

# Policy Guidance 1004-06 Comment

Submitted by NAFSA: Association of International Educators

November 15, 2010

NAFSA: Association of International Educators is pleased to have the opportunity to comment on [SEVP Policy Guidance 1004-06 – Emergent Circumstance Q&A](#) addressing the suspension of certain requirements for qualified Haitian students pursuant to [75 Fed. Reg. 56120](#) (September 15, 2010). NAFSA is the world's largest association of international education professionals in higher education, with nearly 10,000 members throughout the United States and worldwide. Many NAFSA members serve as Designated School Officials and both will be directly affected by this guidance and also advise Haitian students who will be affected by it.

NAFSA applauds SEVP's efforts to ease the hardship faced by Haitian students, but would offer three general comments about the FRN and request clarification on a number of specific points in the Policy Guidance.

## 1. Impact of TPS on F-1 status

It appears that SEVP has misinterpreted the effect of Temporary Protected Status (TPS) on those holding a valid nonimmigrant status. For example, SEVP states that students who use a TPS-related Employment Authorization Document (EAD) would "fall out of status" and be required to apply for reinstatement to regain F-1 status [75 Fed. Reg. 56120, 56123 (September 15, 2010)]. Rather, as the FRN designating Haiti for TPS clearly states: "when the Secretary terminates a country's designation, beneficiaries return to the same immigration status they maintained before TPS (unless that status has since expired or been terminated . . ." [75 Fed. Reg. 3476, 3477 (January 21, 2010)]. TPS beneficiaries are not required to maintain their prior status while TPS-approved in order to return to that status when the TPS designation ends. Therefore, a student who has been granted TPS and has used a TPS-related EAD or dropped below a full course of study should not be required to apply for reinstatement after the TPS designation of his or her country ends. Rather the student should, as the TPS designation states, "return to the same immigration status maintained before TPS" without any action on the part of the student. The Policy Guidance's requirement, at section 4.6, that the DSO terminate the SEVIS record of a student granted TPS is misguided and does not comport with the TPS designation for Haiti or the general operation of TPS. It appears that this requirement is driven by a concern for the SEVIS record and may be an elevation of the SEVIS system above the law and regulations. If SEVP is requiring termination of the SEVIS record because a student's SEVIS record may not have been maintained while the student is TPS-approved, then a better solution would be a suspension of the SEVIS record for the TPS period or other adjustment to SEVIS rather than requiring an unnecessary and extra-regulatory reinstatement application of the student.

NAFSA applauds SEVP's clarification that F-1 status can be maintained concurrently with TPS. However, we disagree that use of a TPS EAD to work before being authorized under the special student relief notice would result in a loss of F-1 status.

8 C.F.R. § 214.1(e) controls loss of nonimmigrant status due to unauthorized employment. That section provides that a "nonimmigrant in the United States may not engage in any employment unless he has

been accorded a nonimmigrant classification which authorizes employment *or he has been granted permission to engage in employment in accordance with the provisions of this chapter* [emphasis added]. A nonimmigrant who is permitted to engage in employment may engage only in such employment as has been authorized. Any unauthorized employment by a nonimmigrant constitutes a failure to maintain status within the meaning of section 241(a)(1)(C)(i) of the Act.”

8 C.F.R. § 214.1(e) establishes two types of “authorized employment” for nonimmigrants:

- a) Employment authorized through the nonimmigrant classification; AND
- b) Other permission to engage in employment “in accordance with this chapter” [8 CFR Chapter I (DHS regulations)]

Since DHS grants TPS employment authorization “in accordance with the provisions of this chapter,” employment on a TPS EAD is not “unauthorized employment,” and should not constitute a failure to maintain status under the plain language of 8 C.F.R. § 214.1(e). This should be so not only in the case of F students and their dependents, but for any nonimmigrant. The interpretation in the SEVP policy guidance would have every nonimmigrant who works on a TPS EAD become a nonimmigrant status violator, a consequence that is certainly beyond the letter and intent of 8 CFR 214.1(e), and contrary to the intent of TPS, which was meant to alleviate, not complicate, the plight of individuals experiencing the effect of disastrous circumstances in their home country.

NAFSA also requests clarification on the following procedural points:

## **2. SEVIS procedures for on-campus employment**

For on-campus special student relief employment, the federal register notice and SEVP guidance state only that the DSO should enter the required special student relief statements "in the remarks field of the SEVIS student record, which will be reflected on the student's Form I-20," without specifying which "remarks" field to use in SEVIS. This may be confusing.

