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MAINTENANCE OF NONIMMIGRANT STUDENT STATUS UNDER THE IMMIGRATION AND NATIONALITY ACT

INTRODUCTION

Increased worldwide interest in education and in the exchange of mutual knowledge has caused many students to come to the United States to study.¹ In response to the educational and scholastic interests of foreign students, Congress has prescribed conditions under which they, as aliens, may enter and remain in the United States.²

The Immigration and Nationality Act (the Act) provides for the admission to the United States of "nonimmigrants" or temporary visitors who qualify within one of a number of specified categories.³ Aliens who intend to pursue a course of study or training in the United States may enter under one of the following nonimmigrant classifications:⁴ (a) "F" academic student,⁵ (b) "M" vocational student⁶ or (c) "J" ex-

1. See Bartos, *The Growing Foreign Student Program*, 9 IN REPORTER 47 (1961); 1 C. GORDON & H. ROSENFELD, IMMIGRATION LAW AND PROCEDURE § 2.12a (1984).

2. See Immigration and Nationality Act § 101 (a)(15)(F), 8 U.S.C. § 1101(a) (15)(F) (1982). For a description of the source of the power of Congress to control immigration, see *Chae Chin Ping v. United States*, 130 U.S. 581 (1889) and *Edye v. Robertson, Collector*, 112 U.S. 580 (1884).

3. The Act does not directly define the term "nonimmigrant." Instead, the Act sets forth various nonimmigrant classifications as exceptions to the general presumption that all aliens intend to immigrate, i.e., to seek permanent admission to the United States. Immigration and Nationality Act § 101(a)(15), 8 U.S.C. § 1101(a)(15) (1982). The section states that "the term 'immigrant' means every alien except an alien who is within one of the following classes of nonimmigrant aliens. . . ." *Id.* See generally *infra* note 29 (describing the effect of the denial of nonimmigrant status).

4. Under the Immigration Act of 1924 students were classified as "nonquota immigrants," but were admitted for a limited time period. Immigration Act of 1924 ch. 190, § 4(e), 43 Stat. 153 (vol. 1, 1923-1925) (repealed 1952). This classification was inappropriate because the students sought temporary rather than permanent residence. Subsequently, the Immigration and Nationality Act of 1952 properly classified the student as a nonimmigrant. See S. REP. No. 1137, 82nd Cong., 2d Sess. 20; H. REP. No. 1365, 82nd Cong., 2d Sess. 44, reprinted in 1952 U.S. CODE CONG. & AD. NEWS 1697.

5. Immigration and Nationality Act § 101(a)(15)(F), 8 U.S.C. § 1101(a)(15)(F) (1982).

6. *Id.* § 1101(a)(15)(M). Under the Immigration and Nationality Act amendments of 1981, Pub. L. No. 97-116, 95 Stat. 1611 (codified at 8 U.S.C. § 1101(a)(15)(M) (1982)), this new nonimmigrant category was added. It is expressly limited to nonimmigrant students undertaking a full course of study at an established vocational or other recognized nonacademic institution, other than a language training program. Students in a foreign language program remain in the "F" nonimmigrant category. The "M" nonimmigrant category came into effect on June 1, 1982.

change visitor.⁷ This note discusses the "F nonimmigrant" category and various regulations and problems academic students may encounter in maintaining such status once they have entered the United States.⁸

BASIC REQUIREMENTS

Section 101(a)(15)(F) of the Act sets out a number of specific requirements for an alien to qualify as a nonimmigrant student.⁹ The student alien must have a residence in a foreign country which he has no intention of abandoning; be a bona fide student qualified to pursue a full course of study and seek to enter the United States "temporarily and solely for the purpose of pursuing such a course of study at an established institution of learning or other recognized place of study in the United States."¹⁰ The institution must be "particularly designated" by the student and "approved by the Attorney General after consultation with the Office of Education of the United States."¹¹ After qualifying as a nonimmigrant student and following the proper procedures,¹² the alien who has entered the United States is subject to various regulations promulgated in section 214.2(f)¹³ of the Code of Federal Regulations.

7. Immigration and Nationality Act § 101(a)(15)(J), 8 U.S.C. § 1101(a)(15)(J) (1982). The acceptable purposes for participation in an exchange visitor program under § 101(a)(15)(J) include "teaching, instructing or lecturing, studying, observing, conducting research, consulting, demonstrating special skills or receiving training." Among those groups qualified to enter the United States in a designated "J" program are aliens who participate in a program under which they will receive graduate medical education or training. *Id.*

8. This note concentrates on major problem areas students encounter in maintaining nonimmigrant status; it will not address various forms and administrative procedures which such students must follow.

9. 8 U.S.C. § 1101(a)(15)(F) (1982).

10. *Id.*

11. *Id.* § 1103(a) "The supervision of the admission of aliens into the United States has been entrusted by Congress to the Department of Justice under the Attorney General who is charged with the enforcement of our immigration laws. . . ." S. KANSAS, IMMIGRATION AND NATIONALITY ACT ANNOTATED 22 (1953).

