after granting the student permission to withdraw the application for admission. Therefore, ***it is prudent for students to apply for new visas at an embassy or consulate abroad prior to traveling to the United States to return to their studies after an absence of more than five months that is not related to their course of study.***
  - When student is denied reinstatement

The Ubiquitous "How Will They Know?"

- MFTM: It's highly unlikely that the consular officer deciding my F-1 visa application would know that I'm married to a U. S. citizen
- Actually: It's certain that the officer ***will*** know unless you commit fraud in the application

What MF Didn't Know

- DS-156 nonimmigrant visa application asks about this
  - Q. 37. Are Any of The Following Persons in The U.S., or Do They Have U.S. Legal Permanent Residence or U.S. Citizenship? Mark YES or NO and indicate that person's status in the U.S. (i.e., U.S. legal permanent resident, U.S. citizen, visiting, studying, working, etc.).
    - Husband/Wife
    - Fiance/Fiancee
    - Father/Mother
    - Son/Daughter
    - Brother/Sister
  - Fraud or willful misrepresentation of material fact makes one inadmissible to the U.S. (INA §212 (a)(6)(C), 22 CFR 40.63)

Violation of Status and Unlawful Presence

- MFTM: I stopped attending school, violated my F-1 status, and so cannot return to the U.S. for three or ten years if I leave

- Actually: Since you were admitted "D/S," you are out of status but not unlawfully present (unless found so by USCIS or a judge), so you are not barred from returning to the U.S.

What MF Didn't Know

- In violation of status ≠ unlawfully present
  - Student is in violation of status and "removable" from the U.S. but, unless found so by USCIS or judge, not unlawfully present
    - Three and ten year bars apply only to those who have accrued unlawful presence (181 days = 3 year bar; 365 days = 10 year bar)
  - For the latest USCIS guidance on unlawful presence, see 05/06/2009 memo "Consolidation of Guidance Concerning Unlawful Presence . . ." at www.uscis.gov under "Laws and Regulations" and "Policy Memoranda" – p. 25:

(ii) Nonimmigrants Admitted for Duration of Status (D/S). If USCIS finds a nonimmigrant status violation while adjudicating a request for an immigration benefit, unlawful presence will begin to accrue on the day after the request is denied. If an immigration judge makes a determination of nonimmigrant status violation in exclusion, deportation, or removal proceedings, unlawful presence begins to accrue the day after the immigration judge's order. It must be emphasized that the accrual of unlawful presence neither begins on the date that a status violation occurs, nor on the day on which removal proceedings are initiated. *See* 8 CFR 239.3.

H-1B Furloughs

- MFTM: My employer can furlough me without violating the H-1B regulations
- Actually: If MF had the standard definition of furlough in mind (leave without pay), this is a violation of law and regulations

What MF Didn't Know

- It is a violation of the law to place an H-1B employee . . . "in nonproductive status due to a decision by the employer (based on factors such as lack of work), or . . . to fail to pay the nonimmigrant full-time wages . . . for all such nonproductive time." (INA 212(n)(2)(C)(vii)(I))
- "If the H-1B nonimmigrant is not performing work and is in a nonproductive status due to a decision by the employer (e.g., because of lack of assigned work), lack of a permit or license, or any other reason except as specified in paragraph (c)(7)(ii) the employer is required to pay . . . the required wage for the occupation listed on the LCA." (20 CFR 655.731(c)(7)(i))
  - Narrow exceptions for employee-requested leave (20 CFR 655.731(c)(7)(ii))
- If an employer terminates an H-1B worker, it should notify USCIS (8 CFR 214.2(h)(11)(i)(A)), notify DOL (20 CFR 655.750(b)(2)), and offer employee transportation home (8 CFR 214.2(h)(4)(iii)(E))
- If an employer reduces the "hours" of an H-1B worker, it usually must file a petition to amend (8 CFR 214.2(h)(11)(i)(A))

Effect of Travel on COS Application

- MFTM: My employer's H-1B petition for me requesting change of status will be denied if I leave the U.S. before it's approved

