To: **León Rodríguez, USCIS Director**
Ur Mendoza Jaddou, USCIS Chief Counsel

From: **The American Immigration Lawyers Association**

Date: **December 15, 2016**

Re: **Change of Status Applications to F-1: Deferral of Initial Program Start Date**

In the spring of 2016, AILA members began reporting routine denials of applications to change status to F-1 in cases that followed a very similar fact pattern: The change of status to F-1 was timely filed prior to the expiration of the applicant's underlying nonimmigrant status (typically B-2), and the program start date indicated on the Form I-20 was within 30 days of the expiration of the underlying status. However, due to lengthy delays in the processing of Forms I-539, the school's Designated Student Official (DSO) was required to defer the program start date in SEVIS. As a result, though still within 30 days of the initial start date listed on Form I-20, the applicant's underlying status expired more than 30 days before the new program start date.

In denying the applications, USCIS is erroneously interpreting 8 CFR §248.1(b), 8 CFR §214.2(f)(5)(i), and the Form I-539 instructions to require applicants seeking a change of nonimmigrant status from B-2 to F-1 to maintain active B-2 status up to 30 days before the new program start date, even when the original date was deferred by the DSO only because USCIS did not timely adjudicate the change of status application. USCIS has recently indicated that individuals in this situation should file applications to extend B-2 status in order to "bridge the gap" between the expiration of the underlying status and the 30-day period prior to the new program start date. For the reasons explained below, we urge USCIS to return to its policy of relying on the initial program start date noted on Form I-20, rather than the deferred program start date in SEVIS.

Applicable Legal Authority and Guidance

The Regulations

According to **8 CFR §248.1(b)**, "a change of status may not be approved for an alien who failed to maintain the previously accorded status or whose status expired before the

application or petition was filed…." 8 CFR §248.1(b) also permits USCIS to excuse the failure to timely file in the exercise of discretion if the failure to file was due to extraordinary circumstances beyond the control of the applicant and the delay is commensurate with the circumstances; the alien has not otherwise violated his or her nonimmigrant status; the alien remains a bona fide nonimmigrant; and the alien is not the subject of removal proceedings.

Under **8 CFR §214.2(f)(5)**, "[a]n F-1 student may be admitted for a period up to 30 days before the indicated report date or program start date ***listed on Form I-20***." (Emphasis added).

SEVIS/I-20 Requirements

In order for a prospective student to file a change of status, the DSO must create a SEVIS record and print a Form I-20, Certificate of Eligibility for Nonimmigrant Student Status, for submission with Form I-539. Form I-20 includes critical information about the school, the program of study (including the program start and end date), and tuition and costs.

According to SEVIS guidance, DSOs are required to defer the program if USCIS has not approved the change of status within 5 days of the program start date. Deferring the program start date keeps the record from canceling while the I-539 is pending with USCIS. If the program start date is not deferred, the SEVIS record will be cancelled and the I-539 will be denied.

USCIS Processing Times

Although the most recent processing time report (dated November 16, 2016) indicates that the CSC is adjudicating F-1 change of status applications in 2.5 months, processing time reports from earlier this year indicate that the average processing times were around 5 months, and reports from AILA members indicate that actual processing times are closer to the 5 to 6 month range. The most recent VSC processing time report (also dated November 16, 2016) indicates a similar 5 month processing time, though historically, delays at VSC have been known to be longer.

Current USCIS Position

USCIS is taking the position that the denials recently observed by AILA members are not the result of a change in policy. USCIS cites 8 CFR §248.1(b), 8 CFR §214.2(f)(5) and the I-539 Form Instructions to require the applicant to file a Form I-539 application to extend B-2 status when the DSO is forced to defer the F-1 program start date because USCIS has not yet approved the change of status. According to USCIS, the nonimmigrant must file such an application and pay the appropriate fee to "bridge the gap" between the expiration of B-2 status and the 30 day period prior to the new F-1 program start date.