12. Consular officers will classify an alien as a nonimmigrant student if the student demonstrates that he or she will attend, and has been accepted for attendance by an established institution of learning or other recognized place of study in the United States which has been approved by the Immigration and Naturalization Service (INS). Evidence of this must be in the form of a *Certificate of Eligibility*, executed by the accepting school and signed by the student. Such a certificate, properly signed and executed, will be accepted by the consular office as *prima facie* evidence that these essential requirements have been met. 22 C.F.R. § 41.45(a)(1) (1983).

13. 8 C.F.R. § 214.2(f) (1983).

Section 241(a)(9) of the Act refers to persons who, having been admitted as nonimmigrants, or who, having had their status changed to nonimmigrant, have violated such status.¹⁴ This section provides for the deportation of any alien who fails to maintain his or her nonimmigrant status.¹⁵ A nonimmigrant student, therefore, must comply with the regulations set forth in section 214.1(f),¹⁶ which contains the requirements for admission and maintenance of status for foreign academic students.¹⁷ Violation of one or more of these conditions may render an alien student deportable under section 241(a)(9) of the Act. This note will examine how the regulations set forth in section 214¹⁸ have been interpreted by the courts and other judicial bodies,¹⁹ as well as specific problem areas encountered by nonimmigrant students.

THE REQUIREMENTS OF APPROVAL OF SCHOOLS AND A FULL COURSE OF STUDY

To comply with the regulations, a full course of study must be undertaken at an institution approved by the Attorney General for foreign students.²⁰ The State Department regulations consider presentation of an executed Certificate of Eligibility (Form I-20) as *prima facie* evidence that the Attorney General has approved the issuing school.²¹ All federal, state or local public education institutions, schools listed in the United States Department of Education (DOE) publications, and secondary schools operated by a college or university listed in the DOE publications, are considered "prequalified."²² Other institutions must make formal applications to receive approval from the Attorney General.²³

14. Immigration and Nationality Act § 241(a)(9), 8 U.S.C. § 1251(a)(9) (1982), provides:

(a) Any alien in the United States (including an alien crewman) shall, upon the order of the Attorney General, be deported who— . . . (9) was admitted as a nonimmigrant and failed to maintain the nonimmigrant status in which he was admitted or to which it was changed pursuant to section 1258 of this title, or to comply with the conditions of any such status.

15. *Id.*

16. 8 C.F.R. § 214.1(f) (1983).

17. *Id.*

18. *Id.* § 214.

19. The relevant judicial bodies include INS district directors, the Board of Immigration Appeals and regional commissioners.

20. *Id.* § 214.2(f)(6) (1984); Immigration and Nationality Act § 101(a)(15)(F), 8 U.S.C. § 1101(a)(15)(F) (1982).

21. See *supra* note 12.

22. 8 C.F.R. § 214.3(c) (1983).

23. *Id.* § 214.3.

A number of cases have been decided pertaining to the denial of approved status to various institutions of learning.²⁴ These cases illustrate the application of a number of standards for evaluating whether an institution of learning is offering a bona fide student program.²⁵ In *Matter of Franklin Pierce College*,²⁶ a case involving a small liberal arts college in its first year of existence, the regional commissioner²⁷ stated:

[T]he record contains no evidence of the reputation of the college as an educational institution in the community, and the library and recreational facilities do not appear to be adequate for an institution of this type. Additionally, no evidence has been submitted that the credits earned by students at the institution would be recognized or transferable to other schools.²⁸

The importance of an approval of the educational institution lies in the fact that foreign applicants are not entitled to status as nonimmigrant students under section 101(a)(15)(F) if the institution has not been approved by the Attorney General.²⁹ Moreover, an alien bound

24. *Id.* § 214.3(e), which sets forth a number of criteria necessary for a school to be deemed an approved institution of learning under the Act. The institution must establish that—

- (1) It is a bona fide school;
- (2) It is an established institution of learning or other recognized place of study;
- (3) It possesses the necessary facilities, personnel, and finances to conduct instruction in recognized courses; and
- (4) It is, in fact, engaged in instruction in those courses.

Id.

25. *See, e.g., Matter of Healy and Goodchild*, 17 I. & N. Dec. 22 (B.I.A. 1979); *Matter of Peninsula School, Ltd.*, 11 I. & N. Dec. 411 (Reg. Comm'r 1965) (denying approval for nonimmigrant students to attend an elementary school because the school failed to establish that its facilities satisfied local safety and fire requirements).

26. 10 I. & N. Dec. 659 (Reg. Comm'r 1964).

27. The Attorney General is charged with the administration and enforcement of the immigration laws. 8 U.S.C. § 1103(a) (1982). He is authorized by Congress to delegate any of his powers or duties to various officers of the INS. *Id.* The INS thus assumes certain judicial functions and must decide various types of immigration cases. The district director has primary authority to grant or deny formal applications or petitions. *See* 8 C.F.R. § 103.1(n) (1983). In several situations an appeal is allowed to the Board of Immigration Appeals. In other cases, an appeal to the regional commissioner of the district director's ruling is permitted. *See id.* § 103.4.

