

2010 Immigration Updates

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SEVP and SEVIS I

SEVP Updates Mailing Address

SEVP posted an update to its mailing address on November 24, 2009. The new address is:

Student and Exchange Visitor Program
Attn: (Branch Name or Job Title)
SEVP MS 5600
DHS/ICE
500 12th Street, SW
Washington, DC 20598-5600

SEVIS Releases 6.1, 6.2, and 6.3

Since last year's NAFSA Annual Conference, SEVIS was updated three times, with releases 6.1 (November, 2009), 6.2 (February, 2010), and 6.3 (April, 2010). Visit [NAFSA's SEVIS Release Notice page](#) to access the release change notices. Highlights include:

- Removal of Social Security Number and Taxpayer ID fields in F, M, J SEVIS
- In J SEVIS, the Program Begin Date can no longer be amended to a date earlier than the Amend Program function is used.
- In J SEVIS, if an EV's program is less than 30 days and his/her program participation has not been validated, the EV's status changes to No Show or Invalid. If the EV's status changes to Invalid, the program's allotment of DS-2019 Forms increases by one.

CIP 2010 Codes

Beginning in Fall 2010, postsecondary schools will be required to submit [IPEDS](#) surveys to the Department of Education using the new [CIP 2010 codes](#). Many schools have already begun updating the CIP coding of their majors, minors, and other programs, in anticipation of this change from the CIP 2000 to CIP 2010 system.

In addition to the full CIP 2010 list, you can also find the following lists on the [CIP 2010 Web site](#):

- New codes that have been added to CIP 2010
- CIP 2000 codes that have been deleted from CIP 2010
- CIP 2000 codes that have been transferred to the COP 2010 list with no substantive changes
- CIP 2000 codes that have been moved, to be reported under another code in CIP 2010.

There is also a [CIP 2000 to CIP 2010 crosswalk](#) to track individual CIP codes.

Because SEVIS and the 17-month STEM OPT extension currently rely on CIP 2000 codes, NAFSA requested guidance from SEVP so that schools will have time to prepare and if necessary review data links between SEVIS and campus systems, as well as to properly advise students on their eligibility for the 17-month STEM OPT extension.

Important things to be aware of:

- DOE is requiring CIP 2010 for fall reporting, so school will be making the transition to CIP 2010 from now throughout the summer. A number of CIP codes are being added and/or changed;

the impact on individual schools will vary by school. The numbers of new, moved and deleted CIP codes are available at <http://nces.ed.gov/ipeds/cipcode/Default.aspx?y=55>

- Schools that make the change before SEVIS is able to accept the new CIP 2010 codes may face difficulties, particularly if they are batch processing schools that send data directly from their student information systems. RTI schools that try to match the CIP codes they use for SEVIS processing with the codes used in their academic record system (something that I assume SEVP would consider desirable in terms of SEVIS II preparation) will also encounter problems.
- NAFSA has shared members' concerns about this issue. Since CIP codes are used for many institutional reporting purposes, international offices will not be able to delay their institutions' transition to CIP 2010.

NAFSA has asked SEVP for:

- A timeline: when will SEVIS be able to accept CIP codes that exist in CIP 2010 but not in CIP 2000
- Guidance for schools during the transition period
- Clarification on how the CIP code change will affect 17-month OPT extensions

SEVIS II

Stay up to date on SEVIS II developments by visiting NAFSA's SEVIS II Update Page: www.nafsa.org/sevisii.

SEVIS II Timeline

The Student and Exchange Visitor Program (SEVP) has completed a "rebaselining" of the SEVIS II project with the developer, Booz Allen Hamilton. In its [Spring, 2010 newsletter](#), SEVP also stated that "we can say that SEVIS II will not be deployed this year." It is expected that they will be able to announce a revised timeline sometime after SEVP makes its rebaselining report to DHS management in May, 2010. NAFSA's SEVIS II Update Page includes a [SEVIS II Milestone Matrix](#) that describes the key events that must occur in both software and regulatory development before SEVIS II goes live.

DHS System of Records Notice for SEVIS II

On January 5, 2010, the Department of Homeland Security Privacy Office published a "System [of Records Notice](#)" (SORN) that identifies certain fields of data that will be maintained in the SEVIS II system once it is deployed. The notice also describes the "routine uses" that the Government will make of that data. This SORN modifies a 2005 SORN that described the data and uses of that data within SEVIS I.

On January 26, 2010, [NAFSA submitted comments on the SORN](#). The NAFSA comment identified certain fields of data that will be maintained in the SEVIS II system once it is deployed. The notice also describes the "routine uses" that the Government will make of that data. Public comments to DHS are due on or before February 4, 2010. NAFSA commented on the following aspects of the notice:

- The notice's characterization of the SEVIS as a "law enforcement system"
- The expansion of routine uses of SEVIS information
- The expansion of individuals covered by the system
- The categories of records in the system and system-to-system data sharing

- Mechanisms for requesting correction of data in the system
- The nature of information provided by schools and sponsors

Letter From SEVP To College Presidents

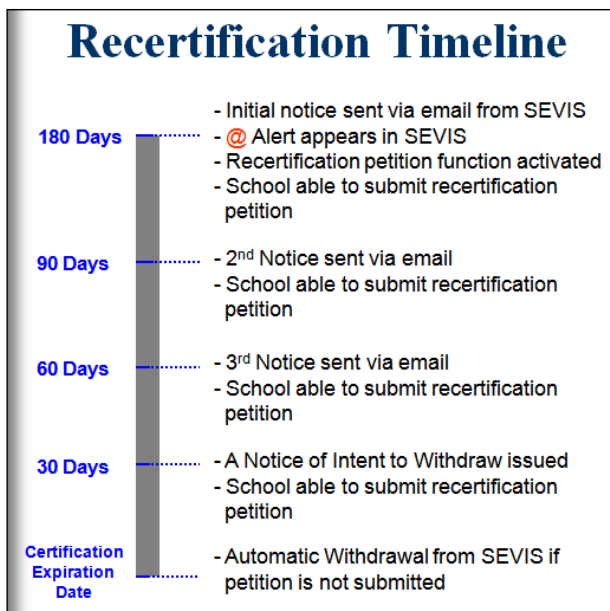
[NAFSA's SEVIS II Task Force](#) commented on a [Fall, 2009 letter](#) that the Director of the Student and Exchange Visitor Program (SEVP), Louis Farrell, sent to numerous college and university presidents, to explain the key role that Designated School Officials play in ensuring the success of the SEVIS endeavor.

