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July 30, 2007

Via email: jexchanges@state.gov

United States Department of State
Bureau of Educational and Cultural Affairs
301 4th Street, SW
Washington, DC 20547

Re: Proposed Rule on Sanctions and Terminations – **RIN: 1400-AC29**

Comments to Proposed Rule "Exchange Visitor Program – Sanctions and Terminations" (Comments Due by July 30, 2007)

Dear Sir or Madam:

The American Immigration Lawyers Association (AILA) is a bar association of more than 10,000 immigration lawyers across the country and is the nation's leading training and information-sharing organization in immigration law. Among other areas of activity, our members represent program sponsors, as well as individual researchers, professors, students, trainees, interns and summer work travel students who regularly rely on designated J-1 program sponsors to enter the United States. AILA submits the following comments on the proposed rule published in the Federal Register on May 31, 2007 concerning sanctions on designated exchange visitor program sponsors and terminations of such programs.

AILA appreciates the opportunity to comment on this proposed rule and would like to reiterate its strong support for policies that foster international mutual cooperation. These policies are at the very heart of the J-1 exchange visitor program, as authorized by the Fulbright-Hays Act of 1961. We believe that the private and public exchange visitor programs designated by the Department to sponsor J-1 exchange visitors are at the forefront of the Department's efforts to engage in public diplomacy. There is perhaps no better way to encourage the development of democratic systems and free economic systems abroad than by having exchange visitors come to the United States and then return home to share their experiences.

We applaud the department's efforts to clarify and improve its processes by reformulating applicable regulations. Sponsoring organizations must be diligent in fulfilling their contractual obligations in the exchange visitor program. However, we are troubled by several aspects of the proposed rule. Portions of the proposal represent significant and unfair reductions in the procedural rights of program sponsors.

The Department Has Not Clearly Identified or Explained the Need for the Proposed Rules' Significant Changes

As a starting point in our analysis of the proposed changes, we attempted to understand the nature and extent of the problems that the department felt it needed to fix. This seemed vital to assessing whether these revisions are warranted, appropriate, and sufficiently tailored to achieving the desired results. But we found that, overall, the department has provided little background on any deficiencies in the current rules that it has identified.

The Supplementary Information acknowledges that the "overwhelming majority" of designated programs perform in an excellent manner and that only five have had their designations revoked in the past 14 years. This is out of a total of over 1,400 such programs in 2005, as reported by the Government Accounting Office (GAO).[1] In addition, though the Supplementary Information reported that over 100 other sponsors have been cited for lesser sanctions in this same time period, it noted that the overall sanctions scheme, particularly in relation to lesser sanctions, has been useful in deterring and rehabilitating transgressing programs. Without any further information, it provides the cursory explanation that "(n)evertheless . . . the sanctions regulations need clarification and fine-tuning."

In addition, we know of no reports that the department has issued on significant problems that would justify these proposed measures. Despite this lack of background, we offer the following observations and recommendations regarding specific changes that have been proposed.

The Additional Reasons for Sanctions in the Proposed Rule Relating to U.S. Foreign Policy Objectives and U.S. National Security Interests Are Vague and Violate Due Process

The proposed rule would make sanctions applicable to any activities which undermine U.S. foreign policy objectives or compromise U.S. national security interests, in addition to the current list of activities. We certainly agree with the motivation behind this proposal. We all need to be vigilant about these matters.

However, these standards are extremely vague and ambiguous. Program sponsors need to have specific criteria by which they will be judged. But this terminology, coupled with the reduction and elimination of other important rights of sponsors, places in the department enormous, almost unfettered, authority to impose serious penalties on program sponsors.

While we have no reason to believe that the department will abuse this authority, its mere existence offends the most basic tenets of the Due Process Clause of the Constitution. The rule would make the department the sole arbiter of whether a program has compromised this nation's national security or foreign policy interests.

[1] State Department: Strong Action Needed to Improve Oversight and Assess Risks of the Summer Work Travel and Trainee Categories of the Exchange Visitor Program. Government Accounting Office, GAO-06-106, October 2006, at page 5.

We urge the creation of clear guidance about what these terms mean and the standards by which sponsors will be judged.

Removal of the "Willful or Negligent" Standard as Bases for Imposing Sanctions Is Unfair and Unwarranted

Under current rules, violations are actionable only upon a showing by the department that they were "willful or negligent." The proposal would remove this requirement and, essentially, create a strict liability standard. Under the proposed regulation, any violations would be sufficient cause for imposition of severe sanctions.