28. 10 I. & N. Dec. at 660. It should be noted that in reaching a decision, the Service is required by section 101(a)(15)(F) of the Immigration and Nationality Act to consult with the United States Office of Education. The Office's recommendation, however, has no binding effect on the INS' final decision.

29. Under section 101(a)(15) of the Act, every alien is considered to be an immigrant unless the alien is able to establish that he is entitled to nonimmigrant status under one of the specific classes of nonimmigrants designated by Congress in section 101(a)(15).

for the United States for the primary purpose of study is not admissible as a nonimmigrant visitor³⁰ for pleasure as defined by section 101(a)(15)(B).³¹ In fact, in *Matter of Healy and Goodchild*, the Board held that since aliens are not entitled to nonimmigrant student status if the institution has not been approved, and they are not admissible as nonimmigrant visitors if their primary purpose is to study in the United States, then alien students may not attend unapproved educational institutions.³² Thus, approval of the educational facility is critical.

The statutory requirements that educational institutions be approved by the Attorney General appears to serve at least two purposes. First, it insures that schools will not be established solely to provide a means for the entrance of aliens outside of the quota system.³³ Second, it insures that a foreign student will not travel a great distance to the United States only to find that the institution he planned to attend does not have the adequate facilities or personnel to provide a proper and adequate education.³⁴

The student likewise must be enrolled in a full course of study at the approved institution.³⁵ The definition of a full course of study was changed by the new regulations to reflect the removal of vocational

Immigration and Nationality Act § 214(b), 8 U.S.C. § 1184(b) (1982). Consequently, the alien is subject to quota restrictions which often prevent entry into the United States. The burden is upon the alien to establish that he is entitled to the nonimmigrant classification and the type of nonimmigrant visa for which he is an applicant. 22 C.F.R. § 41.10 (1983); cf. 8 U.S.C. § 1361 ("Whenever any person makes application for a visa or any other document required for entry, or makes application for admission, or otherwise attempts to enter the United States, the burden of proof shall be upon such person to establish that he is eligible to receive such visa or such document. . .").

30. The Immigration and Nationality Act § 101(a)(15)(B), 8 U.S.C. § 1101(a)(15)(B) (1982) defines "nonimmigrant visitor" as

an alien (other than one coming for the purpose of study or of performing skilled or unskilled labor or as a representative of foreign press, radio, film, or other foreign information media coming to engage in such vocation) having a residence in a foreign country which he has no intention of abandoning and who is visiting the United States temporarily for business or temporarily for pleasure.

Visitors for business or pleasure make up the largest category of nonimmigrants coming to the United States on a temporary basis. 1 A. FRAGOMEN, A. DEL REY & S. BERNSEN, *IMMIGRATION LAW AND BUSINESS* 2-25 (1983).

31. *Matter of Le Floch*, 13 I. & N. Dec. 251 (B.I.A. 1969).

32. 17 I. & N. Dec. 22, 26 (B.I.A. 1979).

33. In view of the large number of aliens seeking to establish residence in the United States, Congress has established limitations on the number of aliens who may be issued immigrant visas or who may otherwise acquire the status of an alien lawfully admitted to the United States. See 8 U.S.C. §§ 1151-1153 (1982).

34. *Royalton College, Inc. v. Clark*, 295 F. Supp. 365, 370 (D. Vt. 1969).

35. 8 C.F.R. § 214.2(f)(6) (1984).

programs from the academic student, "F" classification.³⁶ Under the new regulations, there are five classifications comprising a full course of study, including postdoctoral or postgraduate study or research at a university, and undergraduate study at a college or university that is certified by the school to consist of at least twelve semester or quarter hours of instruction per academic term. The twelve hour program must require payment of full-time tuition or be considered full-time at that institution for administrative purposes.³⁷

The twelve credit minimum for undergraduate programs appears to be particularly controversial with regard to the Immigration and Naturalization Service's (INS) definition of a full course of study. In *Mashi v. INS*, the Fifth Circuit noted in dictum that the twelve credit minimum requirement contains a certain amount of flexibility.³⁸ The court stated that just as "it is inconceivable that the Board would read 8 C.F.R. 214.2(f)(1a)⁽³⁹⁾ as calling for the deportation of an alien simply because he failed to receive a passing grade in one of his courses," it is similarly inconceivable that if an alien must drop a course to avoid failing it, the twelve credit rule must be considered violated.⁴⁰ Since the Immigration and Nationality Act only requires the alien student to *pursue* a full course of study, the courts have construed the provision loosely.⁴¹

EMPLOYMENT

The requirement that a student must demonstrate that he has sufficient funds to cover his expenses in order to be issued a student visa

36. *See id.*

37. *Id.* § 214.2(f)(6) (i-v). The "12 credit" minimum requirement has fluctuated in United States immigration law. The Immigration and Nationality Act of 1924 did not set out academic standards for alien students. *See* S. REP. 1515, 81ST CONG., 2D SESS. 479 (1950). Subsequently, the State Department enacted a regulation pursuant to the 1924 Act requiring "a minimum of 12 semester hours for alien undergraduate students." *Id.* at 479-80. Regulations promulgated under the Immigration and Nationality Act of 1952, however, required no minimum number of semester hours. Then, in 1975, an amendment reincorporated the twelve credit minimum, applicable to student status acquired as of January 1, 1976, 8 C.F.R. § 214.2(f)(1a) (1975). The current regulation, effective August 1, 1983, amended the rule slightly to require the course of study to consist of twelve "semester or quarter hours" rather than twelve hours of instruction under the old regulations. 8 C.F.R. § 214.2(f)(6)(ii) (1983). The new regulations take into account such things as independent study courses and lab work, however, the student is not required to be "instructed" for the full number of semester hours.

