AMERICAN IMMIGRATION LAWYERS ASSOCIATION

December 5, 2014

Office of Policy and Program Support
U.S. Department of State
SA-5, Floor 5
2200 C Street NW
Washington, DC 20522-0505

Submitted via E-mail: JExchanges@state.gov

Re: Exchange Visitor Program—General Provisions
Final Rule: RIN 1400-AC36

Dear Sir/Madam:

The American Immigration Lawyers Association (AILA) respectfully submits the following comments regarding the final rule amending the general rules governing the Exchange Visitor Program, published in the *Federal Register* on October 6, 2014 (79 Fed. Reg. 60294).

Founded in 1946, AILA is a voluntary bar association of more than 13,000 attorneys and law professors practicing, researching, and teaching in the field of immigration and nationality law. Our mission includes the advancement of the law pertaining to immigration and nationality and the facilitation of justice in the field. AILA members regularly advise and represent businesses, U.S. citizens, U.S. lawful permanent residents, and foreign nationals regarding the application and interpretation of U.S. immigration laws. We appreciate the opportunity to comment on this final rule and believe that our members' collective expertise provides experience that makes us particularly well-qualified to offer views that will benefit the public and the government.

Effective Date

We respect the Department's efforts to update its regulations in an effort to achieve greater oversight and accountability in the exchange visitor program. However, the final rule, published on October 6, 2014, contains many new requirements that will require sponsors to implement new processes and procedures. For example, sponsors will need to change their background check procedures, renegotiate insurance contracts, set up new means to assess and document English language proficiency, and establish systems to collect data on spouses and dependents, among many other actions.

The final rules take effect on January 5, 2015, just 90 days after publication in the Federal Register and immediately following the December holiday season. We are concerned that this short turn-around time will cause confusion for sponsors and may result in unintentional non-compliance. Accordingly, we urge the Department to delay the effective date of the final rule for an additional six months, until July 5, 2015, and to delay the effective date of the new insurance provisions for another year, until May 15, 2016. We are concerned that a January 5, 2015 implementation date will be

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counterproductive to the Department's worthy efforts to improve the administration of the exchange visitor program and to further the purpose of the program.

In addition, AILA has the following comments and recommendations:

Definitions — Section 62.2

- *Accompanying spouse and dependents*. The caption to this definition uses the word "dependent(s)," but the definition uses the word "child(ren)." We urge the Department to use "dependent(s)" throughout Subpart J. This will minimize or eliminate difficulties with visa issuance in situations where the dependent may be a "child" of the exchange visitor for program purposes but is under the exchange visitor's legal guardianship pursuant to the law of the home country.

- *Country of nationality of last legal permanent residence*. Certain U.S. federal agencies define one's country of last permanent residence simply as the country where the foreign national resided for at least one year. This definition fails to consider the foreign national's actual legal status in the particular country; indeed, that country often may not consider foreign national students, temporary workers, and others to be permanent residents, despite their having resided in country for at least one year. Therefore, the Department should consider clarifying that an exchange visitor's status as a legal permanent resident in a foreign country is determined by the laws of that country. The definition at §62.2 should be revised to read:

  > … or the last foreign country in which the visitor had a legal permanent residence, *as defined by the laws of that foreign country*, before acquiring status as an exchange visitor.

  Alternatively, the Department could create a separate definition of "legal permanent residence," that is based on the laws of the foreign country where the exchange visitor resided. This will avoid situations in which a country has not considered an exchange visitor to have been a permanent resident but nonetheless has the responsibility of providing a no objection waiver to the two-year home residency requirement, as well as situations in which the exchange visitor has no legal right to return to the foreign country to fulfill the two-year home residency requirement.

- *Financed Indirectly*. The current regulations and the 2009 proposed rule both include definitions of the term "financed indirectly," but the final rule does not. We suggest that the Department include the current definition of the term in the final rule.

- *Home-Country Physical Presence Requirement.* For many years, the Department applied the two-year home country physical presence requirement of INA §212(e) only to the principal J-1 exchange visitor, not to his or her accompanying spouse or dependents. The Department

has now reversed course, not in response to any change in the statutory language, as there has been none. In fact, the Department proffers no rationale for the change, other than to assert that because it applies the requirement to those acquiring J status, the statute therefore includes those acquiring J-2 status.