SCHOOL RECERTIFICATION

Stay up to date on NAFSA's F/M School Recertification Update Page: www.nafsa.org/recertification.

Timing of Recertification

SEVP sent the first group of school recertification notices to 50 schools on May 26, 2010. The plan calls for notifying an additional set of schools each month, until all schools have been notified. Note that a school cannot apply for recertification until its PDSO and DSOs receive an e-mail from SEVP, informing them that it is time for the school to submit the recertification application. That email notification will establish the school's Certification Expiration Date (CED) and the 180-day period in which the school must submit a complete recertification application package. SEVP must receive the complete recertification package no later than 11:59 pm (EST) on the day *before* the school's CEP. Packages received on or after the CEP will not be accepted. Failure to file the complete recertification package in a timely manner will result in the automatic termination of a school's certification.



What Will Recertification Look Like?

The first recertification will be unique, simply because it will be the first one. SEVP has stated that it will use a "scorecard" approach to rate the following focus areas for determining a school's eligibility for recertification:

- The school's bona fides
- Whether the school has reported changes in ownership as required within 60 days of the change
- School reporting
- Student reporting

After being recertified the first time, schools will receive a new certification expiration date (CEP), and will then have to apply for recertification before that date every two years thereafter.

SEVIS recertification functionality is described in Section 2.5 of the DHS [SEVIS RTI User Manual, Volume 1](#) . Also review [SEVP's Spring, 2010 Recertification Primer slideshow](#), and [SEVP's 2010 Recertification Overview](#).

When a school is eligible for recertification, SEVIS RTI will change in three ways:

- A Recertification Notification Screen will appear each time the PDSO and DSOs log in to SEVIS, reminding them that the PDSO must apply for recertification. This screen will continue to appear until the recertification application is submitted, and the status of the application is set to "Filed" in SEVIS.
- In the Listing of Schools screen, an "@" sign will appear to the right of the name of the school.
- An Apply for Recertification link will appear in the Actions menu of the PDSO's School Information screen.

"If the PDSO of the main campus does not submit the recertification application or pay the fee, the PDSO and DSOs will receive reminder emails 90, 60, and 30 days before their certification expiration date."

After submitting the Recertification Application (Form I-17) to SEVIS, the PDSO must then send the following to complete the application process. The application is not considered properly filed until all required documentation is submitted to SEVP. The complete recertification application package must be submitted to SEVP no later than 11:59 p.m. Eastern Standard Time on the day prior to the school's certification expiration date (CED). SEVP states in its Spring 2009 Slideshow that "Petitions received on the CED will not be accepted." Failure to submit a complete application package by the day before the CED will result in an automatic withdrawal of the school's certification. SEVP also stated that it will receive packages either via a dedicated e-mail or dedicated fax. Although that presentation included a fax number and e-mail address, make sure that these are accurate before you use them.

- There is no fee for recertification, but adding a new campus or changing ownership will incur a fee that must be paid through Pay.Gov.
- Send the following to SEVP in one package :
 - Your Recertification Form I-17 (including supplements A and B) bearing the signatures of the PDSO and all DSOs, and of the "president, owner, or head of a school or school system."
 - The completed Recertification Attestation Statement that you received from SEVP
 - If you received a National Center for Education Statistics (NCES) Data Sheet (* see note below) from SEVP as part of your recertification instructions, review that document for accuracy, and compare it to the data on your Form I-17. If portions of the document are

incorrect, make the corrections and sign the document. If the document is accurate, sign the document only.

- Any other evidence as outlined in the submission guidelines that SEVP will provide.

* The data sheet will be an extract of data that your institution's [IPEDS key holder](#) submitted to the Department of Education for [IPEDS reporting](#). The data sheet has two main purposes: 1) To flag any obvious inconsistencies (for example institutional address), and 2) Since the type of data reported to IPEDS is similar to what will be included in SEVIS II, it is a chance to identify your institution's IPEDS key holder and to begin planning for eventually having such data in your schools SEVIS II I-17.

F-1 PRACTICAL TRAINING

Revised SEVP OPT Policy Guidance 1004-03

On April 23, 2010, the Student and Exchange Visitor Program issued an important update to their optional practical training (OPT) guidance [[Policy Guidance 1004-03](#)], that supersedes prior OPT policy guidance documents 0801-01 and 0801-02. According to SEVP, the updated guidance:

- Provides current dates related to H-1B petitioning for FY 2011 numbers (and removes information related to previous years).
- Amends the text to past tense, as applicable.
- Replaces the term "OPT STEM extension" with "17-month extension." Classification of Instructional Program (CIP) codes for all science, technology, engineering and math (STEM) are the universe for those CIPs that are approved by DHS for the 17-month extension. However, DHS does not approve all STEM CIPs for the extension.
- Deletes reference to the public comment period for the IFR, which has closed (section 1.2). Adds text related to school filing of courses of study for CIPs, for STEM designation of CIPs and for DHS approval of STEM CIPs for the 17-month extension of OPT (section 1.3). Adds text on other resources available related to the IFR (section 1.4).
- Refines procedures for filing for OPT after the program end date (section 5.2)
- Deletes 10 day exceptions to the time that counts for unemployment during OPT at the EAD start date and between jobs. SEVP will need approval for such exceptions through another proposed rulemaking. (sections 7.1.6 and 7.1.7)
- Removes restriction that employment during the 17-month extension must be paid employment. SEVP will need approval for such a restriction through another proposed rulemaking. (sections 7.2.2 and 7.2.3)
- Deletes dates for wait-listing for this year. SEVP has been notified by U.S. Citizenship and Immigration Services (USCIS) that there will not be a waitlist utilized as a part of the FY 2011 H1B Cap filing process (section 9.1.1).