38. 585 F.2d 1309, 1312-13 (5th Cir. 1978).

39. The current version of this provision can be found at 8 C.F.R. § 214.2(f)(6)(ii) (1984).

40. 585 F.2d at 1314.

41. *Id.*; *see* 8 U.S.C. § 1101(a)(15)(F) (1982).

relates to the question of whether a student may be employed.⁴² The term "sufficient funds to cover expenses" is defined in the Foreign Affairs Manual to mean that the applicant must establish "not only that he is not likely to become a public charge . . . but also that he is not likely to resort to unauthorized employment in order to support himself during the course of his studies in the United States."⁴³ The student must show he currently has sufficient funds available to him to fulfill all his expenses for the first year of study, and that, aside from any unforeseen change in circumstances, he will have sufficient funds to pay all expenses during the entire period of study in the United States.⁴⁴

The regulations distinguish between several types of employment: on-campus employment,⁴⁵ off-campus employment⁴⁶ and practical training.⁴⁷ On-campus employment is employment performed on the institution's premises.⁴⁸ A nonimmigrant student may engage in on-campus employment pursuant to the terms of a scholarship, fellowship or assistantship, or "any other on-campus employment which will not displace a United States resident."⁴⁹ On-campus employment may not exceed twenty hours per week while school is in session, however, it may be extended to full-time when school is not in session.⁵⁰ Furthermore, no application need be made to the INS for such employment.⁵¹

The area of off-campus employment is far more controversial. The new regulations concerning nonimmigrant students, effective August 1, 1983, limit off-campus employment to a greater extent than earlier regulations.⁵² Under section 214.2(f)(9),⁵³ off-campus employment is prohibited for any student whose program of study is one year or less, and

42. 22 C.F.R. § 41.45(a)(2) (1983) (an alien shall be classified as a nonimmigrant student under section 101(a)(15)(F)(i) of the Act provided he "is in possession of sufficient funds to cover expenses while in the United States or other arrangements have been made to provide those expenses . . .").

43. F.A.M. 41.45, n.2.1 (1983) (Foreign Aff. Manual).

44. *Id.*

45. 8 C.F.R. § 214.2(f)(9)(i) (1984).

46. *Id.* § 214.2(f)(9)(ii).

47. *Id.* § 214.2(f)(10).

48. *Id.* § 214.2(f)(9)(i).

49. *Id.*

50. *Id.*

51. *Id.*

52. Compare *id.* § 214.2(f)(9)(ii) ("Off-campus employment is prohibited for students who remain in the United States in F-1 status for one year or less. Off-campus employment is also prohibited during the first year in the United States for students who remain in the United States in F-1 status for more than one year") with 8 C.F.R. § 214(f)(6)(1983) (no absolute prohibition of employment during the first year).

53. 8 C.F.R. 214.2(f)(9) (1983).

during the first year for students whose program is more than one year.⁵⁴ The INS's reason for this employment bar on F-1 students during their first full year in the United States is that prospective students are required to provide documentary evidence of their ability to meet all expenses during their first year. The INS posits that since under the old regulations, applications for employment were usually denied during the student's first year in the United States, the new provision barring first year employment will eliminate many "frivolous" applications.⁵⁵ The INS supports its decision by stating that "the requirement that the student demonstrate economic necessity and that the Service authorize off-campus employment minimizes any adverse effect on the employment of United States resident students seeking employment."⁵⁶

A student may, after the first year, apply for off-campus employment authorization from the INS. A designated official of the school which the student was last authorized to attend must certify that the student (1) is in good standing and carrying a full course of study; (2) has demonstrated economic necessity due to unforeseen circumstances arising subsequent to his gaining student status; (3) has demonstrated that acceptance of employment will not interfere with carrying a full course of study and (4) has agreed not to work more than twenty hours a week when school is in session.⁵⁷

A controlling factor in the disposition of applications by nonimmigrant students for permission to accept employment is the question of whether or not there has been any unforeseen change in the student's economic situation since his admission into the United States which would make it necessary for him to accept employment as a means of covering his expenses.⁵⁸ In *Matter of A—*, the regional commissioner stated:

If there has been no change in the economic situation of the student, he must be held to the representations which he made when he received his visa and when he was admitted at the port of entry, for employment in this country is always in competition with United States citizens and lawfully admitted resident aliens who depend upon employment for their livelihood,

54. *Id.* Earlier regulations allowed authorization for off-campus employment at any time including the first year, based on a showing of economic necessity arising out of unforeseen changed circumstances. 38 Fed. Reg. 35,425, 35,426 (1973) (repealed 1983).