While this represents a potentially enormous change in the rights of sponsoring entities, the Supplementary Information sheds little light on the reasons for this modification. It says that, because sponsors are required to have a thorough knowledge of program requirements, "any violation or pattern of violation would, arguably, be willful or negligent." But this action to lower the standard for the imposition of sanctions does not take into account the obstacles that often confront program sponsors in their attempts to comply with the rules.

One obstacle is that the regulations are often vague or confusing and offer little information to guide sponsors in situations that are not clear-cut -- for instance, the regulation pertaining to summer work travel, 22 CFR § 62.32 (a), states that foreign post-secondary students are eligible during "their summer vacations." However, many countries do not follow the model of most U.S. schools in providing a lengthy vacation period during the months of June, July, and August. Schools in Thailand, for instance, have shorter school breaks during the spring and gall months. In Costa Rica, half of the schools offer vacations during the period that is the winter in the U.S. Yet it is unclear from the regulations whether there is room for departure from the literal language that is used.

A second obstacle is that the availability of guidance when sponsors need it on such questions is uneven at best. Their inquiries often go unanswered for long periods of time, creating a commonly-held perception that the department is short-staffed. The 2005 GAO report also remarked on this problem. It stated that members of the department staff "were not always responsive to their inquiries or were difficult to reach. Some sponsors attributed the difficulties to an insufficient number of State staff." We are aware that this report preceded the addition of program compliance officers. However, this corps of officers is small in number, and members tell us that accessibility is still a problem when assistance is sought in interpreting the regulations and in other matters.

Another challenge is the department's seemingly ad hoc alteration of interpretations. Recently, the department changed its interpretation of an otherwise-clear regulation regarding the length of stay allowed in the U.S. for camp counselors. The current regulation at 22 CFR § 62.30 (h)(2) allows for stays of up to four months. However, the department changed its interpretation to limit such stays to the duration of the camping season but did not communicate this to stakeholders in any systematic

manner. The result was confusion and frustration on the part of many program sponsors. The GAO confirmed that this practice occurred, reporting that the department at times changes rules "outside of the formal regulation-setting process."

In addition, the department does not regularly or comprehensively publish information concerning its interpretation of the regulations. Answers to inquiries and decisions of the Exchange Visitor Program Designation, Suspension, and Revocation Board are reached in a piecemeal fashion and not disseminated to stakeholders. The department does not generally issue guidance memoranda or FAQs as other agencies frequently do.

Because of these limitations, well-meaning sponsors often run afoul of the regulations. The implementation of this new rule which would empower the department to impose lesser or more serious sanctions without inviting explanation from sponsors is unfair and does not accurately reflect the realities of the atmosphere in which they operate.

We urge the department to return the phrase "willful or negligent" to all sections from which it has been removed by the proposed rule.

The Proposed Suspension Provisions Providing for Immediate Effectiveness Is Unfair and Violates Procedural Due Process

The proposed rule greatly increases the department's authority to suspend programs for violations it deems to be serious. Existing regulations require the issuance of a notice of intent to suspend with opportunity for a paper review before suspension can be imposed. The new rule would reverse this process, enabling the department to suspend immediately and conduct a review later.

We agree that the department needs to be able to act quickly and decisively when serious violations occur. But this expansion of authority is troubling on many levels.

First, the standards which the department can utilize to determine the appropriateness of suspension are vague. The existing rules, like the proposed one, also allow suspension for "serious" violations. But the lack of any definition of this term coupled with the reduced procedural rights that sponsors would experience under these new rules, as discussed below, compel that the department issue guidance regarding the meaning of this term. The vague terminology relating to national security and foreign policy interests only serves to compound our concern about the potential for abuse.

Second, the repercussions from an incorrect assessment of rules violations would be more severe than in the past. Mistakes that may be caused in part by difficulties that many sponsors experience in making inquiries to department staff, as discussed, could now trigger the immediate effect of a suspension order. In addition, suspensions under the new rules could last up to 120 days, double the current length. A suspension of that length would effectively put many programs out of business or, at the least, necessitate the layoff of large portions of their staff.

Third, the initial review process would provide inadequate protections. The five-day response period is onerous because of the shortness of time. It is also troubling because the department would not be required to gather and assess all relevant information about, nor provide any documentary evidence to, the alleged violator serving as a basis for the decision to summarily suspend. The department needs only to provide the "grounds" for the sanction.

This amounts to a curtailment of sponsors' procedural due process rights. We urge the department to withdraw the proposed immediate suspension provision and retain a review process prior to any suspension.

