

# Immigration and DACA Basics: Risk Factors for Higher Education

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# Agenda

- **Overview of Immigration Laws**

- Types of immigration status common to students
- Current DACA Status
- Types of immigration status common to employees

- **Responsibilities of the Institution**

- Government Agencies with Specific Compliance Requirements

- **Compliance Issues for Most Institutions**

- Student-related
- Employment-related



# Overview of Immigration Laws

- Congress is responsible for immigration laws
- Immigrant vs. Non-immigrant Visas



# Immigration Status Common to Students

## ○ F-1

- Educational objective
- Must be full-time
- Employment approved on-campus, 20 hours per week
- CPT/OPT



## ○ J-1 Student

- Exchange students
- Must be full-time
- Employment approved on-campus, 20 hours per week
- Academic Training

## ○ Dependent Status (H-4, A-2, J-2, etc.)

- No on-campus employment authorized without an Employment Authorization Document

## ○ DACA

## ○ Undocumented



# DACA: In a Nutshell

- 2012 Executive Order Established DACA
- Benefits of DACA for Virginia residents
- 9/5/2017 Executive Order establishing the rescission of DACA
  - 1/13/2018: Federal Court Order requiring renewal applications to be accepted
  - 4/24/2018: Federal Court Order requiring new applications to be accepted
    - NOTE: The judge issued a 90 day stay on this order, which will NOT go into effect if the Administration can provide sufficient justification for the original 2017 Executive Order

# Undocumented

- Prior to admissions
  - Students not eligible for DACA
  - Students choosing not to apply for DACA
- Post enrollment
  - Nonimmigrant visa expires
  - DACA is rescinded
- No in-state tuition
- No employment possibilities



# Immigration Statuses Common to Employees

## Legal Permanent Residence (Green Card)

- Unrestricted Employment; treated like U.S. citizen

## H-1B

- Available in “specialty occupations”
- Employment is limited to the specifically approved job

## J-1

- Exchange Visitors in various categories: professor, research scholar, short-term scholar, student, intern, etc.

## B1/B2

- Used for limited engagements; 9-5-6 Rule

# Federal Agency Oversight



## ○ Department of Homeland Security

- U.S. Citizenship and Immigration Service
  - I-9 Form
  - H-1B, I-140, Citizenship and other immigration petitions
- Immigration and Customs Enforcement
  - Student and Exchange Visitor Program (SEVP)
  - I-9 Enforcement
- U.S. Customs and Border Protection

## ○ Department of State

- Visa Issuance
- J-1 Program

## ○ Department of Labor

- H-1B: Labor Condition Applications & prevailing wage
- Green Card: PERM & prevailing wage



# Compliance Issues for Most Institutions

- Student-related compliance Issues
  - SEVIS
  - Sanctuary Campus Overview
- Employee-related compliance Issues
  - I-9
  - H-1B
  - PERM/Green Card
  - Taxes



# SEVIS Compliance – DSO Requirements

## DSO Requirements

- Must be a “regularly employed member of the school administration” (must be compensated)
- Must have an office at the school
- Compensation may not come from commission for recruitment of international students
- Must be a citizen or lawful permanent resident of the United States
- Must certify that s/he “is familiar with the Service regulations relating to the requirements for admission and maintenance of status of nonimmigrant students, change of nonimmigrant status... school approval under §§214.3 and 214.4 and affirming the official’s intent to comply with those regulations.”



# SEVIS Compliance – Recordkeeping and Reporting Requirements

- **Recordkeeping for Students** – to be kept for 3 years after the students latest contact with the institution
  - Name, identity (date and place of birth, country of citizenship, etc.), and address
  - Record of Coursework, including all transfer credit accepted, and current academic status
  - Practical training, beginning and end dates
  - Termination or graduation date and reason for termination if not graduation
- **Reporting Requirements**
  - Each term/session the Designated School Official (DSO) must register all students and note the start date of the following term/semester
- Within 21 days of the event, **DSO must notify SEVP if student:**
  - Drops below full-time status without approval by DSO
  - Fails to enroll
  - Participates in unauthorized employment
  - Otherwise violates status
  - Changes address and/or major