55. 48 Fed. Reg. 14,577 (1983).

56. *Id.*

57. 8 C.F.R. § 214.2(f)(9)(ii) (1984).

58. *See id.* *Matter of Mody*, 15 I. & N. Dec. 542, 543 (Dist. Dir. 1975).

and it is not open to nonimmigrant students as [a matter] of course.⁵⁹

A number of cases have interpreted the meaning of economic necessity due to unforeseen circumstances. In *Matter of Kashri*, the district director denied a student's application for permission to accept part-time employment to pay for an increase in tuition.⁶⁰ The case held that a tuition increase does not constitute economic necessity due to unforeseen circumstances.⁶¹ In *Matter of Jahromi*, however, the regional commissioner granted an application for permission to accept part-time off-campus employment where a nonimmigrant student was unable to meet his expenses because of unanticipated medical bills incurred subsequent to entry.⁶² If a student pursuing a full course of study accepts off-campus employment without applying for permission as required by section 214.2(f)(9), the student will probably be determined to be deportable by the INS.⁶³ In *Oki v. INS*, a nonimmigrant student was found deportable and in violation of his status when he began working before receiving authorization, although permission for the requested employment was granted subsequent to the deportation order.⁶⁴ The decision in *Oki* is strict, yet it is important for the INS to ensure that nonimmigrant students will only work if and when they receive permission.

The "F" nonimmigrant classification contains two categories, F-1 student status and F-2 status for the student's alien spouse and minor children. The conditions for maintenance of "F" nonimmigrant status apply to both the F-1 student and the alien spouse and minor children.⁶⁵ In *Matter of Boroumand*, the spouse of a nonimmigrant stu-

59. 7 I. & N. Dec. 661, 663 (Reg. Comm'r 1958).

60. 15 I. & N. Dec. 457 (Dist. Dir. 1975). See also *Matter of Patterson*, 15 I. & N. Dec. 398, 399 (Dist. Dir. 1975) (a student applicant for permission to accept part-time employment may not be found to have economic necessity when it is established that he has sufficient funds available to carry him through school. The claim that tuition, fees and the cost of living will "undoubtedly" rise over the coming years was purely speculative on the applicant's part and may not be considered as a fact in determining whether necessity is due to unforeseen circumstances).

61. 15 I. & N. Dec. 457 (Dist. Dir. 1975).

62. 15 I. & N. Dec. 424 (Reg. Comm'r 1975).

63. See, e.g., *Tashnizi v. INS*, 585 F.2d 781 (5th Cir. 1978).

64. 598 F.2d 1160 (9th Cir. 1979).

65. The F-2 status, consisting of the spouse and children of a F-1 student, was created by the 1961 amendment to the Immigration and Nationality Act, Pub. L. No. 87-256, 75 Stat. 534 (1961) (codified as amended at 8 U.S.C. § 1101(a)(15) (1982)). Prior to this amendment, a student's spouse and children were admitted as nonimmigrant visitors. The effect of the creation of F-2 status was to permit the spouse and children to remain in the United States for the identical period to which the student is authorized to

dent accepted employment and was held to be deportable and in violation of her F-2 status.⁶⁶ Regulation 214.2 clearly states that the F-2 spouse and children of an F-1 student may not accept employment.⁶⁷ This inflexible provision is clearly intended to protect United States residents' employment opportunities; no guise of infringement upon a student's time and attention to studies can be used to justify this restriction on a student's spouse. The legislative history indicates that in creating the F-2 status, Congress' limited objective was to unite the nonimmigrant student and his family during their temporary stay in the United States.⁶⁸

Another consideration in the student employment area is the determination of the meaning of "employment" under the regulations. In *Matter of Tong*,⁶⁹ a nonimmigrant student opened a used car dealership without INS permission. He contended that this self-employment constituted an investment rather than employment. The Board of Immigration Appeals held that an alien student violates student status, whether he is engaged in off-campus employment for an employer or independently, unless his employment application receives prior approval from the INS.⁷⁰ In *Wettasinghe v. U.S. Department of Justice, INS*, a nonimmigrant student purchased a fleet of ice cream trucks, leased the trucks to individuals for the purpose of selling ice cream, purchased ice cream and personally stocked the trucks on a daily basis.⁷¹ *Wettasinghe* argued on the authority of *Bhakta v. INS*⁷² that his activities constituted an investment. In *Bhakta*, the court held that an alien's ownership and operation of a motel did not constitute unauthorized employment which would preclude adjustment of student status⁷³ to that of permanent resident alien status. The court found, rather, that the alien's activities were that of an investor-manager.⁷⁴ The court reasoned that entrepreneurial investors do not compete with American

stay by the terms of his visa. SENATE REPORT OF THE COMMITTEE OF FOREIGN RELATIONS ON SENATE BILL 1154, S. REP. NO. 372, 87th Cong., 1st Sess. 18-19 (1961).

66. 13 I. & N. Dec. 306 (B.I.A. 1969).