- Actually: MF was half right: the petition will —if otherwise approvable—be approved, but the change of status request will be denied, so you'll have to travel, obtain a visa, and re-enter to establish H-1B status

What MF Didn't Know

- "An alien on whose behalf a change of nonimmigrant status has been filed and who travels outside the U.S. before the request is adjudicated is considered to have abandoned the request" and application should be denied (06/18/01 Cook memo)

- Extension of stay petition/application must be filed while applicant/ beneficiary is in U.S., but subsequent travel does not result in abandonment (06/18/01 Cook memo)

- In the situation at issue here, USCIS will likely issue petition approval notice, granting the period of work authorization but not the change of status, as if beneficiary is not in U.S., so it will not include a new I-94 and will include instructions to consular process an H-1B visa and re-enter the U.S. in order to obtain H-1B status

Leaving Quota-Subject Employer

- MFTM: Since I'm already an H-1B and "my H-1B visa will be transferred" from the university, where I now work, to my new employer, a software company, I'll be able to start my new job immediately
- Actually: There's no such thing as a "transfer" and, unless you were "counted" against the H-1B quota before working at the university, this change of employer petition will be subject to the quota

What MF Didn't Know

- There's no such thing as an "H-1B transfer" (and calling a change of employer petition a transfer leads to much confusion)
- The new employer's petition will be subject to the "quota"
  - Unless employee worked in industry (and was counted against the quota) before working for the university (which is exempt), the petition will be subject to the quota
    - This means an Oct. 1 start date for the new job and concerns over whether the quota will be exhausted
  - INA § 214(g)(6) states that "any alien who ceases to be employed by" a quota exempt employer "who has not previously been counted" against the quota shall be counted the first time the alien is employed by a quota-subject employer

Travel as F-1 (OPT) with Approved H-1B Petition

- MFTM: I won't have any problems returning to the U.S. after my trip home this summer since my employer's H-1B petition for me has been approved, with an Oct. 1 start date, and my OPT has been "extended"
- Actually: Depending on whether you have a valid EAD when you travel, this travel will be either somewhat risky or exceedingly risky

What MF Didn't Know

- "Last action" issue
  - DHS often looks at the "last action" in a sequence of immigration events to determine a person's status
  - In situations such as the one described here (re-entry as an F-1 prior to 10/1 effective date of COS), many people worry that the entry to the U.S. will be considered the "last action" and somehow "undo" the 10/1 COS
    - We have only a letter to a lawyer, from a now-retired DHS official, stating that the taking effect of the COS on 10/1 is the "last action" in the sequence (remember the hierarchy of authority)
    - We also worry that the traveler might not be considered a bona fide F-1 at return to the U.S. with a COS approved for a future date
    - If an F-1 visa application is necessary, the situation will be especially risky
    - While such travelers often experience no problems (f they have a valid F-1 visa), it's important for students to know about the risks
  - If the student is in the "cap gap" and does not have a valid EAD, then travel should be strongly discouraged (due to 8 CFR 214.2(f)(13))

H-1B Petition for Student

- MFTM: My future employer can't file an H-1B petition for me because I haven't yet completed my course of study (MBA program)
- Actually: Whether MF is correct or not depends on the requirement for your job and your undergraduate degree

What MF Didn't Know

- Students are often surprised to find out that an H-1B petition is for prospective employment, so it doesn't require the beneficiary to be currently employed by the petitioner
- Two basic requirements for H-1B:
  - The job must fall within a "specialty occupation," for entry require—throughout the industry—a baccalaureate degree or equivalent (INA § 101(a)(15)(H)(i)(B), 8 CFR 214.2(h)(4)(iii)(A))
  - The beneficiary must be qualified for the job when the petition is filed (USCIS policy)
- An H-1B petition may be filed for a (fortunate) graduate student who has secured future employment requiring just a baccalaureate degree, and who has a baccalaureate degree in a field related to the employment, before the student completes the graduate program
  - Of course, this is also possible—though less common—for an undergraduate obtaining a second degree or any student who could qualify through experience equal to a degree (USCIS counts 3 years of experience for one year of education) (8 CFR 214.2(h)(4)(iii)(D)(5))

