

Back To School: Immigration Issues for Students and Universities,

Steve Springer's Outline/Notes

III. Maintenance of status and reinstatement

A. Maintenance of status and reinstatement

1. F-1s

a. Maintenance of status

“Duration of status” is defined as “the time during which an F-1 student is pursuing a full course of study . . . or engaging in authorized practical training following completion of studies . . . The student is considered to be maintaining status if he or she is making normal progress toward completing a course of study.” 8 *CFR* 214.2(f)(5)(i)

- 1) Take a full course of study (may pursue a degree or “specific educational objective”), except during annual vacation or OPT/CPT 8 *CFR* 214.2(f)(6)(i)
 - a) For graduate students, as determined by DSO (institution)
 - b) For college/university undergraduates, at least 12 hours per term, unless last term or authorized for reduced course load)
 - c) For study at other degree-conferring institutions, 12 hours of instruction per week
 - d) For ESL students (and some other training programs) at least 18 clock hours per week
 - e) For elementary/high school, not less than the minimum prescribed by the school for normal progress
- 2) Make normal progress (not defined in regs.)
- 3) Refrain from unauthorized employment
- 4) Avoid criminal convictions (conviction of certain crimes constitutes a failure to maintain status under INA 241(a)(1)(C)(i)) 8 *CFR* 214.1(g)



- 5) Do not willfully fail to provide full and truthful information requested by the Service 8 *CFR* 214.1(f))
- 6) Also subject to a variety of SEVIS reporting requirements, too (report to DSO no later than 30 days after program start date, notify DSO of change of address within 10 days, etc.)
--DSO can request SEVIS Help Desk to correct some SEVIS record problems (see "I-20 User Manual" at www.ice.gov/sevis)

b. Reinstatement

1) Criteria

"The district director [*note: reg. does not reflect current process of filing at SC*] may consider reinstating a student who makes a request for reinstatement on Form I-539 . . . accompanied by a properly completed SEVIS Form I-20 indicating the DSO's recommendation for reinstatement . . . The district director may consider granting the request if the student (8 *CFR* 214.2(f)(16)):

- a) Has not been out of status for more than 5 months at time of filing or failure to file within the 5 month period was the result of exceptional circumstances
- b) Does not have a record of repeated or willful violations
- c) Is currently pursuing/intending to pursue full course of study
- d) Has not engaged in unauthorized employment;
- e) Is not deportable on any ground other than section 237(a)(1)(B) [Present in violation of law] or (C)(i) [Nonimmigrant status violators] of the Act; and
- f) Establishes to the satisfaction of the Service, by a detailed showing, *either* that:
 - i) The violation of status resulted from circumstances beyond the student's control (serious injury or illness, closure of the institution, a natural disaster, or inadvertence, oversight, or neglect on the part of the DSO . . .), *or*
 - ii) The violation relates to a reduction in the student's course load that would have been within a DSO's power to authorize, and that failure to

approve reinstatement would result in extreme hardship to the student.

2) Process

Prior to 2006, applications filed at district office and adjudicated by “schools officer,” then filed at district office and forwarded to CSC or VSC, now filed directly by applicant at CSC or VSC

- a) DSO issues from SEVIS a new I-20 with notation “reinstatement requested”
- b) Student files I-539 at either CSC or VSC, depending on state in which school is located, and includes \$300 filing fee, original I-94, reinstatement I-20, letter describing eligibility, financial documents, letter from DSO recommending reinstatement and corroborating student’s account (optional but can be helpful)
- c) If the Service approves, it stamps I-20, issues approval notice with new I-94, sends both to student, and updates SEVIS record
- d) Reinstatement in practice:
 - i) Shifting jurisdiction from DO and “schools officer” known to DSOs and some attorneys to CSC and VSC caused consternation and has made chances of success more difficult to predict
 - ii) But common experience is that USCIS does not interpret “beyond the student’s control” exclusively as “serious injury or illness, closure of the institution, a natural disaster” as reg. might suggest
 - iii) For violations RCL violations that would have been authorized by DSO, showing loss of opportunity to continue studies usually suffices as “extreme hardship”
 - iv) Usually, if the now-unauthorized employment would have been authorized had student not fallen out of status, it will not cause denial (i.e., continuing assistantship during unauthorized RCL)

