The Big Bad Wolf: Is Your House in Order for Government Visits?

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An Era of Heightened Enforcement?

• An administration that has emphasized enforcement as it pushes for immigration reform?

• Better systems for verifying data, detecting fraud, and ensuring compliance as agency processes involve less human interaction

• Creation of the SEVIS Exploitation Section within ICE–CTCEU and implementation of Program Campus Sentinel

HI!
I might be a Federal agent!
The Ice-Man/Woman Cometh!

U. S. Immigration and Customs Enforcement Investigations is “re-branding” as Homeland Security Investigations (HSI)
SEVP, part of DHS Office of Homeland Security Investigations, has instituted (starting with SEVIS 6.8) adjudications of updates previously accomplished through SEVIS notification, like adding a DSO or program of study

- In part, response to notorious incidents/headlines (Tri-Valley University, etc.)
- Expect SEVP to monitor data more closely to ensure that
  - Student records are up to date (esp. residence address)
  - School information I-17 is up to date (esp. “instructional sites”)
  - Students are not violating employment and distance education restrictions
- Expect slow adjudications, cumbersome process, problematic RFEs related to accreditation, and continuing issues concerning “sites of instruction”
SEVP recertification of F and M international student programs

- Occurs every two years (required by statute) (8 CFR214.3(h)(2))
- “Reaffirms . . . school's eligibility for SEVP certification and . . . compliance with recordkeeping, retention, reporting and other requirements” (8 CFR214.3(h)(2)(iii)(A))
- “Assessment . . . will focus primarily on overall school compliance, but may also include examination of individual DSO compliance . . . [which] will be considered in any petition for recertification of the school.” (8 CFR214.3(h)(2)(iii)(B))
- “All schools are subject to on-site review, at the discretion of SEVP” (8 CFR214.3(h)(2)(iii)(C))

SEVP is off to a late start but ramping up quickly

- More than 2000 schools have started the process
- Initially SEVP notified 50 schools/month, but is now notifying 450/month to begin the process
• Recertification, ctd.
  • Two important tips for successful recertification
    • Review your I-17 to be sure that it is up to date and lists all sites of instruction (not just campuses) – *NOW*!
    • See NAFSA Practice Resource
      http://www.nafsa.org/resourcelibrary/default.aspx?id=29197
      - If you don’t, you’ll be surprised to learn what “campus” means when your application is returned by SEVP or “flagged”
    • Applications of many schools rejected with instructions to update I-17 and re-submit, while 180-day recertification clock continues “ticking”
    • Since the application may be returned to you—perhaps due to your oversight or an adjudicator’s misunderstanding—do not wait to start the application process when you receive notification
  • After you’re recertified, follow up on all flags, even if they don’t require action, since SEVP thinks you are doing something improperly
Mysterious Calls?

- SEVP reports that more than a few schools (including colleges/universities—that’s the surprising part) have failed to file a recertification application by the deadline, even after prompting by SEVP. Of course, when presidents, owners, etc. find out they’ve been decertified, they go into crisis mode, enlist the assistance of Congressional offices and lawyers in fixing the situation, and demand to know why only the PDSO was notified of the requirement to file the application. NAFSA staff was brought into one situation in which the college eventually attributed the failure to apply to the PDSOs “personal problems.” SEVP takes “Congressionals” very seriously, and has to deal with them and questions about whether students need to begin transferring, etc., so these situations are chaotic for them and require substantial staff time, further slowing their very slow and problematic adjudications. So, with all of that in mind, they decided that it might be a good idea also to notify the president, owner, etc. that a recertification application is required and due.