67. 8 C.F.R. § 214.2(f)(9)(vi) (1984).

68. See 1961 U.S. CODE CONG. & AD. NEWS 2780.

69. 16 I. & N. Dec. 593 (B.I.A. 1978).

70. *Id.*

71. 702 F.2d 641 (6th Cir. 1983).

72. 667 F.2d 771 (9th Cir. 1981).

73. See Immigration and Nationality Act § 245, 8 U.S.C. § 1255 (1983) ("adjustment of status" refers to the procedure in which an alien, after fulfilling specific requirements and conditions, changes his status or current classification under the Act to a new classification, e.g., from an "F" nonimmigrant alien to a permanent resident alien).

74. 667 F.2d at 772.

labor, and instead often *provide* jobs for Americans.⁷⁵ In *Wettasinghe*, however, the court found the student to be engaged in "employment" in violation of his student status.⁷⁶ The court stated that *Bhakta* was not applicable since *Wettasinghe* was not seeking an adjustment of status. The prohibition against unauthorized student employment is designed to insure that alien students pursue their education on a full time basis.⁷⁷ "The protection of American labor is not the primary goal of that Provision."⁷⁸

It is interesting to note that in both *Tong* and *Wettasinghe* the decisions were at least partly based on regulation 214.2(f)(6),⁷⁹ which provided in pertinent part that a nonimmigrant student is in violation of his status whether he engages in off-campus employment or independent employment (i.e., self-employment).⁸⁰ The new regulations, which became effective August 1, 1983, make no mention of "independent" employment.⁸¹ The continuing validity of the decisions, thus, is thrown into question.

The regulations, reflecting the INS's strictness concerning employment, specifically declare that decisions on applications for permission to accept off-campus employment are not appealable by the applicant.⁸² The decision of the district director is final. Furthermore, reinstatement of the alien to F-1 student status by the district director is prohibited if the student has engaged in unauthorized employment.⁸³

Although INS approval is required, nonimmigrant students may engage in practical training.⁸⁴ Under the new regulations temporary employment for practical training may be authorized (1) after completion of a particular course of study, even if the student intends to engage in a new course of study; (2) after completion of all course requirements for the degree; (3) before completion of the course of study if practical training is required for conferral of the degree or (4) during the student's annual vacation, if recommended by the designated

75. *Id.* at 773.

76. 702 F.2d at 641-42.

77. *Id.*

78. *Id.* at 642. This reasoning is inconsistent when one considers that a student's spouse is not permitted to work, even though the spouse has no classes to attend.

79. 8 C.F.R. § 214.2(f)(6) (1983).

80. 16 I. & N. Dec. at 594; 702 F.2d at 642. The addition of the word "independently" became effective on September 2, 1975, 40 Fed. Reg. 32,312 (1975).

81. 8 C.F.R. § 214.2(f)(9) (1984).

82. *Id.* § 214.2(f)(11); see also *Ghorbani v. INS*, 686 F.2d 784 (9th Cir. 1982) (same result before 1983 amendments of the C.F.R.).

83. 8 C.F.R. § 214.2(f)(12) (1984).

84. *Id.* § 214.2(f)(10).

school official as beneficial for the student's academic program.⁸⁵ The provision allowing practical training to be authorized for F-1 students during their annual vacation has only recently been adopted by the INS and became effective August 1, 1983.⁸⁶ According to one group of commentators, this provision is a major breakthrough for alien students wishing to work during their vacations; prior to the amendment such employment was difficult or impossible to procure.⁸⁷

An F-1 student must apply for permission to accept employment for practical training, and the designated school official must certify that (1) the proposed employment is for the purpose of practical training; (2) the proposed employment is related to the student's course of study and (3) comparable employment is not available in the student's country of residence, according to the designated school official's information and belief.⁸⁸ A student is limited to an aggregate of twelve months for all practical training.⁸⁹ The student, however, need not have found employment in order to apply for practical training authorization.⁹⁰ The discussion of proposed regulations dealing with practical training included various suggestions that practical training be eliminated for some or all students, but these were rejected.⁹¹ The INS reasoned that such restrictions would impede its policy of providing for the development of knowledge and skills which occur through such training.⁹²

SCHOOL TRANSFER

The issue of school transfer by F-1 students is another area which has provoked numerous lawsuits. The previous regulations required INS permission for students desiring to transfer from one school to another.⁹³ The new regulations changed the procedure for transfer within the same educational program from an "approval" process to a "notification" process,⁹⁴ involving officials at both the old and new schools.

A student who wishes to transfer to a new school must obtain from that school a properly completed form relating to the student's eligibil-

85. *Id.*

86. *Id.*

87. A. FRAGOMEN, A. DEL REY & S. BERNSEN, *supra* note 30, at 2-56.

88. 8 C.F.R. § 214.2(f)(10) (1984).

89. *Id.*

90. *Id.*

91. 48 Fed. Reg. 14,577 (1983).

92. *Id.*

93. 8 C.F.R. § 214.2(f)(8) (1983).