This tacit admission of error in statutory construction is itself undermined by a closer look at the statutory language in question. The home country physical presence requirement of INA §212(e) applies to those acquiring J status *only if* the individual's "participation" in the J-1 program was financed by the U.S. or a foreign government, the foreign national was subject to the Skills List, or the foreign national acquired J status to receive graduate medical education or training. *None* of these activities pertains to someone in J-2 status who is accompanying his or her spouse or parent.

In response to a 1970 amendment to INA §212(e) that expressly adopted the above language, the Department changed its regulations, in 1972, to conform to the new statutory mandate. Other than a later statutory amendment expressly subjecting J physicians to the two-year requirement in certain circumstances, there have been no changes since 1970 to the basic statutory language. As such, AILA maintains that the current regulation at 22 CFR §41.62(c)(4) is *ultra vires*, as is the Department's recent about-face concerning this definition. The Department should retain the existing definition of "home-country physical presence requirement" and change its regulation at §41.62(c)(4) to comport with both the statute and the existing definitional section of §66.2.

- *Third Party.* The definition of "third party" includes language not present elsewhere that requires sponsors to enter into specific written agreements while establishing compliance standards and penalties. To avoid confusion, we suggest moving these substantive requirements to a new paragraph at a more appropriate location in the rule. We also recommend moving portions of the discussion as to who is *not* a third party out of the Supplementary Information and into the rule itself. Specifically, we suggest amending §62.2 by confining the definition of "third party" to the following:

  > A person or legal entity who acts on behalf of a sponsor in the conduct of the sponsor's exchange visitor program. Sponsors must execute a written agreement with all third parties, as required by section 62.9(h) of this Part. Parties with whom sponsors contract with or engage to provide ordinary services in the support of their business operations (e.g., cleaning, payroll processing, and utilities) do not constitute "third parties" for purposes of this Part.

  In addition, we urge that the substance of the deleted text be moved from §62.2 to a new paragraph (h) in §62.9, General obligations of sponsors:

  > (h) Sponsors must execute written agreements with all third parties who act on behalf of the sponsor in the conduct of the sponsor's exchange visitor program. The written

agreement with these third parties must outline the full relationship between the entity and the sponsor on all matters involving the administration of the exchange visitor program. A sponsor's use of a third party does not relieve the sponsor of its obligations to comply, and to ensure third party compliance, with the provisions of this Part. Failure by any third party to comply with the regulations set forth in this Part or with any additional terms and conditions governing administration of the Exchange Visitor Program that the Department of State may from time to time impose will be imputed to the sponsor. Sponsors are required to ensure that third parties know and comply with all applicable provisions of these regulations.

Categories of Participation Eligibility—Section 62.4

Just as the Department has restored the activity of "teaching" to the description of Research Scholar in §62.4(f), so too should the definition of "Short-Term Scholar" at §62.4(b) include "teaching." Though "lecturing" is included, lecturing and teaching are not necessarily the same. Therefore, §62.4(b) should be amended to make it clear that Short-Term Scholars are permitted to teach on a short-term basis.

Designation Application Procedure—Section 62.5

Section 62.5 relates to "designation application procedures," and describes the initial designation process for entities that are not yet exchange program sponsors. Section 62.5(c)(8)(iii) sets forth a criminal background check requirement for potential Responsible Officers (ROs) and Alternate Responsible Officers (AROs) in the initial designation process, but also refers to background check requirements for sponsors seeking redesignation. We suggest that §62.5(c)(8)(iii) be amended to remove the language pertaining to background check requirements unrelated to the initial designation process, and consolidate that language with §62.7(c)(3), which addresses recertification. The related requirements for adding or replacing ROs and AROs should be moved to or consolidated with §62.9(g), which addresses appointment of ROs and AROs.