# SEVP vs. FERPA

- A DHS officer may request any or all of the data in paragraphs (g)(1)(i) through (x) of 8 C.F.R. §214.3 on any individual student or class of students upon notice.
- Notice must be in writing *if requested by the school*.
- School has three work days to respond to any request for information concerning an individual student, and ten work days to respond to any request for information concerning a class of students. The school will respond orally on the same day the request for information is made if DHS requests information on a student who is being held in custody, and DHS will provide a written notification that the request was made after the fact, if the school so desires.
- Note: This is ONLY applicable to students on F, M, or J visas. Normal FERPA regulations apply to other categories of students (even DACA & undocumented)

# SEVIS Consequences of Non-Compliance

**Denial or Withdrawal of Certification can be processed for violations.** Among the violations:

- Failure to comply with DHS Officer's request for information without a subpoena.
- Failure of a DSO to notify SEVP of the attendance of an F-1 transfer student as required by 8 CFR 214.2(f)(8)(ii).
- Willful issuance by a DSO of a false statement, including wrongful certification of a statement by signature, in connection with a student's school transfer or application for employment or practical training.
- Conduct on the part of a DSO that does not comply with the regulations.
- The designation as a DSO of an individual who does not meet the requirements of 8 CFR 214.3(l)(1).
- Issuance of Forms I-20 to students without receipt of proof that the students have met scholastic, language, or financial requirements as required by 8 CFR 214.3(k)(2).
- Issuance of Forms I-20 to aliens who will not be enrolled in or carry full courses of study, as defined in 8 CFR 214.2(f)(6) or 214.2(m)(9).
- Failure to operate as a bona fide institution of learning.
- Failure to employ adequate qualified professional personnel.
- Failure to limit advertising in the manner prescribed in 8 CFR 214.3(j).

# Sanctuary Campus Overview

- An institution which declares itself a sanctuary for undocumented students. The specific provisions may include, but is not limited to:
  - Refusal for ICE to come onto campus without a warrant
  - Refusal for campus police to cooperate with ICE or to enforce immigration laws
  - Not gathering data on immigration or citizenship status of students
  - Proving tuition support, including in-state tuition, to undocumented students
  - Proving distance-learning options for deported students to complete their degrees



# Sanctuary Campus Legal Ramifications

- No legal standing
- Executive Order: Enhancing Public Safety in the Interior of the United States
  - “The Attorney General.....to the extent consistent with law, shall ensure that [sanctuary] jurisdictions are not eligible to receive Federal grants.”
  - A comprehensive list of criminal actions committed by aliens shall be made public on a weekly basis