Prior USCIS Position and Policy Pronouncements

Despite USCIS's position that the recent denials do not represent a change in policy, prior pronouncements from both the Vermont Service Center (VSC) and the California Service Center (CSC) confirm that adjudicators would previously rely on the initial program start date on the I-

20 when adjudicating a change of status to F-1 application where the program start date was deferred. The minutes (on USCIS letterhead) from the August 20, 2009 VSC stakeholder meeting include the following Question and Answer:

25. B. Under SEVP policy, a school is instructed to defer the program start date in SEVIS if it appears the change of status will not be approved before the program start date as originally set. NAFSA would like to confirm that the change of status application remains approvable after subsequent deferrals of the start date in SEVIS pursuant to this SEVP policy, provided the applicant's immigration status at the time of filing was valid to at least 30 days before the program start date on the I-20 initially submitted in support of the application for change of status.

    Response: If otherwise approvable, a change of status will remain approvable regardless of subsequent deferrals of the program start date provided that the applicant's status at the time of filing was within at least 30 days of the program start date indicated on the initial I-20.

In addition, minutes (on USCIS letterhead) from the May 6, 2009 CSC stakeholder meeting state:

21. This is a follow-up item to Question 9 from our General Meeting on February 25, 2009. We asked whether the start date of the course of study as indicated on the Form 1-20 must be on or before the expiration of the current status (i.e. B-2) and CSC responded that the start date of the course should be on or before the expiration of status. The regulations at 8 CFR §214.2(f)(5)(i), defining "duration of status" state "An F-I student may be admitted for a period up to 30 days before the indicated report date or program start date listed on Form1-20." AILA urges CSC to reconsider its answer, and to conclude that, consistent with the 30-day window provided by 8 CFR §214.2(f)(5)(i), a change of status to F-1 may be approved where the intended start date for the course of studies will commence no more than 30 days after the expiration of the period of authorized stay held by the alien ***at the time of the filing*** of the request to change nonimmigrant status. (Emphasis added).

    Response: If the requested start date is within 30 days of the previous status expiration date, this would not be cause for denial of the application.

Though stakeholder minutes do not represent "binding USCIS policy," they are an affirmative communication to the public regarding current policies and sanctioned practices, particularly when published on USCIS letterhead. These minutes also support the experiences of AILA members up until this past spring. Prior to the spring of 2016, AILA received no reports from members who had received denials of this nature. After receiving initial reports of denials in spring 2016, AILA posted a "call for case examples" to the general membership. We received more than 100 cases in response, the earliest of which had been denied in February 2016. This response, along with the above minutes, clearly indicates a shift in policy.

Case Law

Current case law has not dealt with the specific issue addressed in this memorandum; namely, when a change of status to F-1 is timely filed with an initial program start date listed on the I-20

within 30 days of the expiration of the underlying status, but the DSO is forced to defer the program start date due to USCIS adjudication delays. However, the following cases interpret the regulations cited in the recent denials received by AILA members.

Interpretation of 8 §CFR §248.1(b)

Prior case law addressing change of status applications has focused primarily on whether USCIS's interpretation of 8 CFR §248.1(b) is reasonable. Only one circuit court, the Ninth Circuit, has spoken on this issue. In *L.A. Closeout v. DHS*, 513 F.3d 940 (9th Cir. 2008), the plaintiffs challenged USCIS's denial of a change of status from B-2 to H-1B. The H-1B beneficiary's B-2 status expired on April 5, 2004, and the start date on the H-1B petition could not be earlier than October 1, 2004, due to the annual H-1B quota. USCIS denied the change of status, finding that the beneficiary failed to maintain his status during the period between April 5, 2004 and October 1, 2004. In so holding, USCIS interpreted the phrase "maintain the previously accorded status" to require the applicant to be "in status" not only at the time the change of status petition was filed, but also until the time the H-1B status became operative. Finding 8 CFR §248.1(b) sufficiently ambiguous, the court found that USCIS's interpretation of the regulation was not "plainly erroneous or inconsistent" as would be required under the *Auer* deference standard to rule in favor of the plaintiffs and thus, affirmed USCIS's decision.

Shortly after *L.A. Closeout*, the Ninth Circuit considered the same issue in the context of a change of status from B-2 to F-1. In *Tomeh v. DHS*, 321 Fed. Appx. 620 (9th Cir. 2009), an unpublished decision, the plaintiff's B-2 status expired on June 16, 2016, but the original F-1 program start date could not go into effect until mid-July. Without any detailed analysis, the court rejected Tomeh's argument that the regulations only require the applicant to file the change of status while still in the previously accorded status, noting that this argument had been foreclosed by the court's prior decision in *L.A. Closeout*.