- NAFSA has undertaken a couple of initiatives to inform college and university executives that they may be hearing from SEVP and why, including assisting another association that serves them in preparing a news item and letter.
• Although schools are subject to on-site review during recertification process, this seems pretty unlikely unless school is deemed to be in serious violation

• SEVP may determine that “out of cycle” review, not related to recertification, is warranted, probably based on changes to I-17 (remember new adjudications) or suspicions of violations (8 CFR 214.3(h)(3))

• New SEVP Field Representatives Unit
  • Main activities of Field Reps (http://www.ice.gov/doclib/sevis/pdf/sevp-external-newsletter-jan2012.pdf)
    • Conduct training for DSOs
    • Review nonimmigrant student files
    • Answer questions
    • *Conduct site visits*
    • Attend conferences/meetings
  
• SEVP has advertised three regional section chief positions, and will hire 60 Field Reps this spring (15 per quarter for four quarters)

• SEVP has indicated that Field Reps are not enforcement agents, but some DSOs are concerned about file reviews, etc.
Ensuring institutional compliance

- Keep your I-17 up to date

- Establish/improve systems to get information you need to report in SEVIS, such as student addresses

- Have a careful CPT policy so that you authorize, but only for an activity that “is an integral part of an established curriculum” 8 CFR 214.2(f)(10)(i)
  - Some of the notorious incidents in the headlines have involved inappropriate authorization of CPT, and apparently one legitimate school was threatened with withdrawal of certification because so many students using CPT inadequately

Create DSO “checks and balances” to avoid “rogue DSO” situation

- For example, if only one person sees international student records, see DOJ report on DSO who (apparently with no bad intent) falsified student SEVIS records, faces serious criminal charges, and placed university at risk [http://www.justice.gov/usao/ncw/press/briggs.html](http://www.justice.gov/usao/ncw/press/briggs.html)

- Help students ensure compliance by informing them of the regulations and agency guidance and their responsibilities, such as the OPT unemployment provision, appropriate OPT employment, etc.
CTCEU

• Counterterrorism and Criminal Exploitation Unit (CTCEU) is, like SEVP, part of DHS Office of Homeland Security Investigations

• Comprised of three divisions
  • National Security Threat Task Force
  • Terrorist Tracking Pursuit Group
  • SEVIS Exploitation Section
    • “Identifies, investigates, and prosecutes schools and individuals who exploit the vulnerabilities of SEVIS”
    • “Proactively targets and reviews SEVP certified schools . . . to develop criminal investigations for HSI field agents”

• Administers Project Campus Sentinel

• This summer, CTCEU trained 100+ ICE/HSI field agents, from all 26 field offices, to carry out Project Campus Sentinel (100+ more in 2012)
CTCEU, ctd.

- Project Campus Sentinel
  - “is an outreach initiative established in April 2011 by ICE . . . (HSI) directed toward academic institutions that are approved by HSI to enroll nonimmigrant students. The purpose of this outreach program is to build mutual partnerships between HSI Special Agent in Charge offices and Student and Exchange Visitor Program certified institutions. This exchange will enable HSI to detect and proactively combat student visa exploitations and address inherent national security vulnerabilities.” [http://www.dhs.gov](http://www.dhs.gov)

- See 2011 and 2010 CTCEU presentations on NAFSA website

- Many schools and DSOs have been visited by an ICE agent (now referred to as an HSI agent), and eventually almost all will

- Ask DSOs to identify questionable schools and “problem students”
• Campus Sentinel will result in a visit to most schools, so prepare
  • Usually contact is with PDSO but could be DSO met at a conference, etc.
  • Outreach has been informal, such as “dropping by for a cup of coffee,” which is probably well-intentioned but doesn’t recognize institutional protocols
  • Be prepared for questions about “problem institutions,” “problem students,” as well as requests for records and information about some students
  • Establish protocol for such visits, so they’re helpful/effective but internally controlled. MD Anderson’s is an example (will be provided later).
  • Based on FERPA and regulations, determine record release policy/protocol
  • Careful to avoid identifying difficult students and “institutions who do things differently” who don’t warrant law enforcement investigation
  • One proactive approach by some institutions has been to invite ICE to a larger meeting of campus officials to discuss Campus Sentinel