# Employee-Based Compliance Issues

- I-9
- H-1B
- PERM/Green Card

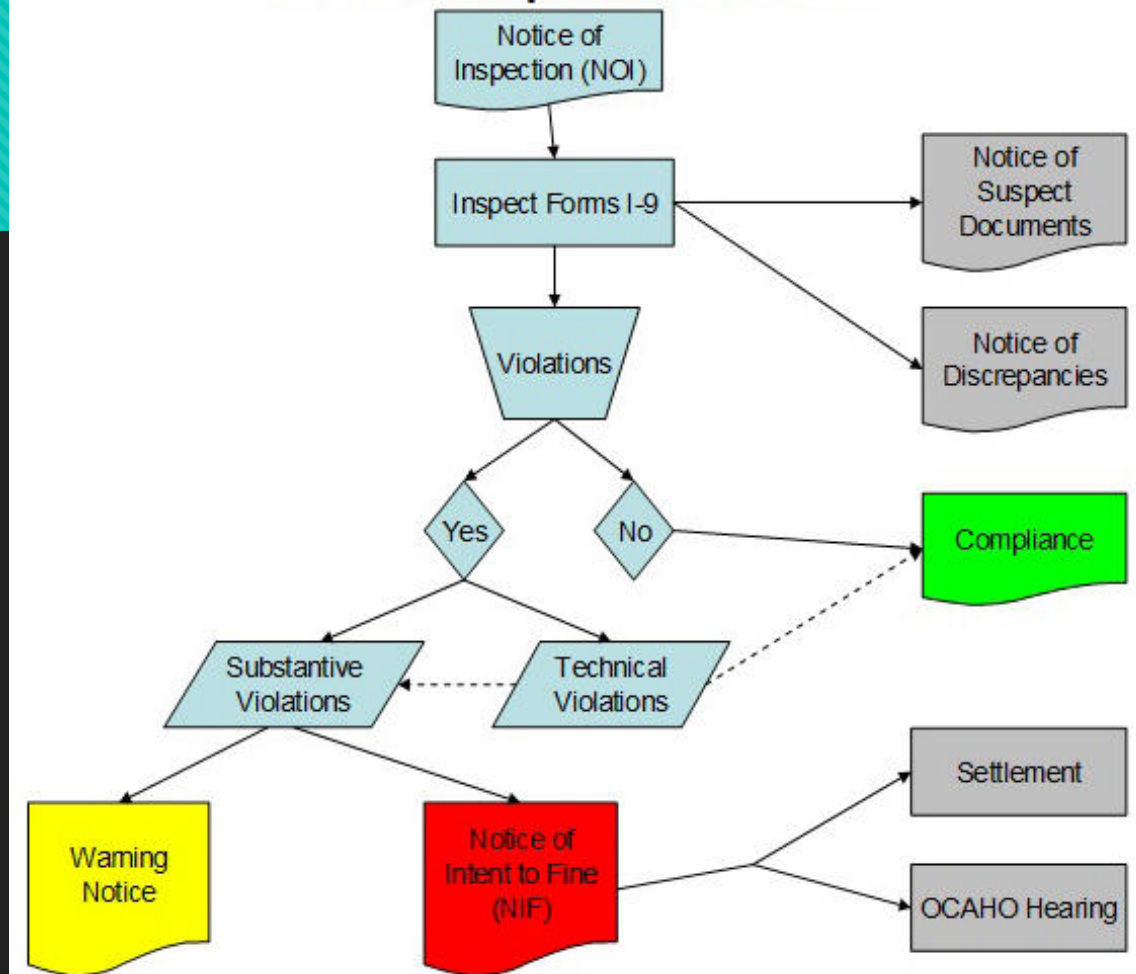




# I-9 Compliance

- Institutions are required to verify identity and employment eligibility of all workers (student workers, faculty, staff and any other "employee") 8 U.S.C. § 1324a (b)
- Retention of I-9: Three years from the date of hire or for one year after the employee is no longer employed, whichever is longer
- Violations: Employers are required to cease the unlawful activity, may be fined, and may be criminally prosecuted. Note: an employer found to have knowingly hired or continued to employ unauthorized workers may be subject to debarment by ICE, meaning the employer will be prevented from participating in future federal contracts and from receiving other government benefits.

## Form I-9 Inspection Process



<https://www.ice.gov/factsheets/i9-inspection>

# I-9 Consequences of Non-Compliance

Substantive / Uncorrected Technical Violation Fine Schedule (Effective for penalties assessed after January 27, 2017 whose associated violations occurred after November 2, 2015)

Substantive Verification Violations	Standard Fine Amount		
	1st Offense \$220 - \$2,191	2nd Offense \$220 - \$2,191	3rd Offense + \$220 - \$2,191
<b>0% – 9%</b>	<b>\$220</b>	<b>\$1,096</b>	<b>\$2,191</b>
<b>10% – 19%</b>	<b>\$548</b>	<b>\$1,315</b>	<b>\$2,191</b>
<b>20% – 29%</b>	<b>\$876</b>	<b>\$1,534</b>	<b>\$2,191</b>
<b>30% – 39%</b>	<b>\$1,205</b>	<b>\$1,753</b>	<b>\$2,191</b>
<b>40% – 49%</b>	<b>\$1,534</b>	<b>\$1,972</b>	<b>\$2,191</b>
<b>50% or more</b>	<b>\$1,862</b>	<b>\$2,191</b>	<b>\$2,191</b>

# I-9 Consequences of Non-Compliance, Con't

## Enhancement Matrix

Factor	Aggravating	Mitigating	Neutral
Business size	+ 5%	- 5%	+/- 0%
Good faith	+ 5%	- 5%	+/- 0%
Seriousness	+ 5%	- 5%	+/- 0%
Unauthorized Aliens	+ 5%	- 5%	+/- 0%
History	+ 5%	- 5%	+/- 0%
Cumulative Adjustment	+ 25%	- 25%	+/- 0%

# H-1B Compliance Issues

## ○ Labor Condition Application (LCA)

- Department of Labor form which sets out details of position
- Must be certified by DOL prior to H-1B petition to USCIS

## ○ Prevailing Wage and Actual Wage

- Payment must equal or exceed industry averages, as regulated by the Department of Labor
- Payment must equal or exceed the amount the employer actually pays to other employees in the same position