USCIS AND SERVICE CENTERS

USCIS Case Inquiries

On August 6, 2009, USCIS posted guidance [on making inquiries with the agency's four Service Centers](#) about case-related issues. The 3-step process involves: 1) contacting the National Customer Service Center (NSCS); 2) following up with a special Service-Center e-mail address if the NSCS has not

resolved the issue within 30 days; and 3) following up with USCIS headquarters if the Service Center has not responded to that e-mail within 21 days. Contact information is included in the guidance.

Lockbox Filing

Since February, 2010, several key forms must be initially filed with USCIS lockboxes, instead of Service Centers. USCIS states that this is "part of an overall effort to transition the intake of some benefit forms from Service Centers to USCIS Lockbox facilities."

- [Lockbox Filing For Form I-485](#)
- [Lockbox Filing For Form I-765](#)
- [Lockbox Filing For Form I-824](#)
- [Lockbox Filing For Form I-102](#)

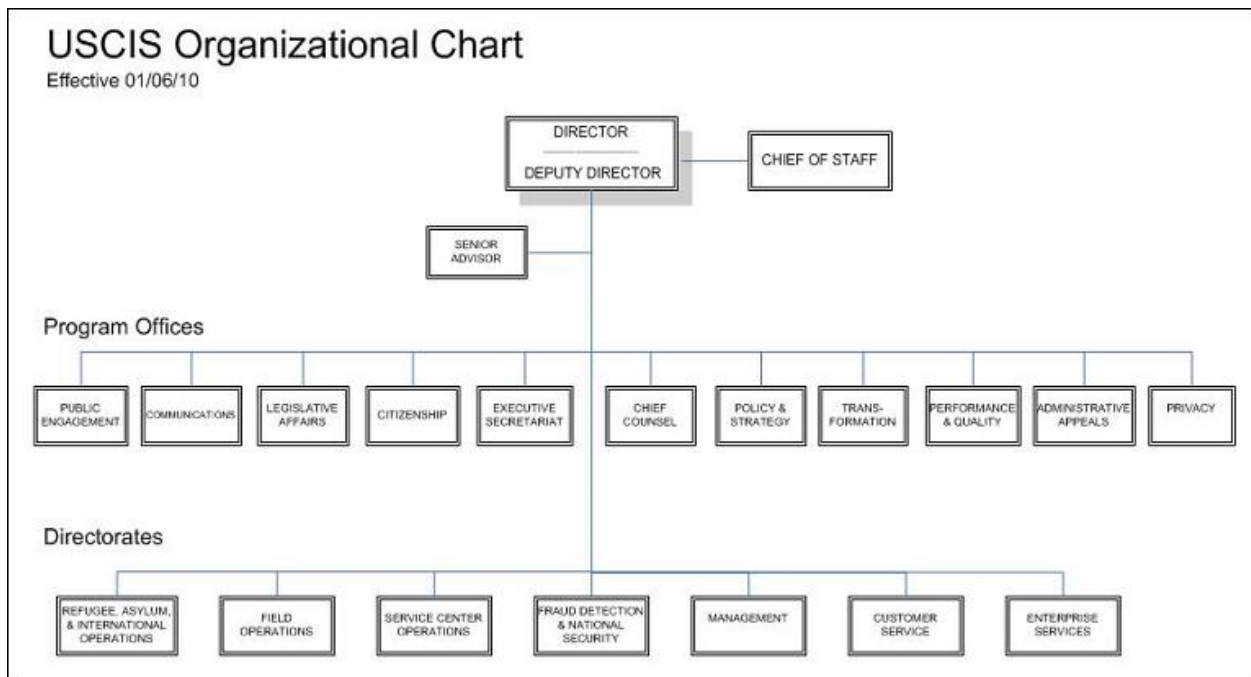
Responses to Requests for Evidence (RFEs) on applications or petitions filed at a lockbox should, however, be sent to the address listed on the RFE, not the lockbox.

On May 24, 2010, USCIS announced that it will be transitioning the following additional forms to the lockbox filing system in June, 2010. The transition began mid-May with the Service Centers forwarding applications to the USCIS Dallas and Phoenix Lockbox facilities for processing. In June USCIS will post the revised filing instructions, update the web page for each form, and announce the address change with a USCIS Update. Applicants and petitioners should continue to file the following forms with the proper Service Center, and not file with a lockbox, until USCIS posts revised filing instructions. Stay tuned to [NAFSA's USCIS Update Page](#) for news on this topic.

- I-817, Application for Family Unity Benefits (If filing under section 301 of the Immigration Act of 1990);
- I-526, Immigrant Petition by Alien Entrepreneur;
- **I-539**, Application to Extend/Change Nonimmigrant Status (Only those filed separately from the I-129);
- I-129F, Petition for Alien Fiancé;
- **I-140**, Immigrant Petition for Alien Worker

New USCIS Organizational Structure

USCIS announced the following structural changes: a new Fraud Detection and National Security Directorate, a new Customer Service Directorate, and dividing the current Domestic Operations Directorate into two separate directorates, Service Center Operations and Field Operations.



Proposed USCIS Fee Changes

On May 5, 2010, USCIS sent a proposed fee rule to OMB for review. No further details are available. OMB review can usually take up to 90 days. After OMB review, USCIS can publish the proposed rule in the Federal Register, which will begin a public comment period. Stay tuned to the NAFSA Web site for updates on this topic.

New Opportunity For Feedback On USCIS Guidance Before It Is Issued

USCIS's Outreach section added a [Feedback Opportunities page](#) to their Web site that will contain drafts of proposed or revised guidance to field offices and service centers for public feedback or comment. The first posted draft is a memorandum on "clarifying guidance on "O" petition validity period revisions to the Adjudicator's Field Manual (AFM) Chapter 33.4(e)(2) AFM Update AD10-36". USCIS accepted public comments on this memo until May 24, 2010.