• See http://www.ice.gov/counterterrorism-criminal-exploitation/
• Records/Information release policies and protocols – FERPA, USA PATRIOT, and the regulations
  • Discuss/Establish policy and protocol with your institution’s legal counsel
  • Most ICE agents say that “FERPA does not apply to . . . Agents seeking information on foreign students” (from CTCEU presentation “Project Campus Sentinel and School Fraud Overview”)
  • Many FERPA experts disagree
    • IIRIRA § 641(c)(2) [codified at 8 USC § 1372(c)(2), the statute that underlies the SEVIS system, provides that “FERPA.-The Family Educational Rights and Privacy Act of 1974 shall not apply to aliens described in subsection (a) to the extent that the Attorney General determines necessary to carry out the program under subsection (a).”
    • “The program” is now SEVIS, and the regulations were published to implement this exception (8 CFR 214.1(h)), apply this FERPA exception only to information that is required to be reported in SEVIS, so the exception does not apply to information that is not required to be reported in SEVIS.
CTCEU, ctd.

• Records/Information release policies and protocols, ctd.
  • When students sign I-20 they affirm “. . . I also authorize the name school to release any information from my records which is needed by INS pursuant to 8 CFR 214.3(g) to determine my nonimmigrant status.”
  • When Exchange Visitors sign DS-2019 they affirm “. . . I authorize the U.S. Department of State-designated sponsor and any educational institution named on the Form DS-2019 to release information to the U.S. Department of State relating to compliance with Exchange Visitor Program regulations.”

• The basic disagreement: ICE agents see the FERPA exceptions as complete and total, while many FERPA experts see them as limited to specific purposes/issues

• DSOs should not be deciding their institutions’ policies and protocols on the fly when an ICE agent has requested records, but rather policies and protocols should be carefully established with legal counsel, campus FERPA experts, etc.—Maybe DSO is not the best person to handle releases?
What You Need to Know about FERPA

• The “myth”-information (quote from a recent ICE PPT on Project Campus Sentinel):
  – “8 USC § 1372(c)(2) exempts ICE from...[FERPA].
  – FERPA does not apply to HSI Agents seeking information on foreign students.
  – 8 CFR § 214.3(g)(1) describes the information that a certified institution must make available to a requesting HSI Agent, such as transcripts or other evidence of a student’s current status.
  – An institution may be decertified for failing to provide requested information.”
What You Need to Know about FERPA

• The truth:
  – In 1996, immigration legislation (IIRIRA, Section 641) gave the former Immigration Service unfettered authority to expand the data elements it previously collected at 8 CFR 214.3(g), but solely via a rulemaking procedure in the Federal Register.
• 8 CFR 214.1(h)—
  “The waiver of FERPA under this paragraph authorizes and requires an educational agency or institution to report information concerning an F, M, or J nonimmigrant that would ordinarily be protected by FERPA, but only to the extent that 8 USC 1372 and [8 CFR] 214.3(g) requires the agency or institution to report information.”
What You Need to Know about FERPA

- ICE says “USA Patriot did away with FERPA”.
  - Contrary to popular belief (and, apparently, ICE training), the USA Patriot Act did not affect this FERPA exception.
  - USA Patriot only permitted law enforcement to obtain and serve ex parte subpoenas, that is, subpoenas not made known to the affected party.
  - This has nothing to do with FERPA.
What You Need to Know about FERPA

• Federal agencies can only change the regulation—214.3(g)—via a rulemaking in the Federal Register.
• The required data elements of 214.3(g) cannot be changed ad hoc or on the spot.
• Nonimmigrants other than F’s, M’s and J’s are not subject to the FERPA disclosure exception (data elements) at 214.3(g). In other words, they are completely protected by FERPA, as are permanent residents and the undocumented.
• The FERPA exception for F’s, M’s, and J’s ONLY applies to representatives of DHS, NOT other federal agencies, eg, FBI, DEA, ATF, NSA, etc....
• In other words, any agency outside DHS MUST have a subpoena to obtain non public student information.
What You Need to Know about FERPA

• ICE says “The student/EV has waived FERPA rights by signing the I-20 or DS 2019”.
  – These are government documents but they are governed by regulations.
  – The signature on the I-20 or DS 2019 authorizes the school to give information required by 8 CFR 214.3(g).
  – This signature is not a blanket waiver of all FERPA protections.
CTCEU, ctd.