94. *Id.* § 214.2(f)(8) (1984).

ity for F-1 status.⁹⁵ The student must then give the form to the designated official of the school which the student was last authorized to attend.⁹⁶ A student's failure to furnish the designated official of the old school with the proper form prior to transfer constitutes a breach of the conditions of the student's status and, therefore, the student is deemed deportable under section 241(a)(9) of the Act.⁹⁷

The official must, within thirty days of the date the student presents the form, make a recommendation to the INS to be used in determining which students should be interviewed by the INS concerning their status.⁹⁸ If the designated official at the old school fails to follow the proper procedure, the student must report the official's non-compliance to the INS in writing within ten days after the thirty day period for compliance has expired.⁹⁹

In *Matter of Yazdani*, a case decided under the old regulations, a nonimmigrant student was found to be deportable for a school transfer prior to securing permission from the Service.¹⁰⁰ The Board reasoned that failure to enforce this regulation would severely impede the Service in fulfilling its responsibilities of "keeping track of the thousands of alien students within our borders and of enforcing the immigration laws with respect to those students."¹⁰¹ Although the new regulations permit school transfer without an adjudication by the INS, the school officials' recommendations will assist the Service in locating F-1 students who are not maintaining their status.¹⁰²

An F-1 student, for school transfer eligibility, must still be a bona fide nonimmigrant student, pursuing a full course of study at the last school authorized and intending to pursue a full course of study at the school to which the student intends to transfer. The student must also be financially able to attend the new school.¹⁰³ In *Shoja v. INS*, a non-immigrant student entered this country and attended a school other than the school he was authorized to attend.¹⁰⁴ The court held that the student failed to maintain his nonimmigrant status and was, therefore, deportable.¹⁰⁵

95. *Id.*

96. *Id.*

97. *Id.*

98. *Id.*

99. *Id.*

100. 15 I. & N. Dec. 626 (B.I.A. 1981).

101. *Id.* at 630.

102. See 48 Fed. Reg. 14,576 (1983).

103. 8 C.F.R. § 214.2(f)(8) (1984).

104. 679 F.2d 447 (5th Cir. 1982).

105. *Id.* at 450.

The regulations provide a degree of latitude in school transfer cases. An alien who is "out of status" due to a failure to follow any of the steps for transfer may have the status reinstated by the district director in charge of the INS office with jurisdiction over the transfer application.¹⁰⁶ The director has discretion if the student (1) demonstrates to the satisfaction of the district director that the violation of status resulted from conditions outside the student's control, or that failure to be reinstated would result in "extreme hardship" to the student; (2) makes a written request for reinstatement; (3) is currently pursuing or intends to pursue a full course of study at school; (4) has not engaged in unauthorized off-campus employment and (5) is not deportable on any basis other than his failure to maintain status.¹⁰⁷ The power to reinstate the student, however, lies within the exclusive jurisdiction of the district director; the student may not appeal the decision.¹⁰⁸ Similarly, a denial by the district director of the original request for school transfer is not appealable.¹⁰⁹

DURATION OF STATUS

An F-1 student is admitted to the United States for the "duration of status."¹¹⁰ The prior regulations permitted a student to attend a school for the period of time necessary to complete the course of study indicated on the Certificate of Eligibility issued by the particular school.¹¹¹ The new regulations define "duration of status" as the time period during which the student is pursuing a full course of study in one educational program and any periods of authorized practical training plus thirty days.¹¹² A student who pursues a higher level degree or another degree at the same academic level must file an extension application.¹¹³ The new regulations, contrary to the old, do not require an extension application from a student who fails to complete a course of study on the expected date of completion indicated on his Certificate of Eligibility form because of illness, academic problems, change in major field of study or school transfer.¹¹⁴

106. 8 C.F.R. § 214.2(f)(12) (1984).

107. *Id.*

108. *Id.* See also *Matter of Teberen*, 15 I. & N. Dec. 689 (B.I.A. 1976); *Matter of Hosseinpour*, 15 I. & N. Dec. 191 (B.I.A. 1975), *aff'd* 520 F.2d 941 (5th Cir. 1975); *Matter of Gallares*, 14 I. & N. Dec. 250 (B.I.A. 1972).

109. 8 C.F.R. § 214.2(f)(12) (1984).

110. *Id.* § 214.2(f)(5).

111. *Id.* § 214.2(f)(2) (1983).

112. *Id.* § 214.2(f)(5) (1984).

113. *Id.* § 214.2(f)(5) & (7).

114. 48 Fed. Reg. 14,575 (1983).