Please specifically describe which field in SEVIS should be used to record the required statements for special student relief on-campus employment, or confirm the accuracy of the following sample instruction:

“To add the required statement to the student’s SEVIS record:

- From the *Student Information* screen, click the Personal Information link. The *Update Personal Info* screen appears.
- Type the required statement in Field 16, **Remarks**.
- Reminder: comments entered in any **Remarks** field throughout the electronic Form I-20 will overwrite existing remarks and will print in field 9 of the printed Form I-20.
- Print an updated Form I-20 to give to the student”

## **3. SEVIS procedures for off-campus employment**

For off-campus special student relief employment, the federal register notice and SEVP guidance state only that the DSO should enter the required special student relief statements "in the remarks field of the SEVIS student record, which will be reflected on the student's Form I-20," without specifying which "remarks" field to use in SEVIS. This may be confusing to some DSOs, especially since SPECIAL STUDENT

RELIEF is one of the Off-Campus Employment Types in the drop-down menu on the *Add Off-Campus Employment* screen.

Please describe proper SEVIS procedures for off-campus special student relief employment, when:

- The student does not currently have standard off-campus employment authorization
- The student already has standard off-campus employment authorization
- The student already has a TPS EAD

The essential question is whether SEVIS's Off-Campus Employment functionality should be used in each of the above scenarios.

- If so, SEVP should provide specific instructions on how to complete the 5 fields in the *Add Off-Campus Employment* screen.
- If not, then a specific instruction modeled perhaps after the one suggested in item 1 above should be disseminated.

#### 4. USCIS EAD procedures

There is no separate "special student relief" work authorization category to select on Form I-765. For the 1998 special student relief program, INS had instructed filers to use the code (c)(3)(iii) (the standard F-1 off-campus work authorization code), but to annotate the space next to the code with the phrase "Special Student Relief." USCIS has not issued specific guidelines for the Haitian program, except that filers should annotate the bottom right-hand side of the mailing envelope with the phrase "SPECIAL STUDENT RELIEF."

Can SEVP confirm the following with USCIS:

- Should applicants use code (c)(3)(iii) when requesting special student relief off-campus employment authorization?
- Should applicants annotate the space next to the code with the phrase "special student relief?"
- Have the lockboxes and USCIS adjudicators been instructed that in the case of special student relief off-campus employment requests, no documentation of economic need caused by the earthquake needs to be submitted with Form I-765, since the notice requires that determination to be made by the DSO?

#### 5. Eligibility dates

The SEVP Policy Guidance document states on page 6, Question 1.1:

"This FRN applies exclusively to F-1 students whose country of citizenship is Haiti and who  
A. **On or before January 12, 2010, gained lawful admission into the United States in F-1 classification** for duration of status under §101(a)(15)(F)(i) of the Immigration and Nationality Act, as amended and 8 U.S.C. 1101(a)(15)(F)(i)...

The Federal Register notice of September 15, 2010 has somewhat different wording at page 56120, column 2:

"Who is covered by this notice?"

This notice applies exclusively to F-1 students whose country of citizenship is Haiti and who were **lawfully present in the United States in F-1 nonimmigrant status on January 12, 2010** under section 101(a)(15)(F)(i) of the Immigration and Nationality Act (INA), 8 U.S.C. 1101(a)(15)(F)(i) and (1) are enrolled in an institution that is Student and Exchange Visitor Program (SEVP)-certified for enrollment of F-1 students; (2) are currently maintaining F-1 status; and (3) are experiencing severe economic hardship as a direct result of the January 12, 2010 earthquake in Haiti.”

The SEVP Policy Guidance focuses on *acquisition* of F-1 status “on or before January 12, 2010,” while the Federal Register focuses on *presence* in F-1 status “on January 12, 2010.” This difference in wording could be very significant to a student who had gained lawful admission in F-1 classification before January 12, 2010, but who was by chance out of the country on January 12, 2010 itself (as a number of students might have been, because of the between-semester break).

Please clarify whether a student is eligible for special student relief under the following circumstance:

- Student acquired F-1 status before January 12, 2010
- Student was out of the country on January 12, 2010 itself
- Student reentered the U.S. as a continuing student after this temporary absence, on the basis of the same SEVIS ID, on or after January 12, 2010.

## **6. Blanket fee waiver is appropriate**

First, this laudable measure would have been even more effective and beneficial to Haitian students had SEVP coordinated with U. S. Citizenship and Immigration Services (USCIS) a waiver of the Form I-765 filing fee. Students who apply for off-campus work authorization must convince the DSO that “this employment is necessary to avoid severe economic hardship and that the hardship is resulting from the January 12, 2010 earthquake in Haiti,” and the DSO must certify this fact in making the recommendation [75 Fed. Reg. 56120, 56122 (September 15, 2010)]. While SEVP notes that students may request a filing fee waiver of USCIS, a better approach would be to provide a blanket fee waiver, since requiring students to pay \$340.00 for this kind of work authorization simply runs contrary to the purpose of the notice.

Thank you for considering these comments.