• For ICE visits and other kinds of visits, establish a campus protocol

• Does your institution already have policies and procedures on this?

• If not, think about establishing some since “who speaks for the institution” and how it is done are important operational factors
  
  – Can any employee call the newspaper or local TV station and step forward as a representative of the institution?

  – For the same reasons, institutions need protocols for agency interactions

• These can be established so that they are not obstructive in any way but enhance the efficiency and effectiveness of such interactions for the agency and the institution

• A variety of models can work

• Once established, they must be made known to all employees, such as through orientation, training, announcements, etc.
Department of State

- Exchange Visitor Program (EVP) is administered by DOS Bureau of Educational and Cultural Affairs, Office of Private Sector Exchange

- Recent extensive “bad press” for summer work/travel program and longstanding questions about it led to investigations and a moratorium, and could lead to misguided attack on all J programs
  - NAFSA News item “State Department Action on Summer Work Travel Program” at http://www.nafsa.org
  - NY Times article: http://www.nytimes.com/2011/08/18/us/18immig.html?_r=1&pagewanted=all
  - Also other criticism of EVP, such as this study from the Economic Policy Institute http://www.epi.org/files/2011/BriefingPaper317.pdf and this GAO study http://www.gao.gov/products/GAO-06-106
  - Congressional hearings expected soon (scheduled once, then delayed)
DOS, ctd.

• DOS redesignation of J exchange visitor programs
  • Regs. (22 CFR 62.7), indicate every five years but Border Security Act requires every two years, and this is current practice.
  • No specific mention of site visits in regs., but quite possible and increasingly likely
• “On-site reviews”: last year DOS visited 21 largest academic J-1 programs and expressed an interest in expansion of site visits
  • [http://www.nafsa.org/resourcelibrary/default.aspx?id=25275](http://www.nafsa.org/resourcelibrary/default.aspx?id=25275)
• Major issues reported by these institutions:
  • Addresses
  • “Employment” vs “exchange”: watch your titles!
  • Insurance
• Expect EVP to monitor SEVIS data more closely to ensure that Student/Scholar records and institution information are up to date
• Expect more “on site reviews” both as part of redesignation but also as random and targeted integrity measures, possibly without notice
• Expect increasing emphasis on “exchange” and scrutiny of scholar programs to ensure not being used as “workers”
Visa Office, within DOS Bureau of Consular Affairs, has initiated variety of verification/fraud detection/compliance activities in recent years

- Sporadic reports from nonimmigrants (including students) of contact from consulate that issued visa to verify certain information/activities
  - Usually by e-mail
  - May seek to verify employment, school attendance, or departure from U.S. after program

- 2010 DOS Fraud Prevention Unit pilot program to solicit/verify information related to petitions (such as H-1B) filed with USCIS that could result in visa
  - Employers contacted by telephone (apparently some site visits, too) and asked to provide/confirm information that would be sent to the consulate and inform any related visa application

- Possible FPU student/EV verifications in the future (?)
Within the U.S., especially near borders, U. S. Customs and Border Protection (CBP) regularly makes stops, boards buses and trains, and searches travel hubs like airports and train/bus stations.


Recent news reports indicate that CBP has been instructed to discontinue this practice in favor of "‘intelligence driven’ enforcement [that] will provide better targeting . . ., thus making better use of Border Patrol agents and resources.”


Institutions probably need not expect site visits from CBP but if the internal stops and searches resume, CBP may “visit” your students/staff traveling within U.S. in various stations and public conveyances.

You may hear from students and employees surprised by “show me your documents” encounters inside the U.S., possibly even detained. Insist that students/EV’s carry original docs if traveling outside home city.
Preparing for Agency Visits: Review

1. Know the rules
2. Establish compliance practices
3. Gather the players and plan ahead
4. Establish agency visit protocols
5. Establish record/information release protocols