- v) Most likely approvals are in situations of DSO error or oversight
- vi) In all cases DSO letter can be very helpful
- vii) Remember that, since violations of status do not trigger 222(g) and 212(a)(9)(B) [no 222(g) visa cancel.], departure and re-entry to establish status is often a good alternative to reinstatement (if Canada/Mexico – get new I-94!)
- viii) Denial of reinstatement triggers 222(g) and 212(a)(9)(B), and particularly male students from predominantly Muslim countries will be probably picked up, others NTA'd eventually (sometimes years later) -- you will have to educate judge to get reinstatement in proceedings
- ix) Careful and informed decision required
- x) Reinstatement re-starts practical training clock

2. M-1s

a. Maintenance of status

- 1) Take a full course of study except during vacation term, practical training, or if authorized for reduced course load by DSO) 8 *CFR* 214.2(m)(9)
 - a) For study at community college, 12 hours per term
 - b) For other degree-conferring postsecondary vocational or business schools, 12 hours of instruction per week
 - c) For other vocational programs, 18 clock hours per week
 - d) For vocational high school, not less than the minimum prescribed by the school for normal progress
- 2) Refrain from unauthorized employment
- 3) Refrain from criminal activity (conviction of certain crimes constitutes a failure to maintain status under INA 241(a)(1)(C)(i)) 8 *CFR* 214.1(g)
- 4) Do not willfully fail to provide full and truthful information requested by the Service 8 *CFR* 214.1(f))

- 5) Also subject to a variety of SEVIS reporting requirements, too (report to DSO no later than 30 days after program start date, notify DSO of change of address within 10 days, etc.)
--DSO can request SEVIS Help Desk to correct some SEVIS record problems

b. Reinstatement

- 1) Criteria – same as for F-1s (8 CFR 214.2(m)(16)):
- 2) Process – same as for F-1s

3. J-1s

a. Maintenance of status

The Exchange Visitor program provides a variety of categories, such as college/university students, professors and research scholars, short-term scholars, specialists, trainees, interns, foreign medical graduates, etc. and requirements for maintenance of status vary among them.

1) General requirements:

- a) Maintain health insurance meeting DOS requirements
- b) Refrain from unauthorized employment
- c) Avoid criminal convictions (conviction of certain crimes constitutes a failure to maintain status under INA 241(a)(1)(C)(i) 8 CFR 214.1(g))
- d) Do not willfully fail to provide full and truthful information requested by Service 8 CFR 214.1(f))
- e) Also subject to a variety of SEVIS reporting requirements, too (report to DSO no later than 30 days after program start date, notify DSO of change of address within 10 days, etc.)
--DSO can request SEVIS Help Desk to correct some SEVIS record problems

2) Examples of category-specific requirements:

- a) College and university students: pursue a full course of study as defined by the institution, except during

annual vacation or academic training or unless authorized for reduced course load

- b) Professors and research scholars: pursue the teaching, research, observation or consulting activities described on the DS-2019 at the location noted, and do not hold a tenure-track position

b. Correcting the Record and Reinstatement

1) Correcting the record

Some minor or technical infractions may be remedied by the Responsible Officer or an Alternate Responsible Officer of the institution's J-1 program through a correction of the SEVIS record *22 CFR 62.45(b), (c), and (d)*

- a) Technical/minor violations listed at 22 CFR 62.45(c)(1), include, for a period of no more than 120 days:

- i) failure to extend the Form DS-2019 in a timely manner,

- ii) failure on the part of the exchange visitor to conclude a transfer of program prior to the end date on the current Form DS-2019,

- iii) failure to receive RO approval before accepting an honorarium or other type of payment for engaging in a normally approvable and appropriate activity

- b) RO corrects record by issuing a Form DS-2019 with "correct the record" notation or, in the case of honorarium, by giving EV an authorization letter

2) Reinstatement

- a) For substantive violations, reinstatement is required.