USCIS Continues Development Of VIBE Program

USCIS continues to develop a program called VIBE (Validation Instrument for Business Enterprise) which will use "commercially available data" through Dunn and Bradstreet to validate and verify financial viability of employers filing employment-based petitions (Form I-129 and I-140).

VISAS AND CONSULAR PROCESSING

Visa and Passport Fee Hikes

In an [interim final rule](#) published on May 20, 2010, the Department of State (DOS) raised the Machine Readable Visa fee (MRV) and the Border Crossing Card (BCC) fee, effective June 4, 2010. The MRV for all nonimmigrant visa types prior to June 4, 2010 was \$131. The interim final rule implements for the

first time a tiered fee structure that distinguishes between the fee charged for different kinds of nonimmigrant visas, as shown below.

Tiered MRV fees, effective June 4, 2010:

- H, L, O, P, Q and R: \$150
- E: \$390
- K: \$350

MRV fee for all other nonimmigrant visas, effective June 4, 2010:

- \$140

Fees for Mexican citizens applying for a BCC, effective June 4, 2010:

- Age 15 and over: \$140
- Under age 15: \$14

The above fees are effective June 4, 2010, but since it is an interim final rule, DOS will continue to accept comments from the public until July 19, 2010.

A [companion proposed rule](#) published February 9, 2010 would also raise immigrant visa application fees and U.S. passport fees.

Implementation Of DS-160

A November 12, 2009 Department of State (DOS) cable advised consular posts of DOS's plans to implement the DS-160 nonimmigrant visa electronic application worldwide by Spring, 2010. The DS-160 is a fully integrated electronic form that combines all information currently collected on Forms DS-156, 157, and 158. The cable identified 45 "priority posts" that were directed to implement the DS-160 no later than March 1, 2010. All remaining posts were directed to implement the DS-160 between March 1 and April 30, 2010. See the [DOS DS-160 Web site](#) for details.

Annual Student and Exchange Visitor Update Cable

The Department of State issued its annual Student and Exchange Visitor Visa Update [STATE 047061, 05/10] to consulates worldwide. This year's update covers the following topics:

- Visa Appointment Wait Times
- Students and Lesser-known Programs
- Reporting Suspect Schools
- Summer Work and Travel Program Participant Timely Return
- Flight Training and Certification
- Study Incidental to Visit vs. Principal Purpose of Admission
- SEVIS CCD Reports

The cable is similar to prior annual cables. Of particular note, though:

- In response to continued reports of consular offices who are unreceptive to applications from prospective students at community colleges, DOS states in the cable that such action is "at odds with CA policy."
- On the importance of the U.S. educational product, the cable states:
The U.S. educational sector regularly creates new formats and packaging to keep their products in the public eye. Following the economic downturn, U.S. educational institutions have stepped up overseas recruiting efforts, especially in countries where the language of instruction is English or that have an increasing demand for educated

citizens who are adept in English. U.S. educational institutions may be considered a "good buy" with the decline in the value of the dollar. In addition, the United States may also be perceived to offer a level of institutional support that does not exist in other countries.

- Finally, on the topic of short-term incidental study on a B-2 or B-1 visa, the cable goes into some detail, stating:

13. Several posts have raised instances in which U.S. institutions offer courses for foreign students that strain the definition of "study incidental to visit," particularly in the case of summer programs. In such cases, we remind posts that 9 FAM 41.31 N6.1 instructs you that "an alien desiring to come to the United States for one principal, and one or more incidental purposes, should be classified in accordance with the principal purpose." That means that posts need to make some findings as to what actually goes on in these courses. If the student plans to spend a week or more of full-time study (more than 18 hours per week) for academic credit or completion of an academic program of study in the United States, an F-1 or M-1 visa is appropriate.

14. Many of these summer programs, however, are marketing programs aimed at exposing high school students to a variety of subjects they might be interested in pursuing at the higher educational level rather than at providing students with any substantive academic instruction. Typically, the class instruction is often coupled with social and other activities. The fact that the courses are offered by an academic institution should cause you to look into the activity more closely, but it should not preclude B-2 classification of the activity if circumstances warrant it. Don't forget to annotate those visas, "STUDY INCIDENTAL TO VISIT-Form I-20 NOT REQUIRED."

15. If posts find applicants will be engaged in something other than a week or more of full-time study, and that the course is neither offered for academic credit, nor required for completion of an academic program of study, then the activity may be properly classifiable as B-1 as an educational convention or seminar.

DOS Cable Outlines Effect Of New Laws Removing Bars On HIV-Positive Visa Applicants

A [December 12, 2009 Department of State \(DOS\) cable](#) provides consulates with field guidance on new laws that removed HIV infection from the list of communicable diseases that could bar an individual from the United States.

“SUMMARY: On November 2, the Department of Health and Human Services, Centers for Disease Control and Prevention (HHS/CDC), published a Final Rule in the Federal Register that will remove HIV infection from the list of communicable diseases of public health significance and remove references to HIV from the scope of medical examinations for aliens. The final rule will go into effect on January 4, 2010. This cable provides guidance to posts for handling cases involving HIV after January 4, 2010, and in the interim. END SUMMARY.”

Impact on visa processing, as outlined in the DOS cable and new FAM guidance:

- “Effective January 4, 2010, visa applicants required to receive medical examinations will not be tested for HIV, and HIV-positive visa applicants will not be found ineligible for visas under Section 212(a)(1)(A)(i) of the INA and will not need waivers from the Department of Homeland Security (DHS) prior to being issued visas, if otherwise qualified.”
- “Although applicants with HIV cannot be found ineligible for visas under Section 212(a)(1)(A)(i) of the INA starting on January 4, 2010, they still must overcome INA Section 212(a)(4), public charge, by demonstrating to consular officers that they will have means of

support in the United States and that they, therefore, will not need to seek public financial assistance.”

