

## US IMMIGRATION CLIENT ALERT

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June 8, 2008

### Updated Travel Guidelines for Foreign Students

*Continued Caution is Advised for F-1 Students Planning Changes of Status to H-1B*

#### EXECUTIVE SUMMARY

F-1 students who are planning a future change of status to H-1B should avoid traveling outside the United States before October 1. If travel during this time cannot be postponed, students should ensure that they possess all necessary travel documents – including a valid F-1 visa, a Form I-20 certificate of eligibility that is endorsed for travel, and a valid optional practical training employment authorization document. F-1 students who travel internationally should be aware that they could be subject to delays and heightened scrutiny at U.S. consulates and ports of entry.

As summer approaches, many F-1 students are coming to the end of their educational programs or optional practical training (OPT) and are planning changes of status to the H-1B category in the future. At the same time, these students may be contemplating travel outside the United States during the summer holidays. However, because of recent regulatory changes and ongoing transition in Department of Homeland Security (DHS) policies, travel during the period before a change of status to H-1B takes effect can be problematic.

F-1 students who anticipate beginning H-1B employment on October 1, 2008 should avoid international travel if possible. If travel is unavoidable, these individuals should proceed with caution and prepare for possible delays. Similar caution is advised for F-1 students who are in their optional practical training period or who are seeking an OPT extension under new regulations permitting an additional 17 months of practical training for graduates in science, technology, engineering and mathematics (STEM) fields.

Foreign students planning to travel internationally while awaiting a change of status to H-1B or during their optional practical training period should discuss their plans with their designated FRAGOMEN professional.

#### Travel Will Jeopardize a Pending Change of Status Application

An F-1 student who is the beneficiary of an H-1B petition for employment beginning on October 1, 2008 and an application to change from F-1 to H-1B status should avoid traveling abroad while the change of status application is pending. Leaving the United States during this time will

cause U.S. Citizenship and Immigration Services to deem the change of status application to be abandoned. Though the foreign national's underlying H-1B petition could still be approved, he or she would not be able to begin H-1B employment on October 1 pursuant to the change of status. Instead, the student would be required to leave the United States, apply for an H-1B visa at a U.S. consulate abroad, and reenter in order to begin the H-1B employment. Because significant delays could occur during the H-1B visa application process, international travel is not recommended.

### **Travel Should Be Avoided After a Change of Status is Approved But Before October 1**

Travel between the time that an application to change status to H-1B is approved and the time the change of status takes effect on October 1, 2008 should also be avoided. Though unofficial U.S. Citizenship and Immigration Service (USCIS) policy allows foreign students to depart the United States and reenter in F-1 status before the H-1B change of status takes effect, travel can be risky during this time. Foreign nationals seeking to reenter in F-1 status must be able to prove that they have a bona fide intent to enter the United States temporarily to pursue F-1 activities. This can be difficult to establish when the foreign national has an approved H-1B petition and an offer of indefinite employment in the United States.

Travel after the approval of an application to change status is particularly risky if the foreign student is in the "cap gap" period between the end of F-1 status and the beginning of the approved H-1B petition on October 1, 2008. USCIS's new cap gap rule allows an F-1 student's period of lawful stay and work authorization for optional practical training to be extended through the approved H-1B employment start date. However, it is not clear how officials at U.S. consulates and ports of entry will treat foreign nationals seeking to reenter as F-1 students during the gap period.

If travel is unavoidable during this time, F-1 students must be sure to have a valid passport with a valid F-1 visa stamp, a Form I-20 that is endorsed for travel and a valid OPT employment authorization document (EAD). If the foreign national's F-1 visa is no longer valid and he or she must apply for a new visa to reenter in F-1 status, lengthy delays can be expected during the visa application process. Upon reentry, the student should be prepared for heightened scrutiny. Officials at U.S. consulates and U.S. ports of entry may question whether an F-1 student with a prospective status change to H-1B intends to reenter to resume legitimate F-1 student activities. If officials doubt the foreign national's intentions, a new visa or admission to the United States could be denied or delayed.

### **Travel During the OPT Period**

Special travel rules apply to F-1 students who are in a period of approved optional practical training or who are seeking a 17-month extension of OPT on the basis of a degree in a STEM field.

An F-1 student who has approved optional practical training and a valid OPT EAD can depart and reenter during the OPT period, but only if he or she has obtained a job or a job offer before departure. If the student has a job or job offer, he or she may travel and reenter the United States to resume or begin work at the same job. If the foreign national has approved OPT but leaves the United States without a job or a job offer, the OPT ends and the foreign national cannot reenter. If the F-1 student is seeking an extension of OPT on the basis of a degree in a STEM field, he or she should not travel until his or her new employment authorization document for the extension period is received.

When traveling, the student should carry his or her valid passport with a valid F-1 visa stamp, a Form I-20 that is endorsed for travel, a valid employment authorization document, and a letter from the OPT employer that verifies his or her employment.

Because agency policies with regard to student travel are fluid and may be inconsistently applied, FRAGOMEN continues to seek clarification from the government regarding student travel in advance of a change of status and during the OPT period. If you have any questions about this Client Alert, please contact the FRAGOMEN professional with whom you regularly work.

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