Redesignation—Section 62.7

Section 62.7(c)(3) requires sponsors seeking recertification to provide the Department with a "list of the names, addresses and citizenship or legal permanent resident status of the current members of its Board of Directors or the Board of Trustees or other like body, vested with the management of the organization or partnership, and/or the percentage of stocks/shares held, as applicable." This presumably relates to the requirement at §62.3 that sponsors that are not a government entity or an international organization be "[r]eputable organizations that are United States Persons." The defined term "United States Person (legal entity)" includes "[a]n accredited college, university, or other post-secondary academic institution in the United States created or organized under the laws of the United States, or of any state, country, municipality, or other political subdivision thereof, the District of Columbia, or of any territory or outlying possession of the United States."

Because, by definition, an accredited college, university, or other post-secondary academic institution is a "United States Person," such institutions should not have to submit documentation regarding board members and board composition, in the context of both initial designation and redesignation, particularly when the requirement itself does not relate to sponsor eligibility for such an entity. If, however, the Department deems such information essential, an attestation of the President/CEO of the organization should be sufficient.

Criminal Background Check Attestation—Section 62.7(c)(5)

Section 62.7(c)(5) should be amended to reflect the criminal background check requirements for redesignation applicants, currently found at §62.5(c)(8)(iii).

General Obligations of Sponsors—Section 62.9

Regarding §62.9, we recommend adding a new paragraph (h) to this section, per our recommendations above relating to "Third Party," and as well a new paragraph (f)(3), as discussed below in the discussion of §62.11(a).

In addition, under §62.9(g), Appointment of Responsible Officers and Alternate Responsible Officers, we suggest clarifying that the requirement to replace an ARO within 10 days applies only to sponsors who have one ARO. Sponsors must have at least one ARO, but they have the discretion to appoint and maintain additional AROs.

Program Administration—Section 62.10

Section 62.10(a)(2) requires a sponsor to ensure that a prospective exchange visitor is proficient enough in the English language "to participate in his or her program and to function on a day-to-day basis." The rule then requires a sponsor to verify the applicant's English language proficiency using one of three methods: (1) "a recognized language test;" (2) "signed documentation from an academic institution or English language school;" or (3) "a documented interview ... either in person or by videoconferencing or by telephone if videoconferencing is not available."

Most commenters to the 2009 proposed rule urged that the language in the current regulation (that the exchange visitor possess sufficient English language proficiency to participate in his or her program) be retained. However, the Department rejected these comments, asserting that too many exchange visitors lack sufficient English language proficiency.

Rather than specifying three means of assessing proficiency, we believe the Department can address these concerns by adopting a rule that requires sponsors to maintain and provide on request sufficient documentation of English language proficiency. In doing so, the Department would only need to require exchange visitors to possess sufficient English language proficiency to participate in his or her program, "as documented by the sponsor." If the Department feels it must specify the means by which sponsors assess English proficiency, we recommend that the

rule be expanded to accommodate electronic communication methods and other suitable alternatives.

Flexibility in this regard is required, in part, because the final rule does not adequately address exchange visitors coming to the United States to study English, an activity clearly provided for in the definition of "prescribed course of study," and implied in the general definition of "full course of study." Such students almost assuredly lack English language proficiency before they arrive, and indeed, attaining proficiency is one of their exchange objectives. Also, the regulation fails to address the unique circumstances of distinguished high-level exchange visitors. For example, a group of foreign supreme court justices coming for a short-term exchange and accompanied by professional interpreters could successfully pursue a program without extensive English proficiency.

We suggest that the regulation be modified to accommodate these, and other, situations, as follows:

> "… the applicant possesses sufficient proficiency in the English language to participate in his or her program, as documented by the sponsor. Documentation may consist of the results of a recognized English language test, official documentation from an academic institution or English language school, a documented interview conducted by the sponsor (in-person or remotely), documentation corroborating that English is an official language of the applicant's country, or other documentation that supports the sponsor's determination that the participant is sufficiently proficient in the English language to participate successfully in his or her program and to function on a day-to-day basis."

Reporting E-mail Addresses of Exchange Visitors' Spouses and Dependents—Section 62.10(d)(5)

The final rule requires sponsors to report the e-mail address for each accompanying spouse and dependent. The Department should clarify that e-mail addresses are optional and that an e-mail address of the spouse, if available, may be supplied on behalf of a minor.