L.A. Closeout is clearly distinguishable because the gap in status in that case existed at the time of filing the H-1B petition and could not be avoided due to the annual H-1B cap. By contrast, in all of the cases we have observed regarding the present issue, there was no gap in status when the application was filed; the gap was caused through no fault of the applicant, and is solely due to USCIS processing delays. Further, the present issue requires an interpretation of both 8 CFR §214.2(f)(5)(i) and 8 CFR §248.1(b). Though *Tomeh* involved a change of status from B-2 to F-1, it does not involve a deferred program start date, and as an unpublished decision, it cannot be relied upon as precedent.

Interpretation of 8 CFR §214.2(f)(5)(i)

At least one court has spoken on the interpretation of 8 CFR §214.2(f)(5)(i) and §248.1(b) and in doing so, ruled in favor of the applicant. In *Youssefi v. Renaud*, 794 F.Supp.2d 585 (D. Md. Mar. 11, 2011), USCIS denied the plaintiff's application for change of status to F-1 where her B-2 status expired on June 27, 2008, and the program start date on the I-20 was listed as November 3, 2008. USCIS found her ineligible because "[she had not maintained her] current nonimmigrant status up to thirty days prior to the start of classes."

The *Youssefi* court found that the statutory provision governing change of nonimmigrant classification, INA §248, is inherently ambiguous, but that 8 CFR §248.1 clarifies the ambiguity in favor of the applicant by permitting a discretionary change of status filed after the underlying status has expired. The court concluded that it did not make sense to treat an applicant who timely filed but whose case was simply not adjudicated within the 30 day time frame worse than an applicant who did not timely file in the first place:

> If the failure to file before expiration of status can be excused [under 8 CFR §248.1] within the discretion of the service, then, a fortiori, it is only logical that filing within status (and later falling out of status) must be excusable. The Court cannot conceive how any reasonable regulator would intend to provide a mechanism for excusing the former, yet not the latter. The USCIS's interpretation would therefore result in an absurd and inexplicable inconsistency within the statute, and such interpretations are disfavored. *See, e.g., United States v. Granderson*, 511 U.S. 39, 56 (1994).

In addition, though 8 CFR §214.2(f)(5)(i) states that an F-1 student may be admitted for a "period up to 30 days before the … program start date," the *Youseffi* court found no basis for USCIS's reliance on this provision to deny the change of status because that provision merely relates to the first date on which an intending student may be "admitted" to the United States and bears no connection to the issue of maintenance of status. The court said "Nowhere does it state or imply that the agency may not consider change-of-status applicants whose prior status expired more than 30 days prior to the program start date."[1]

USCIS Should Return to its Prior Practice of Relying on the Initial F-1 Program Start Date on the I-20

USCIS should return to its prior practice of relying on the initial F-1 program start date on the I-20, and not a deferred program start date in SEVIS when adjudicating change of status applications. As noted above, both the CSC and the VSC are on record as taking the position that a change of status to F-1 remains approvable as long as the applicant's status at the time of filing was within 30 days of the program start date listed on the I-20. Reports from AILA members of change of status applications being routinely approved prior to February 2016 based on the initial program start date corroborate this practice. This position is also consistent with the Form I-539 instructions, which state:

> A change of status may be granted for a period up to 30 days before the report date or start date of the course of study listed on Form I-20. ***You must maintain your current, or other, nonimmigrant status up to 30 days before the report date or start date of the course of study listed on Form I-20 or your requested change of status may not be granted***. [Emphasis added].

[1] In so holding, the court cited *Unification Church v. Attorney Gen. of the U.S.*, 581 F.2d 870, 877 (D.C. Cir. 1978) (stating, in dicta, that it "appears to be the position taken" in 8 CFR §248.1 that "an applicant nonimmigrant must continue to maintain his 'status' only until he petitions for a change in classification," not "until his petition is granted"); and *Salehpour v. INS*, 761 F.2d 1442, 1447 (9th Cir. 1985) ("The plain regulatory language [of section 248.1] allows an applicant to file for change of classification up to the last day of his prior authorized stay.").