LPR Petition for Future Employee

- MFTM: My future employer can't start the "green card" process for me until I start my job

- Actually: Not true; the EB LPR process generally requires only a "prospective employer" and a "job offer," and employer's often file LPR petitions for persons abroad and others they don't currently employ

What MF Didn't Know

- The regulations refer to petitioners as "prospective employers" and require only a "job offer" (8 CFR 204.5(g)(2))
  - So it is possible for an employer to pursue labor certification (if required) and file a petition for someone it does not yet employ
  - Many are unwilling since the process carries a great burden and employers prefer the certainty of filing for people currently employed
  - So, for example, it is possible to start the LPR process for a student, butt there might be strategic reasons for waiting until the student completes the program of study
  - In short, MF incorrectly states "the possible" and should have explained it as "the common approach among employers"
- An "extraordinary ability" petition does not require a job offer at all (8 CFR 204.5(g)(2))

Security-Related Visa Delay

- MFTM: An egregious error has been made; I am being made to undergo a Security Advisory Opinion before I receive my visa
- Actually: A Security Advisory Opinion is common among visa applicants and does not suggest any problem or mistake with the individual's visa application

What MF Didn't Know

- All visa applicants are subject to certain security checks, and if "hits" arise, the officer often has no choice but to request a Security Advisory Opinion (SAO) which will lead to "additional administrative processing" (Condor, Donkey, Mantis)
- NAFSA—DOS Visa office liaison report (02/15/2008):
  - "Most SAOs are triggered by clear and objective circumstances, such as the applicant's nationality, place of birth, residence or visa name check results. In addition, in cases where reasonable grounds exist, regardless of the results of the name check, to suspect that an applicant may be ineligible, including the potential transfer of sensitive technology and cases that may be politically sensitive, consular officers in the field suspend processing and institute SAO procedures. Average processing times for most SAO categories are about two weeks. SAOs based on name check hits may take longer. For the past three summers, the Visa Office has taken a variety of steps to ensure that SAOs related to student and scholar visa applications are completed in time to permit timely entry to the U.S." (recent drastic slow-down – DOS promises faster processing)
- Students may receive MANTIS clearance for length of program, but officers may request one at any visa application (03/16/2006 AILA—DOS liaison report)
- See NAFSA Manual section 10.13.1 and excellent practice advisory at http://www.nafsa.org/knowledge_community_network.sec/international_student_3/international_student_4/practice_resources_18/visas_mantis_security

E-Verify and STEM Extension

- MFTM: The STEM extension for OPT is going away because the E-verify program is being discontinued since it has not received additional funding

- Actually: While there have been lively discussions in Congress and elsewhere concerning funding and whether enrollment in E-Verify should be mandatory, few expert commentators think that the program is "going away"

What MF Didn't Know

- The regulations (8 CFR 214.2(f)(10)(ii)(C)(3)) do require that, in order for a student engaged in OPT to be eligible for a STEM extension, the student's employer must be "registered in the E-Verify program"
- Active debate concerning whether E-Verify should be mandatory, but debate over whether the program should exist seems to have subsided
  - Funding for E-Verify program set to expire 09/30/2009, but House Appropriations Committee recently approved a two-year extension of funding through FY2012 (included as part of DHS' $42.6 billion funding for FY2010)
  - The administration has stated its commitment to holding employers responsible for hiring undocumented workers, so it seems unlikely to push for abandonment of E-Verify
  - The E-Verify program is not really new
    - Congress first authorized an electronic verification pilot program in 1996 as a provision of the Illegal Immigration Reform and Immigrant Responsibility Act, which created (originally named Basic Pilot, it has been extended and expanded several times renamed E-Verify in 2007).