In *Matter of Teberen*, another case decided under the old regulations, an F-1 student completed his undergraduate education and sought to extend his stay to attend graduate school.¹¹⁵ The proper application was mailed to the Service, but the application was lost prior to its adjudication. On review, the Board rejected the contention that a student cannot be an "overstay" until the student receives a formal denial of the extension from the district director. The Board determined that a student becomes deportable as an "overstay" when the admission period expires, unless the student receives an extension of his status.¹¹⁶ Other cases decided under the prior regulations have found nonimmigrant students deportable for remaining beyond the time period indicated on their Certificate of Eligibility.¹¹⁷ The result under the new regulations is the same; students are deportable if they remain beyond their newly defined "duration of status" without authorization.¹¹⁸ The decision to grant or deny an extension of stay is within the sole discretion of the district director and, as in the case of transfer requests, may not be appealed.¹¹⁹

CRIMINAL ACTIVITY

The regulations state that a nonimmigrant's conviction in the United States for a violent crime for which a prison sentence of more than one year may be imposed constitutes a failure to maintain status under section 241(a)(9) of the Act,¹²⁰ whether or not the sentence is in fact imposed.¹²¹ In addition, the service has discretion in cases involving less serious criminal activity of nonimmigrant students. In *Matter of O—*, a nonimmigrant student was arrested for soliciting for lewd and immoral purposes, but was not incarcerated.¹²² The Board determined

115. 15 I. & N. Dec. 689 (B.I.A. 1976).

116. *Id.* at 690.

117. *See, e.g., Akhbari v. U.S. INS*, 678 F.2d 575 (5th Cir. 1982); *Ghajar v. INS*, 652 F.2d 1347 (9th Cir. 1981).

118. 8 C.F.R. § 214.2(f)(5) (1984). The regulation provides:

duration of status means the period during which the student is pursuing a full course of study in one educational program (e.g., elementary school, high school, bachelor's degree program, or master's degree program) and any period or periods of authorized practical training, plus thirty days following completion of the course of study or authorized practical training within which to depart from the United States.

Id.

119. *Id. See also Matter of Hosseinpour*, 15 I. & N. Dec. 191, 193 (1975).

120. 8 C.F.R. § 214.1(g) (1983).

121. *Id.* § 214.1(g) (1984).

122. 9 I. & N. Dec. 100 (B.I.A. 1960). *See also Matter of D—*, A-1349127 (B.I.A., Dec. 3, 1959) (unreported decision holding that an alien sentenced to a probationary term had

that the student retained his nonimmigrant status because his conduct resulted in a suspended sentence without any interruption of school attendance.

Criminal conviction per se is not considered a violation of nonimmigrant status.¹²³ In *Matter of Marat-Khan*, a nonimmigrant student was convicted for the offense of residing in an abode where drug laws were being violated and was sentenced to 180 days in jail. The sentence was subsequently reduced to twenty days.¹²⁴ The Board held that the twenty day incarceration did not constitute a failure to maintain status since the student's criminal conduct did not meaningfully disrupt her pursuit of studies, as evidenced by above-average grades which actually improved following her confinement.¹²⁵ The Board indicated that the decision in such cases should be based on the purpose for which the nonimmigrant was admitted, and not merely on the presence or absence of incarceration.¹²⁶ In *Matter of Mehta*,¹²⁷ however, an F-1 student's twenty-three day incarceration resulting from a conviction for the use of profanity in public and breach of peace was found to be inconsistent with the purpose for which the student was admitted. The incarceration meaningfully interrupted the alien's pursuit of academic studies, as evidenced by his lack of satisfactory progress toward a degree. The Board stated that "incarceration for a substantial period for a criminal offense constitutes a violation of nonimmigrant status, in that the respondent is no longer pursuing the purpose for which he was admitted."¹²⁸

CONCLUSION

In *Lennon v. INS*,¹²⁹ the Second Circuit stated, "[i]t is settled doctrine that deportation statutes must be construed in favor of the alien. . . ."¹³⁰ In *Ex parte Tsiang Hsi Tseng*,¹³¹ the court wrote:

maintained his student status since there was no evidence of intent to abandon it, and the student had continued in school while on probation).

123. 9 I. & N. Dec. at 102.

124. 14 I. & N. Dec. 465 (B.I.A. 1973). See also *Mashi v. INS*, 585 F.2d 1309, 1315 (5th Cir. 1978) (an alien who was arrested for demonstrating—a misdemeanor punishable by a \$100 fine but not by imprisonment—and who was prepared to post bond, but was incarcerated for twelve days due to an INS *ex parte* "hold" order, suffered only a minor disruption in his pursuit of studies. The disruption did not justify deportation).

125. 14 I. & N. Dec. at 466.

126. *Id.*

127. 14 I. & N. Dec. 451 (B.I.A. 1973).

128. *Id.* at 452.

129. 527 F.2d 187, 193 (2d Cir. 1975).

130. *Id.* (citing *Fong Haw Tan v. Phelan*, 333 U.S. 6, 10 (1948): "We will not assume that Congress meant to trench on his [the alien's] freedom beyond that which is required by the narrowest of several possible meanings of the words used").

131. 24 F.2d 213 (N.D. Cal. 1928).

It must be remembered that foreign students in this country suffer from various handicaps. They are in unfamiliar surroundings. The language in which classes are conducted is strange to them. The rule cannot be construed to require them to do more than in good faith to try to continue their studies until they either complete them to their own satisfaction or confess defeat.¹³²

Not all decisions, however, are sympathetic to the alien student. Non-immigrant students must avoid the potential problems described above. It is essential for the foreign student to follow the proper regulations to begin and complete the cultural and educational experience of studying in the United States.

John J. Schwab

132. *Id.* at 214.