- “The following medical examination forms are being revised to remove references to HIV and the sections for the laboratory findings of the HIV test: Form DS-2053, Medical Examination For Immigrant or Refugee Applicant (For use with TB Technical Instructions 1991 and the DS-3024); Form DS-2054, Medical Examination For Immigrant or Refugee Applicant (For use with TB Technical Instructions 2007 and the DS-3030); and Form DS-3030, Chest X-Ray And Classification Worksheet.”
- “The DS-156 Nonimmigrant Visa Application, DS-160 Online Nonimmigrant Application, and DS-230 Application for Immigrant Visa and Alien Registration forms contain the following question: "Have you ever been afflicted with a communicable disease of public health significance or a dangerous physical or mental disorder, or ever been a drug user or addict?" Effective January 4, 2010, HIV- positive visa applicants will no longer have to answer "Yes" to this question based solely on their HIV status. Applicants who are HIV-positive, and can otherwise answer "No" to the question, should answer "No" beginning on January 4, 2010.”

EXCHANGE VISITOR PROGRAM

Office Contact Information

Academic and Government Programs Division	Private Sector Programs Division
<p><i>Mailing Address:</i> U.S. Department of State Office of Designation Academic and Government Programs Division ECA/EC/AG – SA-5, Floor 5 2200 C Street, NW Washington, DC 20522-0505</p> <p><i>Street Address (couriers):</i> U.S. Department of State Office of Designation Government and Academic Programs Division ECA/EC/AG – SA-5, Floor 5 2200 C Street, NW Washington, DC 20037</p> <p>TEL: 202.632.9310 FAX: 202.632.2701</p> <p>This division handles the following J exchange visitor categories:</p>	<p><i>Mailing Address:</i> U.S. Department of State Office of Designation Private Sector Programs Division ECA/EC/PS - SA-5, Floor 5 2200 C Street, NW Washington, DC 20522-0505</p> <p><i>Street Address (couriers):</i> U.S. Department of State Office of Designation Private Sector Programs Division ECA/EC/PS - SA-5, Floor 5 2200 C Street, NW Washington, DC 20037</p> <p>TEL: 202.632.2805 FAX: 202.632.2701</p> <p>This division handles the following J exchange visitor categories:</p>

Academic and Government Programs Division	Private Sector Programs Division
<ul style="list-style-type: none"> • Government Visitor • International Visitor • Professor • Research Scholar • Short-Term Scholar • Specialist • Student (College/University) • Student Intern 	<ul style="list-style-type: none"> • Alien Physician • Au Pair (including EduCare) • Camp Counselor • Intern • Student (Secondary/High School) • Summer Work/Travel • Teacher • Trainee

Proposed Subpart A Regulation

On September 22, 2009, [DOS published a proposed rule](#) that would amend Subpart A of the J exchange visitor regulations, the part of the regulations that applies to all exchange visitor programs and program categories. Public comments had to be received by November 23, 2009. These were proposed changes only. No changes will become effective until DOS publishes a final rule, after receiving public comment. Specific proposals include:

- Certain definitions have been added, clarified or deleted; for example, DOS proposes definitions of: foreign medical graduate; actual and current U.S. address; site of activity, and validation.
- New requirements for designation and redesignation.
- Incorporates SEVIS procedures, and defines actions sponsors must take to update SEVIS records, however, does not appear to address certain SEVIS II concepts such as the IIN/Customer account.
- An increase in the required amount of health insurance coverage (e.g., medical benefits of at least \$200,000 compared to the current rule's \$50,000).
- Requirement to use an Employer Identification Number (EIN) and Dun & Bradstreet numbers to identify sponsors and third parties.
- Collection of employment authorization information and validation of the SEVIS record on J-2 spouse and dependents.
- Requirement that the sponsor submit a certification its RO and AROs have undergone a criminal background performed by a "bona fide background screener."
- Would reduce the SEVIS event reporting window from 21 to 10 days
- English language proficiency would have to be "measured by an objective measurement of English language proficiency."
- Implementation of management audits for all categories under the Private Sector Programs Division (Alien Physician; Au Pair and EduCare; Camp Counselor; Intern; Student, Secondary School; Summer Work/Travel; Teacher; Trainee and Flight Training).

On November 20, 2009, NAFSA and AIEA (Association of International Education Administrators) submitted a [joint comment on the Department of State's proposed rule](#) to amend the J exchange visitor regulations at 22 CFR Part 62, Subpart A. NAFSA's comments consist of a main comment letter

and a detailed addendum. [NAFSA's J Subpart A Task Force](#) reviewed proposed Subpart A, identified and prioritized concerns on the proposed changes, and communicated those concerns to NAFSA staff to support the preparation of this NAFSA comment letter. Summary of NAFSA and AIEA Comments

- The need for focusing on the spirit of exchange and public and citizen diplomacy.
- The need for interagency coordination regarding SEVIS.
- The need for tailoring regulatory requirements to account for differences between exchange visitor program categories.
- The need to take into account the new data paradigms of SEVIS II, including the “paperless” environment of the future, and the SEVIS II “customer account” that will make individual nonimmigrants responsible for reporting name and address changes.
- The need for SEVIS to leverage data that is already in other U.S. government data systems, to avoid duplicative data entry efforts and improve the quality of data in SEVIS.
- The need to grant exchange program sponsor the level of discretion appropriate to manage their programs.
- The need to rely on measures of program quality and review that already exist in a program sponsor’s industry, rather than creating parallel or additional structures that are expensive and do not add to program integrity or security.
- The need to incorporate public comment into future changes to minimum health insurance coverage levels, and to provide time to transition current plans into the new coverage levels.
- The need for regulatory and policy clarity.

Proposed Changes To High School Exchange Program Regulations

In a [May 3, 2010, Federal Register notice](#), the Department of State (DOS) proposed amending its high school student exchange visitor program regulations. Changes would impact school enrollment of student participants, and screening, selection, orientation, and quality assurance monitoring of students, host families, and field staff. DOS will accept comments from the public up to June 2, 2010.