## ○ Notification Requirements

- Notice must be posted with details of the appointment
- Must give information about how complaints can be filed
- Note: Additional reporting and recruitment requirements apply to employers deemed to be H-1B dependent and/or "willful violators"

20 CFR § 655.705(c); 8 CFR § 214.2(h)(4)(iii)(B)

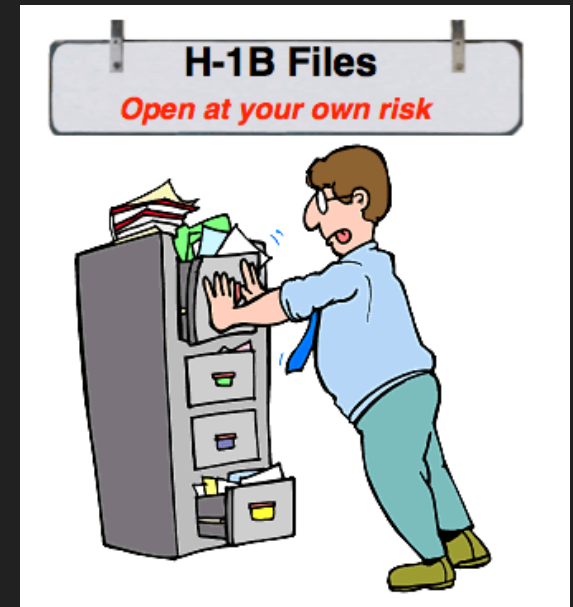
# H-1B Compliance Issues, Con't.

- **Public Access File**

- Information about position, rate of pay, posting notices, proof of actual pay, etc. must be made available to the public on request

- **Termination of Employment Prior to End Date on LCA**

- Notice must be formally given to both employee and to USCIS
- Employer is responsible for employee's return trip to his/her home country (Not relevant if employee voluntarily ended his/her employment)



# H-1B Consequences of Non-Compliance: Fines



## Civil Fines

- Level One: Up to \$1,000 per violation (A violation is any inaccuracy on the LCA, any substantial omission to the notification regulations, or failure to maintain records for an appropriate amount of time)
  - Level Two: Up to \$5,000 per violation, for any "willful violation" (A willful violation is either repeated or intentional violations)
  - Level Three: Up to \$35,000 per violation (typically occurs only after a finding of willful violation and/or when a company has terminated U.S. employees at the same time as hiring an H-1B employee AND committing a willful violation related to the H-1B employee)
- Discretion regarding amount of fines issued. Factors considered:
    - Previous history of violations
    - Number of workers affected by the violations
    - Severity of the violations
    - Efforts made in good faith
    - Employer's explanation of the violation/s
    - Employer's commitment to future compliance
    - Extent to which the employer achieved a financial gain due to the violations, or the potential financial loss, potential injury or adverse effect with respect to other parties

20 C.F.R. §§655.810

# H-1B Consequences of Non-Compliance: Non-Fine Possibilities

## ○ **Suspension of LCA Issuance**

- Level One Violation: Suspension for one year is possible
- Level Two Violation: Suspension for two years is possible
- Level Three Violation: Suspension for three years is possible

## ○ **Payment of Back Wages**

- Any period of time the employee was not paid under a valid LCA (periods of lay-offs, early termination, etc.)
- The employee was not paid the prevailing wage or the actual wage

# PERM/Green Card Compliance Issues

- **Similar to H-1B Requirements**
  - Notification regulations
  - Prevailing Wage
- **Differences from H-1B Requirements**
  - Must be a permanent full-time job
  - Must conduct a national search for U.S. workers meeting specific DOL requirements





# PERM Consequences of Non-Compliance

- Denial of application
- Investigation by Department of Justice, Department of Homeland Security or other government entity
  - DOL will refer for investigation any instance where they believe an employer may be involved in fraud or willful misrepresentation of facts
  - Suspension of processing of pending PERM applications while investigation is pending
- Notice of debarment from the PERM program for up to three years
  - For selling or purchasing a PERM
  - Willfully providing false or inaccurate information in the filing of a PERM
  - Pattern or practice of failure to comply in the audit process
- Criminal indictment
  - Knowingly and willfully furnishing any false information (or counseling another person to do so) in the preparation of a PERM
  - Punishable by fine or imprisonment up to five years

# University Departments Affected

- International Office
- Human Resources
- Student Employment
- Payroll
- Registrar's Office
- Campus Police
- .... ?



Questions?

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