Duties of Responsible Officers and Alternate Responsible Officers—Section 62.11(a)

Section 62.11(a) requires ROs and AROs who "work with programs with an employment component" to "have a detailed knowledge of federal, state, and local laws pertaining to employment, including the Fair Labor Standards Act." This requirement unduly limits those employees a sponsor can appoint as ROs or AROs. Many postsecondary academic institutions have extensive expertise in employment law, but that expertise is usually held by staff in the Human Resources or General Counsel offices. Smaller organizations may utilize contractors to manage that aspect of their business. We recommend revising this provision to require that sponsors, and not individual ROs and AROs, either have such knowledge and information or have access to it, a requirement that logically could be placed in Section 62.9, General Obligations of Sponsors.

Control of Forms DS-2019—Section 62.12(e)(2)

This section provides that Forms DS-2019 may not be forwarded to "any unauthorized party." The Supplementary Information states that "the only authorized parties are the Department of State and the Department of Homeland Security." 79 Fed. Reg. at 60302. We are concerned that this is overly restrictive and could be lost on sponsors, ROs, and AROs who will refer only to the rule, and not the preamble. In addition, exchange visitors and their representatives should be allowed to receive copies or PDFs of Forms DS-2019 in order to provide a historical record of the visitor's nonimmigrant status in the United States upon request. We urge the Department to revise §62.12(e)(2) to include the phrase "sponsors may provide to exchange visitors, their spouses, and dependents copies and/or PDFs of their Forms DS-2019."

Notification Requirements—Section 62.13

Under §62.13(a)(3), the name of the SEVIS field, "Effective Date of Completion," should be changed to its actual name "Effective Completion Date" to reflect the correct wording used in the SEVIS RTI database.

In addition, §62.13(a)(4) discusses departure dates without clarifying whether temporary or permanent departures, or both, must be reported. We believe the Department intends that a sponsor must report any permanent departure from the U.S. by the accompanying spouse and/or dependent(s), if the departure occurs before the exchange visitor's program end date. If this is correct, the regulation should be revised. We suggest the following revision, accompanied by the use of the singular, not the plural:

> Accompanying spouse and dependent records. Sponsors must report in SEVIS if the accompanying spouse and /or dependent(s) permanently depart the United States prior to the exchange visitor's program end date.

Section 62.13(b) should also be amended to remove the word "promptly" and provide an actual time frame. This will avoid confusion among sponsors as to what is considered "prompt" notification to the Department of changed circumstances. In certain subsections, a 10-day notification deadline is articulated and there should be greater consistency throughout the section.

Finally, section 62.13(b)(1) should be revised to reflect that the sponsor must promptly report the exchange visitor's change of U.S. address as follows:

> Change in the actual and current U.S. address. Sponsor must ensure that the actual and current U.S. addresses of an exchange visitor are reported in SEVIS *within ten business days of notification of such change of U.S. address from the exchange visitor*.

Insurance Coverage—Section 62.14

Additional time beyond the May 15, 2015 deadline for insurance coverage is necessary to ensure full compliance in a reasonable and non-financially burdensome manner on the part of the sponsor or

exchange visitor. Many sponsors who provide insurance for their exchange visitors may not be able to obtain insurance policies by the May 15, 2015 implementation date because new coverage amounts and rates must be negotiated with the provider. Sponsors typically negotiate insurance policy coverage and rates in the summer and employee enrollment in the insurance plan for the next calendar year typically occurs in October. As such, most sponsors— especially colleges and universities—no longer have an opportunity to comply with the insurance provisions by the May 15, 2015 deadline. Additionally, once coverage requirements are established, the exchange visitor will not be able to select coverage until October 2015, and coverage will not take effect until January 1, 2016. Exchange visitors who purchase their own coverage will also have difficulties making the necessary budget adjustments to afford the new insurance rates. A January 5, 2016 implementation date will allow both the sponsors and exchange visitors to make the necessary financial arrangements to meet the new coverage mandates.

We appreciate the opportunity to comment on the final rule, and we hope our feedback will assist the Department's implementation of the rule.

Sincerely,

AMERICAN IMMIGRATION LAWYERS ASSOCIATION