H-1B UPDATES

H-1B Cap

The FY 2010 H-1B cap was reached as of December 21, 2009. The FY 2011 "H-1B Filing Season" began on April 1, 2010 (filing for H-1B numbers for FY 2011, October 1, 2010 - September 30, 2011). USCIS uses the information provided in Part C of the H-1B Data Collection and Filing Fee Exemption Supplement (Form I-129, pages 14 through 15) to determine whether a petition is subject to the 65,000 H-1B numerical limitation (the "H-1B cap"). Petitions filed for beneficiaries "employed at" one of the following "qualifying institutions" are exempt from the cap: Institutions of higher education; Nonprofit entities related to or affiliated with an institution of higher education; Nonprofit research organizations; and Governmental research organizations. Some petitions are also exempt from the cap under an advanced degree exemption provided to the first 20,000 petitions filed for a beneficiary who has obtained a U.S. master’s degree or higher. USCIS tracks the use and availability of H-1B numbers at: http://www.uscis.gov/h-1b_count.

USCIS Proposes Adding Deemed Export Acknowledgement To Form I-129

U.S. Citizenship and Immigration Services (USCIS) proposed an update to Form I-129 petition, which would for the first time require petitioners to attest that "deemed export" control rules have been complied with in relation to the beneficiary. Public comments on the revisions to Form I-129 were due April 9, 2010.

In its [April 5, 2010 comments to the proposal](#), NAFSA focused on the fact that an attestation on Form I-129 will unnecessarily burden not only schools that are active in sensitive technology fields, but schools that aren't as well. Although NAFSA's comments were limited to the deemed export attestation proposal, USCIS also proposed the following additional changes to Form I-129 (see USCIS's [table of proposed changes](#) for more detail):

- Adding a field to capture a beneficiary's SEVIS ID and EAD number (if any).
- Adding a question about prior J exchange visitor participation: "**11a.** Has any beneficiary in this petition ever been a J-1 exchange visitor or J-2 dependent of a J-1 exchange visitor? No Yes. **11b.** If yes, to 11a, provide the dates the beneficiary maintained status as a J-1 exchange visitor or J-2 dependent. Also, provide evidence of this status by attaching a copy of either a DS-2019, Certificate of Eligibility for Exchange Visitor status, a Form IAP-66 or a copy of the passport that includes the J visa stamp."
- Adding questions and attestations related to off-site assignment of H-1B beneficiaries and employment under a third party contract.
- More precise questions about the nature of a petitioner's or beneficiary's exemption from the H-1B cap.
- Adding certification language at the signature section that states, "I recognize the authority of USCIS to conduct audits of this petition using publicly available open source information. I also recognize that supporting evidence submitted may be verified by USCIS through any means determined appropriate by USCIS, including but not limited to, on-site compliance reviews."

USCIS Reminder That H-1B Petitions Must Include Certified LCAs

USCIS reminded employers that "As of March 10, 2010, USCIS will reject any H-1B petition filed without an LCA certified by DOL." On November 5, 2009, USCIS had temporarily allowed H-1B petitions to be filed with uncertified labor condition applications (LCAs), "due to delays associated with Department of Labor's (DOL) iCERT system." The USCIS reminder states that this temporary policy expired on March 9, 2010, and that USCIS will not renew it.

USCIS Memo On Employer-Employee Relationship In H-1B Petitions

In a [January 8, 2010 field memo](#), USCIS said that "an employer who seeks to sponsor a temporary worker in an H-1B specialty occupation is required to establish a valid employer-employee relationship." The memo instructs adjudicators that a petitioner "must be able to establish that it has the right to control over when, where, and how the beneficiary performs the job," and lists 15 factors that an adjudicator can consider (with no one factor being decisive) when evaluating whether a petitioner has satisfactorily established the required employer-employee relationship. Although the memo states that this guidance was developed principally to address "problems" that have arisen with "independent contractors, self-employed beneficiaries, and beneficiaries placed at third-party worksites," the guidance is applicable to all petitioners and employers. The memo also incorporates this guidance into section 31.3(g)(15) of the Adjudicators Field Manual (AFM).

On February 18, 2010, USCIS held a “collaboration session” teleconference to discuss implementation of the memo. A [NAFSA summary of that session](#) is available on the NAFSA Web site.

DOL Makes Online H-1B Advisor Tool Available To Assist With LCA Compliance

The Department of Labor has created a set of online tools called [elaws Advisors](#), described as "interactive e-tools that provide easy-to-understand information about a number of federal employment laws. Each Advisor simulates the interaction you might have with an employment law expert. It asks questions and provides answers based on responses given."

The DOL [H-1B Advisor tool](#) "helps users determine if they fulfill the requirements of the visa program by answering questions relevant to specific H-1B classified workers. It also outlines notification requirements, monetary issues, worksite issues, recordkeeping, and worker protections, as well as additional requirements for employers deemed to be H-1B dependent or willful violators."

ADMISSION, EXIT, TRAVEL

DHS Plans To Eliminate I-94W For VWP Visitors By Summer 2010

In a [May 20, 2010 Press Release](#), the Department of Homeland Security announced that by the end of summer 2010 it plans to eliminate the use of paper I-94W forms for Visa Waiver Program (VWP) travelers who have an approved ESTA (Electronic System for Travel Authorization).

PREVAILING WAGE DETERMINATIONS

Principal Challenges With PWD Centralized Processing

Beginning on January 1, 2010, all requests for prevailing wage determinations (PWDs) must be filed on the national Application for Prevailing Wage Determination, ETA Form 9141, and filed with the National Prevailing Wage and Helpdesk Center (NPWHC). PWD requests should no longer be filed at local State Workforce Agencies (SWAs). Centralized PWD processing was established in the regulations by [73 Fed. Reg. 78020](#) (December 19, 2008). ETA Form 9141 functionality became available [in iCERT](#) on January 21, 2010. DOL provided an [iCERT Prevailing Wage Quick Start Guide](#), to help users with the electronic ETA Form 9141.