Multiple LPR Petitions

- MFTM: Since my employer has already filed an immigrant petition for me, my U.S. citizen husband can't
- Actually: The criteria for each route to permanent residency are set by law and regulations, and pursuing one route does not preclude a person from pursuing another

What MF Didn't Know

- LPR routes/processes at INA §§ 201-209 and 8 CFR 204 – 213
  - Generally organized as follows:
    - Persons not subject to limitations (quotas)
    - Family sponsored immigrants
    - Employment based immigrants
    - Diversity immigrants
    - Refugees and asylees
  - So, for example, the criteria for an immigrant petition for an "alien of extraordinary ability" are found at 8 CFR 204.5(i), and the criteria for an immigrant petition for the spouse of a U.S. citizen are found at 204.2(a)
- MF may have heard that USCIS discourages (but cannot prohibit) having two adjustment of status applications pending at the same time, but no law, reg. or policy prevents multiple immigrant petitions, and sometimes it's a good idea to pursue more than one route to LPR
  - Also, USCIS will "transfer" a pending adjustment app. to a subsequently filed petition (05/09/2000 Pearson Memo "Transferring Adjustment to New . . . Visa Petition")

Green Card through Adoption

- MFTM: He can adopt me and get me a green card so I can drop out of graduate school

- Actually: Qualifying adopted child very specifically defined by INA, and some state laws allow only adoption of children, so adoption of adult (even if legal in state) will not provide green card

What MF Didn't Know

- "Qualifying adopted child" (INA 101(b)(1)(E))
  - Must have been adopted before age 16
    - or 18 if the natural sibling of a child adopted before age 16 by the same parents
  - Must have been in legal custody of and have resided with the adopting parents for at least two years
  - Adoption must also be valid under the law where it took place
- Oh, and there's a legal adoption process and usually a home visit!

Green Card through N.I.W.

- MFTM: That since I do cancer research, my "national interest waiver" petition will surely be approved (plus, his was approved, and I'm much more qualified)

- Actually: It's difficult to meet then N.I.W. criteria, the kind of work you do is only one criterion, and USCIS adjudication is pretty subjective and hard to predict

What MF Didn't Know

- The permanent job offer and labor certification requirements can be waived by USCIS if the applicant meets three criteria (set forth in precedent NYSDOT decision, 1998):
  - Area in which applicant seeks employment is of substantial intrinsic merit
  - Prospective benefit of applicant's work is national in scope
  - National interest would be adversely affected if labor certification were required
    - This is the hard criterion to meet
    - Usually requires showing unusual qualifications and/or achievements (awards, publications, grants, patents, etc.), and often USCIS (incorrectly) applies "extraordinary ability" standard
- Even for those with excellent qualifications, N.I.W. should be considered speculative or maybe "last resort"
- Someone with a pending N.I.W. petition who can avail herself of another route (like a post-doc who gets an Ass't. Prof. position) should consider pursuing the other route, too

Two-Year Home Residence Requirement

- MFTM: Since I'm subject to the two-year home residence requirement (INA § 212(e)), if I leave the U.S. I can't come back for two years, and I'm not eligible to change status in the U.S.

- Actually: Js who are subject to the requirement, and haven't waived/satisfied it, are not eligible for:
  - H visa
  - L visa
  - Green Card
  - Change of status in U.S. (from J status), except to A or G

  but that leaves a wide range of options (B, O, etc.)

What MF Didn't Know

- "Visas" — INA § 212(e)
  - "No person [subject to this requirement] . . . shall be eligible to apply for an immigrant visa, or for permanent residence," or for an H or L nonimmigrant visa "until it is established that such person has" satisfied or obtained a waiver of the requirement
- Change of status—8 CFR 248
  - 8 CFR 248.2(a)(4) Ineligible for Change of status: "Any alien classified as a nonimmigrant under section 101(a)(15)(J) of the Act. . . who is subject to the foreign residence requirement . . . and who has not received a waiver of the residence requirement, except" change of status to A or G
    - Since the reg. uses "classified as a nonimmigrant under section 101(a)(15)(J)," USCIS will grant COS to someone subject to the requirement who is not ***currently*** in J classification