We recommend that proposed §62.50(c) should be amended to provide for two "tiers" of sanction through suspension, a temporary suspension of no more than 15 days under a new §62.50(c)(1)(i), and a temporary suspension of no more than 120 days under a new §62.50(c)(1)(ii). Suspension under §62.50(c)(1)(ii) could only be initiated if the program was subject to two or more lesser sanctions under §62.50(b) in the last 12 months or if the program had been subject to both one lesser sanction and one or more §62.50(c)(1)(i) Temporary Suspensions during the last 12 months. Neither suspension could commence any sooner than 10 days (excluding weekends and holidays pursuant to new §62.50(j)) after the later of either (i) the sponsor submits its statement in opposition to the Principal Deputy Assistant Secretary, or (ii) the Department mails its Temporary Suspension notice.

The Establishment of Page Limits Is Unreasonable

The proposed rules establish, for the first time, page limits for submission of statements in opposition to departmental action ranging from 20 to 25 double-spaced pages. These limits apply to initial actions regarding suspension and revocation and also to subsequent reviews in these areas and also regarding denial of redesignation and actions against responsible officers. In addition, supporting documents before the review panel are limited to 50 pages.

While imposing page limits will accomplish the department's understandable desire to prevent avalanches of paper from each case, this rule will compound the deficiencies of the already inadequate appeal procedures. The constraints on length of both statements and documentation will fall more heavily on larger programs and those with more detailed records. It is not hard for us to imagine a detailed letter and packet of accompanying documents exceeding these limits.

The Streamlining of the Administrative Review Process Unfairly Strips Many of Sponsors' Procedural Rights by Impairing the Panel's Ability to Conduct Meaningful Review

The proposed rule would substantially change the manner in which administrative reviews are conducted. This is unfortunate because it would greatly hinder the review body's ability to obtain all the relevant facts, conduct a thorough review, and issue an informed decision.

The existing rule establishes a three-member body known as the Exchange Visitor Program Designation, Suspension, and Revocation Board (board). All three members are from the Bureau of Educational and Cultural Affairs, and the department's Office of Legal Advisor also plays a role. The Board conducts a hearing within ten days of being convened and can address prior decisions on suspension, revocation, and denial of redesignation. Parties may have counsel present at the hearing and a "substantially verbatim record" is maintained. A decision is due within ten days after that. The Board is empowered to rule on motions and offers of proof, hold conferences to narrow the issues or settle the matter, and require the parties to submit lists of proposed witnesses and exhibits. The Board's decision must include findings of fact and conclusions of law.

New 22 CFR § 62.60 (g) and (h) would create a three-member review panel (panel) to rule on challenges to prior decisions on suspension, revocation, denial of redesignation, and actions against Responsible Officers. One major change is that the Bureau of Educational and Cultural Affairs would not be represented on the panel. Rather, three different offices within the department would each appoint one representative. We applaud the diversification of the panel's composition which should result in more considered decisions.

The new rules would greatly truncate the procedural aspects of the current review process. The most significant departure is that hearings would be replaced by a paper review. A sponsor's submissions (statements and documentation) would be subject to strict page limits, as discussed. The review officers may hold a "meeting" to clarify the written submissions but no record is kept of the meeting and no witnesses or argument would be allowed. Parties may have legal counsel present. A written decision must be issued stating the "basis of the decision" but no findings or conclusions need be included.

We also generally endorse the longer time frame that the new rule envisions. Sponsors would have 15 days to challenge a ruling and the panel would have 20 days to call a meeting and 30 more days to issue a decision. However, because suspensions take immediate effect, before the review process, programs challenging this decision are greatly disadvantaged by this longer timeframe.

With respect to the opportunity for a party to be heard, we are concerned that, under the proposed rule, the panel would no longer be able to conduct hearings, but rather, the panel could permit a "meeting," the purpose of which would be solely limited to clarification of written submissions, the duration of which would be limited to two hours, and for which no record would be maintained. The "meeting" is not designed to replicate the benefits of a full hearing. As with the proposal to impose page limits, the elimination of a meaningful hearing opportunity represents a major reduction in procedural rights.

The Supplementary Information to the proposed rule reports that the department has found the current "trial-type procedures" to be "unwieldy, burdensome and time-consuming, both for it and for sponsors." It seems to us, though, that these changes

are being made for the expediency of the department. We presume that most sponsors would prefer to retain a trial-type administrative procedure than face the burdensome, time-consuming, and much more expensive prospect of seeking redress in federal court. We urge the department to restore the hearings process in the final rule.

Conclusion

We hope you will be willing to revise provisions of the proposed rule as recommended above. Program sponsors have important property and other interests regarding the efficient but fair management of the Exchange Visitor Program. The rule, as proposed, disregards or eliminates too many of their procedural rights.

Sincerely,

AMERICAN IMMIGRATION LAWYERS ASSOCIATION