The principal challenges with prevailing wage determinations from the NPWHC at this point are:

- Choosing the Most Accurate SOC/O*NET Code
- Wage Level Assignments
 - Higher wage levels assigned for entry-level positions in academia
 - DOL worksheets; Appendix D; Job Zones; Relationship to SOC/O*NET code assignment; DOL discretion
 - Use of ACWIA v. All Industries OES Databases
 - No functionality in 9131 to request ACWIA be used leads to NPWHC errors
- Quality of Data in OES Database
 - Inadequate response to OES surveys by academia: focus on how BLS chooses who to send it to, NAFSA KCISS effort to identify who on campus receives the survey, and educate campus on importance of completing the survey.
 - DOL use of all industry wages when there's no ACWIA data

- DOL use of data from larger areas when there's no data within the geographic area of employment
- NWPHC Processing Times
 - 60 days or more is often too long, especially given academic hiring schedules
 - Procedure and processing time for redeterminations
 - Procedure and processing time for CO appeals
 - Procedure and processing time for BALCA appeals
- Use of Alternative Sources of Wage Data
 - Acceptability of particular surveys under the regulations
 - Safe harbor v. the open seas

DOL Policy Guidance On Prevailing Wage Determinations

A November, 2009 revision to DOL's "[Prevailing Wage Determination Policy Guidance](#) for Nonagricultural Immigration Programs," provides field guidance to the National Prevailing Wage and Helpdesk Center (NPWHC) on making centralized national prevailing wage determinations. This guidance supersedes DOL's March, 2005 guidance on prevailing wage determination policy, which had been directed to State Workforce Agencies (SWAs). The NPWHC began handling all requests for prevailing wage determinations effective January 1, 2010.

DOL FAQs On Centralized PWD Requests With The NPWHC

The Department of Labor (DOL) posted a set of [Frequently Asked Questions](#) on centralized processing of prevailing wage requests (PWDs) by the National Prevailing Wage and Helpdesk Center (NPWHC). One of the most important pieces of guidance is how to request that special wage procedures be used, in particular:

Requesting that an ACWIA wage be used

To request that an ACWIA wage be used, "On the ETA Form 9141 item D.a.6 (Job Duties), after the description of job duties, include the following statement surrounded by asterisks: ***This employer is an institution of higher education or a research entity under 20 CFR 656.40(e).***"

Requesting that the PWD be based on non-OES wage data

To request that the NPWHC base its PWD on wage data other than OES data (e.g., employer-provided wage information, a Service Contract Act (SCA) wage, a collective bargaining agreement (CBA) wage) in making the PWD, the employer should do two things on the LCA:

1. Place a statement on the ETA Form 9141 at item D.a.6. (Job Duties), that specifies the name, edition, revision, and publication date of the specific source, as appropriate. The statement at item D.a.6. should be placed after the description of job duties, surrounded by three asterisks. DOL gives the following example: *** Request SCA WD 95-0221 (Rev.-23) Emergency Incident/Fire Safety Services ***
2. After entering the employer's job title in item D.a.1., enter the title or occupation name and code in square brackets. DOL gives the following example: *** Site Sample Technician [30210 - Laboratory Technician] ***

NAFSA Practice Advisory On Wage Level Determinations

NAFSA developed a [practice advisory](#) that discusses how DOL determines an occupation's Wage Level when using the OES (Occupational Employment Statistics) survey to make a prevailing wage

determination (PWD). Understanding the mechanics of how DOL evaluates minimum education, experience, and other requirements when making a PWD based on OES wage data can help you when completing your Form ETA 9141, as well as if you decide to challenge a PWD.

PERMANENT RESIDENCE

9th Circuit Finds USCIS Can't Impose Extraregulatory Requirements In EB-1 Petitions

In a March 4, 2010 decision ([Kazarian v. USCIS](#)), the Ninth Circuit Court of Appeals found that U.S. Citizenship and Immigration Services (USCIS) relied “on an improper understanding” of the regulatory requirements in denying an EB-1 petition for a worker of extraordinary ability, and that USCIS may not “unilaterally impose novel substantive or evidentiary requirements beyond those set forth at 8 C.F.R. § 204.5.”

USCIS Memo On General Form I-140 Issues

A [September 14, 2009 USCIS memo](#) from Donald Neufeld confirms USCIS's interpretation that E12 petitions for Outstanding Professors or Researchers can generally not be filed by "government agencies at the federal, state, or local level...unless the government agency is shown to be a U.S. university or an institution of higher learning." This guidance is based on an interpretation of INA section 203(b)(1)(B), which USCIS reads as limiting this category to positions with universities, institutions of higher learning, and "private" employers.

Updates To AFM Guidance On I-140 Petitions For Physicians

A [June 17, 2009 USCIS memo](#) “provides guidance to Immigration Services Officers (ISOs), formerly known as Information Immigration Officers (IIOs) or Adjudications Officers (AOs), on how to determine if a foreign Medical Degree (MD) is the equivalent of a U.S. MD degree, and thus an advanced degree, for EB2 purposes. This memorandum also addresses how to determine whether an alien physician has met the education, training and experience requirements of the labor certification and licensure in the area of intended employment, and it clarifies that all EB2 and EB3 alien physicians must overcome the “unqualified physician” inadmissible alien provisions of INA §212(a)(5)(B) at the time of the permanent job offer.”

USCIS Redesigns Permanent Resident Card – The Green Card Is Now Green

Effective May 11, 2010, USCIS will begin issuing a newly redesigned and more secure permanent resident card. The card is commonly known as a "green card" (and part of the redesign was to make it green in color).

USCIS strongly encourages anyone who holds a permanent resident card without an expiration date to apply to replace their cards with the redesigned version. Existing permanent resident cards that bear an expiration date will remain valid until they expire. Holders of those cards will receive the redesigned version when seeking a renewal or replacement.