A policy of relying on the initial program start date is consistent with the I-539 instructions which require the individual to maintain status up to 30 days before the start date "listed on Form I-20." The program start date "listed on Form I-20" will, by necessity, always be the initial program start date provided by the DSO on the I-20 that is submitted with the I-539 application. Program start date deferrals are done exclusively through the electronic SEVIS system. Therefore, the plain language of the instructions explicitly inform stakeholders that USCIS will rely on the date listed "on the I-20" when adjudicating the application, not a deferred start date in SEVIS. Moreover, the I-539 instructions fail to mention any requirements or procedures for individuals whose underlying status will expire more than 30 days prior to the initial program start date listed on the I-20 or a deferred program start date that is caused by USCIS adjudication delays or otherwise. Thus, to say that the regulated public has adequate notice of a "bridge petition" requirement is simply not the case.

Bridge petitions also create unnecessary confusion and issues surrounding the "intent" of the applicant, an extremely important concept that is an inherent component of our immigration system. An applicant for a change of status from B-2 to F-1 has clearly indicated his or her intent to transition from a temporary visitor to the United States to a temporary student. If, after filing a change of status application, intending students are suddenly required to file an application extend their B-2 status, they find themselves in the untenable position of having to explain to USCIS how they simultaneously intend to visit and study in the U.S. Moreover, if the change of status to F-1 is approved before the B-2 bridge application, what happens when the B-2 bridge application is approved? Will the new B-2 extension supersede the change of status to F-1?

Aside from the substantive problems with requiring "bridge petitions" raised above, the logistics of implementing such a requirement are prohibitive. USCIS is already plagued with backlogs across a multitude of product lines, with average processing times at an all-time high. Requiring F-1 change of status applicants to file B-2 extensions of status to bridge a USCIS-created gap in status forces applicants to hand over an additional $290 filing fee for an unnecessary application (soon to be $370 as of December 23, 2016) – one that may not even be adjudicated before the change of status petition is adjudicated – while only serving to contribute to the ever-growing backlog of pending applications and petitions. This is a clear waste of USCIS resources.

Indeed, AILA members have found that the "bridge petition" requirement has in fact not fixed the "gap in status" problem and is being inconsistently applied. For example:

- [redacted] **(COS to F-1);** [redacted] **(B-2 EOS)**: Applicant filed B-2 EOS and F-1 COS. B-2 EOS denied on 10/24/2016 on the grounds that creating a bridge for F-1 goes against B-2 intent. COS to F-1 denied on 11/10/2016 because program start date is more than 30 days after B-2 expiration. In addition, the COS denial states that "a search of USCIS databases does not reveal any other application filed by you or on your behalf that would extend your previously-accorded status to within 30 days of the anticipated start date of your classes."

- [redacted] **(COS to F-1);** [redacted] **(B-2 EOS):** Applicant filed B-2 EOS and B-2 to F-1 COS concurrently on 9/26/2016. The COS was accepted for processing, but the mail room returned the EOS and indicated that it was not "required."

The attorney refiled the EOS, and it was accepted for filing on 10/11/16. Both cases remain pending.

- [redacted] **(COS to F-1);** [redacted] **(B-2 EOS)**: Applicant filed F-1 COS on 6/21/16 and B-2 EOS on 8/1/16. The applicant's B status expired on 8/16/16, and the EOS filing requested that the EOS be tied to the pending F-1 COS. The COS was denied on 10/14/16 because the program start date was more than 30 days after B-2 expiration, but the EOS remains pending. A motion to reopen/reconsider the COS denial has been filed.

As further evidence of this policy change and the inconsistencies that attorneys and applicants have experienced in the administration of the bridge petition requirement, AILA has received a number of reports of change of status cases that were approved without the filing of a bridge extension. These approvals span from mid-2014 to as recently as September 2016 and consist of adjudications by both the VSC and the CSC. Furthermore, all of the examples that AILA has received took several months to adjudicate, which resulted in the DSO deferring the program start date several times. Despite the deferred start dates, USCIS approved these cases and relied on the initial program start date when adjudicating the application.

Conclusion

This "gap" between the end of an applicant's B-2 status and the start of a program of study that must be deferred is one created by USCIS's inability to timely adjudicate the change of status application. Intending students should not be penalized when their I-539s were approvable when filed. To require these individuals to incur the expense of filing a second application to cure the USCIS-created filing defect is contrary to the principles of fundamental fairness and due process. For these reasons, we urge USCIS to announce a clear policy statement confirming that it will rely on the initial program start date noted on Form I-20 when adjudicating F-1 change of status applications.