- i) Substantive violations include continuing a "correctable" failure to maintain status for more than 120 days, and failure to maintain a full course of study

- ii) Must show failure to maintain valid program status was due to circumstances beyond the control of EV or due to administrative delay or oversight, inadvertence, or excusable neglect on the part of RO or EV, and must show unusual hardship would result if reinstatement not granted
- b) For a variety of violations, reinstatement is not available, including:
- i) knowingly or willfully failing to maintain health insurance
 - ii) engaging in unauthorized employment
 - iii) suspension or termination from EV program
 - iv) continuing a “correctable” or “reinstatable” violation of status for more than 270 days
 - v) receiving favorable recommendation from DOS on waiver of home residence requirement
 - vi) failure to pay SEVIS (I-901) fee
- c) Reinstatement process requires submission of reinstatement request by RO through SEVIS, payment of \$246.00 fee through pay.gov, and then submission supporting documents including letter from RO to DOS Office of Exchange Coordination and Designation. When DOS approves, RO can issue new DS-2019 to EV through SEVIS.

B. DSO and RO, institutional responsibilities, sanctions and de-certification

1. For F-1 programs and M-1 programs

- a) Extensive DSO and institutional responsibilities, including reporting requirements and record-keeping requirements, set out at 8 CFR 214.3
- b) Grounds for withdrawal of school approval to issue I-20s (host F-1 students) set out at 8 CFR 214.4

- c) No specific penalties to institution for students' failure to maintain status, but ICE could consider—in periodic “re-certification” or otherwise—unusually large numbers, frequent occurrences, or patterns to constitute a violation of one of the very general grounds for withdrawal of school approval

2. For J-1 programs

- a) Extensive RO and institutional responsibilities, including “monitoring,” reporting, and record-keeping requirements, set out at 22 CFR 62.72 and 22 CFR 62.2—22 CFR 62.15
- b) Grounds for sanctions and revocations of school approval to host EVs set out at 22 CFR 62.50 (recently expanded -- 72 Fed. Reg. 72245 (December 20, 2007), to include broad violations such as “bringing disrepute to the EV program”)
- c) Sponsors are approved for a specific period, re-designation is periodically required, and DOS considers a variety of program transactions, possibly including reinstatements/corrections
- d) No specific penalties to institution for students' failure to maintain status, but could consider unusual number of reinstatements indicative of a failure to properly advise EVs or even as “bringing disrepute” (see 67 Fed.Reg. 76256, 76265 (Dec. 11, 2002) supp.)

IV. Personas non grata - flight school issues

2001—DOJ Background checks for training on large aircraft: 2001 Aviation and Transportation Security Act prohibited aviation training providers from training to aliens in the operation of aircraft with maximum certified takeoff weight of 12,5000 pounds or more unless Attorney General determined that the individual was not a threat to aviation or national security and so not prohibited from receiving flight training. Background check process was instituted.

2004—Security training for providers, background checks expanded to all foreign trainees and transferred to TSA: On September 20, 2004, the Transportation Security Administration (TSA) published an interim final rule that requires flight schools to ensure that its employees who have direct contact with students receive both initial and annually recurrent security awareness training. Transfers the background check and approval process for foreign students seeking U.S. flight training from DOJ to TSA, and expands the applicability of the background check requirements to cover all foreign flight training students. [69 Fed. Reg. 56324 (September 20, 2004)]. See DHS Alien Flight Student Program at <https://www.flightschoolcandidates.gov>

2008—DOS terminates flight training sponsorship effective 2010: In a July 11, 2008 statement of policy, the Department of State (DOS) notified the public that effective June 1, 2010, it will

exercise its authority under 22 C.F.R. § 62.62 to terminate the J program designations of all eight sponsors of J-1 flight training programs, having determined these programs “no longer further the public diplomacy mission of the Department of State.” In doing so, DOS noted that all eight programs are also designated in the M-1 category for flight training.