Employers should ensure that they are familiar with the new card as employees may be presenting this version as evidence of identity and employment authorization in relation to the Form I-9 and/or E-Verify.

NAFSA has posted a [set of USCIS notices](#) that containing information on the visual and security features of the card, and who will receive the redesigned card.

DRIVER'S LICENSES AND SOCIAL SECURITY

DMV Fact Sheet From SEVP

SEVP developed a fact sheet entitled, "Applying [for a Driver's License or State Identification Card](#)." The sheet contains information and links that can be helpful in that process. According to the fact sheet, if an F, M, or J nonimmigrant applies for a driver's license or ID and the issuing DMV is unable to issue it because the nonimmigrant's status cannot be verified, "the DSO or RO should e-mail SEVP for assistance at sevis.source@dhs.gov. In the e-mail's subject line write the following: DMV Issue – (Name of the state). Also provide the following information:

1. Applicant's name
2. Nonimmigrant's Form I-94 admission number (11 digits) or alien registration number (9 digits)
3. SEVIS number
4. Date of birth
5. Address of the DMV office where the person experienced the problem, and a receipt number (if available)
6. Date the applicant visited the DMV office
7. Contact address and phone number or e-mail address for the applicant (in case the DMV office needs to contact the person)
8. Explanation of the problem

For problem resolution of accompanying spouse/dependent applications, include information of the primary visa holder.

Once SEVP receives the e-mail, a representative will review the case and enter the student's SEVIS ID number into SEVIS. Based on the information in SEVIS, the representative may contact the DSO directly and explain why the student cannot receive a driver's license or state identification card. In all other cases, the SEVP representative will send an e-mail to the appropriate DMV state representative and request the case be reviewed. The representative reviews the case within one or two business days. When the case is resolved, SEVP notifies the DSO or RO immediately."

COMPLIANCE ISSUES

DHS Rescinds No-Match Rule

An October 7, 2009 DHS final rule rescinded the [no-match rule](#), effective November 6, 2009. The "no-match rule" would have required employers to take timely steps after receiving a "no-match" letter from the Social Security Administration (SSA) or the Department of Homeland Security (DHS). An employer who took the steps would enjoy "safe harbor" against future allegations that the employer had "constructive knowledge" that the employee referred to in the letter was not authorized to work in the United States. Although the rule became effective September 14, 2007, litigation in federal court resulted in a preliminary injunction that prevented DHS and SSA from implementing and enforcing the rule.

In the preamble to the rescission rule, DHS explained the administration's basis for rescinding the no-match rule: "After further review, DHS has determined to focus its enforcement efforts relating to the employment of aliens not authorized to work in the United States on increased compliance through improved verification, including participation in E-Verify, ICE Mutual Agreement Between Government and Employers (IMAGE), and other programs."

E-Verify Rule For Federal Contractors

On November 14, 2008, the Department of Defense (DoD), the General Services Administration (GSA), and the National Aeronautics and Space Administration (NASA), published a final rule amending the Federal Acquisition Regulation (FAR) to require certain federal contractors and subcontractors to use the U.S. Citizenship and Immigration Services' (USCIS) E-Verify system. After delays involving litigation, the rule became effective September 8, 2009.

NAFSA has resources available on its [E-Verify For Federal Contractors Update Page](#).

The final rule applies only to employers with a qualifying federal contract that is awarded on or after the applicability date of the final rule. Only federal contracts that meet all of the following conditions will subject a prime contractor to the E-Verify requirement:

- The prime contract has a period of performance longer than 120 days
- The prime contract has a value above \$100,000 (the simplified acquisition threshold)
- The prime contract contains an E-Verify clause requiring the contractor to use E-Verify as a condition of the contract
- The prime contract was awarded on or after the applicability date of the final rule

The rule also applies to subcontracts for services or construction with a value over \$3,000 where the prime contract contains the E-Verify clause.

Contracts awarded prior to the applicability date of the final rule without the E-Verify clause are not bound by the rule, except for indefinite delivery/indefinite quantity (IDIQ) contracts that are modified on or after the applicability date of the final rule to include the E-Verify clause.

Special Category Employers, Including Institutions of Higher Education. Under the final rule, institutions of higher education with qualifying federal contracts can choose to limit the E-Verify verification to only employees (existing or new hires) assigned to the federal contract in question. This exemption also applies to "a State or local government or the government of a Federally recognized Indian tribe; or a surety performing under a takeover agreement entered into with a Federal agency pursuant to a performance bond." The proposed rule published on June 12, 2008, did not contain such an exemption. Federal contractors not eligible for the exemption must use E-Verify to verify all current employees working on a federal contractor as well as all new hires regardless of whether they are working on a federal contract.

ICE I-9 Audit Initiative

U.S. Immigration and Customs Enforcement (ICE) has stepped up its enforcement of I-9 rules, increasing the number of Notices of Inspection (NOI) it has sent to businesses nationwide. ICE's November 19, 2009 [Form I-9 Inspection Overview](#) provides the background of the I-9 and employer sanctions rules, describes the I-9 audit and enforcement procedure, and reviews how monetary penalties are assessed against employers found to be in violation.

USCIS Site Visit Initiative

USCIS expanded its Administrative Site Visit and Verification Program (ASVVP) review of H-1B petitioners. Contract personnel site inspectors use a standardized Compliance Review Report to record the results of an on-site inspection. The expansion is partly in response to a letter sent by Senator Charles Grassley inquiring about USCIS' measures to combat fraud in the H-1B program. USCIS responded that it planned to increase site visits to 25,000 in FY 2010, up from the approximately 6,000 site visits done in FY 2009.

The site visits are used to determine whether the employer actually exists, if the beneficiary is employed at the location specified, is performing the duties as described, and is being paid the salary identified in the H-1B petition.

The site inspector completes a Compliance Review Report to record the results of the on-site inspection. See the content of a [Compliance Review Report Job Aid](#) that USCIS provides its site inspectors, on the NAFSA Web site.