VI. When D/S is no longer D/S - unlawful presence and visa validity

A. Quick review of INA 222(g) and INA 212(a)(9)(B)

1. INA 222(g): When alien remains in U.S. past period of stay authorized by AG, visa becomes void, and alien must obtain visas at consular office located in country of nationality unless extraordinary circumstances
2. INA 212(a)(9)(B): Alien deemed unlawfully present if in U.S. past period of stay authorized by AG, and after voluntary departing is subject to three-year bar after 181—364 days or ten-year bar after 365 days.

B. Ms

1. Admitted for specific period (so have date-specific I-94) not to exceed one year, but may be granted extensions by USCIS in increments of up to one year for a cumulative total of three years
2. Since they are not granted “D/S” but admitted for a specific period of authorized stay, they may overstay and accrue unlawful presence and be subject to 222(g) and 212(a)(9)(B)

C. Fs and Js

1. Admitted for duration of status (“D/S”), so their status endures as long as they maintain it by having a current I-20 or DS-2019 and meeting the other requirements for maintenance of status
2. Since they are admitted for D/S and their period of authorized stay does not expire, when can they become subject to 222(g) and 212(a)(9)(B)?
 - a. Only when the Service finds a violation of status while adjudicating an application/petition or when an immigration judge finds a violation of status in the course of proceedings (violations of status and SEVIS terminations **DO NOT** trigger 222(g) and 212(a)(9)(B))
 1. Memo of 9/19/1997 from Paul Virtue withdrew prior guidance that violation of “terms and conditions” of nonimmigrant status or commission of crimes rendering one inadmissible or removable triggered 212(a)(9)(B). “Under the modified interpretation, unlawful presence . . . includes only periods of stay in the United

States beyond the date noted on Form I-94 [and] does not begin to accrue from the date of a status violation (including unauthorized employment).” Only when an immigration judge makes a finding of violation of status in the course of proceedings or when the Service makes such a determination in the course of adjudicating a benefit application can UP otherwise begin to accrue. *AILA doc. 97092240*. See also 3/23/1998 DOS cable more explicitly clarifying applicability of 222(g) to D/S cases (*AILA doc. 98032392*) and 4/4/1998 DOS cable more explicitly clarifying application of 212(a)(9)(B) to D/S cases (*AILA doc. 98040490*) and 9/19/1999 DOS cable on 222(g), *AILA doc. 99071990*.

2. Memo of 3/3/2000 from Michael Pearson further clarifies with respect to D/S: “Nonimmigrants admitted to the United States for D/S begin accruing unlawful presence on the date the Service finds a violation of status while adjudicating a request for another immigration benefit, or on the date an immigration judge finds a status violation in the course of proceedings.” *AILA doc. 00030774*. See also memo of 3/3/2000 from Michael Pearson clarifying that D/S aliens who leave U.S. while COS or EOS application pending do not become subject to 222(g) if no status violation found, *AILA doc. 00030773*.
3. In practice, how do Fs and Js become subject to 222(g) and 212(a)(9)(B)?
 - a. Denial of reinstatement application is far and away the most common route
 - 1) Usually reinstatement application involves admission of violation of status (see Bednarz letter, 70 *Interp. Rel.* 1120-1121 (Aug. 23, 1993), and denial considered a finding of violation of status
 - 2) Some denial notices state that UP has begun to accrue
 - b. Denial of COS application, for instance request for B-1/B-2 period after F or J program
 - c. Possible in other situations, such as adjudication of I-765 for optional practical training, but rare
 - d. Of course, pursuant to proceedings
 - 1) Remember, status violations and SEVIS terminations do not trigger 222(g) or 212(a)(9)(B), they may lead to removal proceedings
 - 2) Very difficult to obtain reinstatement in proceedings (must educate judge)