PROPOSED ANSWERS TO SPONSORS' 2012 IFR QUESTIONS

June 1, 2012

TERMINATION OF PARTICIPANTS

1. **The 2012 IFR states that sponsors should *terminate* students who do not send in arrival reports by the required date; if they start work at an unvetted initial, replacement, or additional job; or if they do not respond to monthly check in reports. Does the Department really mean for students to be *terminated*?**

   Yes. The Student and Exchange Visitor Information System (SEVIS) is a national security database that sponsors must ensure provides sufficient information for law enforcement officials to locate participants at any time in case of an emergency. It is incumbent upon participants to keep their sponsors apprised of their whereabouts so sponsors may maintain correct and current SEVIS records. Also, it is a privilege, not a right, for foreign nationals to enter the United States. Sponsors should sufficiently inform participants that if they fail to abide by three particular rules, their programs will be *terminated:* Participants must report to their sponsors within ten days after arrival in the United States (not ten days after their program start dates), not start to work at any unvetted jobs, and respond to sponsors' monthly monitoring outreach or sponsors must *terminate* – not *end* – their programs in SEVIS. If sponsors *terminate* participants' programs for any reason, participants must make arrangements to promptly leave the United States or they will be out of visa status and subject to potential law enforcement action.

2. **If participants must be terminated don't their records have to first be validated with a valid U.S. address (which may not be accurate if the participant has not contacted the sponsor)?**

   Sponsors must validate such records to *active* status even if the U.S. address is not correct and then *terminate* them.

3. **Should sponsors change their status to "No Show" instead?**

   No. Sponsors should *terminate* the programs of such participants. Sponsors often input their own addresses in the residential address fields for participants before participants report their actual addresses. Such records can be validated (i.e., put into *active* status) and then terminated. Sponsors should annotate these records with information about the reasons for the terminations.

4. **If participants voluntarily withdraw from the programs prior to the end or are fired from their positions, can they remain in the country for 30 days to travel?**

   It depends upon the circumstances. If participants voluntarily quit work prior to their committed end program dates or for some reason outside their control, their jobs end prior to their intended program end dates, they can travel for 30 days following their actual end program dates. However, sponsors' obligations for insurance coverage of

participants only last between the program begin and end dates printed on Forms DS-2019. Participants who avail themselves of the 30 days of travel prior to their program begin dates or the 30 days of travel after their program end dates should obtain additional insurance coverage. In rare instances, the reasons host employers fire participants may implicate sponsors' program regulations, and sponsors may opt to *terminate* their programs.

5. Can participants who end the work portion of their programs early travel for the remainder of their maximum four-month program duration, or should sponsors end their programs?

The program is designed for participants who could not afford to travel to the United States unless they were able to offset costs through working. Participants who do not intend to work should travel to the United States on tourist visas. Sponsors should *end* (not *terminate*) programs of participants who voluntarily stop work or who cannot find work within a reasonable time (e.g., three weeks). They may then travel for 30 days prior to returning home.

PROHIBITED JOBS

6. Are participants placed in prohibited jobs (i.e., seafood processing in Alaska) required to abide by the program regulations requiring a cultural component and limiting to four, the number of hours that participants can work between 10:00 p.m. and 6:00 a.m.?

Yes. The only provision of the 2012 IFR with a delayed implementation date is 22 CFR §62.32(h)(16). In addition, visas issued under provisions of the 2011 IFR on or before May 11, 2012, were deemed valid, even if the participants were placed in prohibited jobs. All provisions of the 2012 IFR apply to participants in prohibited jobs. For example, host employers should place participants on work shifts with American workers so the exchange visitors can mingle with them and improve their English. (Many participants placed in seafood processing jobs in Alaska last year complained that they had no Americans to talk to.) They also should arrange work schedules so that program participants do not work the night shift, leaving them some time to explore the areas around where they work. All sponsors who place participants in isolated areas should work with the host employers to organize and implement cultural activities. If sponsors cannot ensure that prohibited jobs allow compliance with other regulations, they should find and vet new jobs for such participants.

7. Can participants be placed in positions for which incidental vehicle driving is required?

No. Jobs that require driving vehicles are prohibited by both 22 CFR §62.32(g)(5) that excludes placement of participants in jobs that require licenses and 22 CFR §62.32(h)(5) that includes vehicle driving in the list of prohibited jobs. This means that participants cannot drive vehicles, for example, between work sites or locations.

The regulations are silent on whether participants can drive vehicles to and from work or after work hours.

8. Would a seasonal food service business that operates in two locations be prohibited under 22 CFR §62.32(h)(14)?

No, it would be allowed. The concept of *itinerant* jobs that are prohibited are those that require working in one place for a comparatively short time and then moving on to work in another place, usually as a physical or outdoor laborer. Such jobs are characterized by alternating periods of working and wandering.

9. Can sponsors place participants in new or additional jobs that are on the prohibited jobs list?

No. The only prohibited jobs that participants may fill on a going-forward basis are those identified in 22 CFR §62.32(h)(16) and those that were identified on Forms DS-2019 of participants who obtained visas prior to May 11, 2012. Subsequent and additional jobs may not be on the prohibited jobs list. Sponsors must follow all other provisions in the 2012 IFR for participants placed in prohibited jobs.

10. Can participants be placed in security positions on casino floors? Can they be placed as waiters/waitresses on casino floors?

So long as participants are not engaged directly in gambling/gaming, sponsors may place them at casinos. However, patrons at casinos may get rowdy due to excessive alcohol consumption or gambling losses. Security jobs at *any* work site may place participants' health, safety, and welfare at risk. Sponsors should carefully consider the vulnerabilities before placing participants in positions where they are required to provide the first line of defense: Must the participants carry weapons (e.g., guns, batons, mace)? Are the participants sufficiently trained to control crowds in a non-physical manner? Requirements for training and eligibility of security personnel vary state-by-state. Sponsors should be aware of these requirements before considering placing participants in these positions. Sponsors may wish to find alternative positions for any participants in security-related jobs.

11. Some posts granted visas after May 11, 2012 for prohibited jobs. Can these participants fill these jobs?

Guidance Directive 2012-02 is clear on this issue: "With respect to the effective date of the prohibited jobs list, participants *who obtained visas on or before May 11, 2012,* may fill the jobs identified on their associated Forms DS-2019, even if those jobs are on the prohibited jobs list."

Participants who obtained visas after May 11, 2012 for prohibited jobs cannot fill such jobs. Sponsors should prevent participants with post-May 11 visas based on prohibited jobs from traveling to the United States until they have arranged and vetted

new jobs. The individuals may be refused entry and returned home, thereby losing the money they spent for airfare. Participants already in the country with post-May 11 visas must quit working their prohibited jobs. In either case, sponsors must find and vet new, permitted jobs for those participants for whom they arranged those prohibited jobs, and self-placed participants must find alternative jobs. (The Department encourages sponsors to assist self-placed participants find new jobs).

We will make all efforts to assist these individuals in scheduling new visa interviews. Please identify these participants by name and SEVIS ID# and contact us through SWTSponsors@state.gov.

12. Are placements at dude ranches permitted?

Yes. They are primarily tourist destinations and not primarily the sites of crop growing or animal husbandry.

HOST EMPLOYER VETTING

13. Do sponsors have to re-verify employers using the new requirements?

Employers vetted on or before May 11, 2012, were properly vetted under the regulations in effect at that time. Starting May 12, 2012, sponsors are required to follow the new regulations set forth in the 2012 IFR.

14. How can sponsors obtain proof of workers' compensation coverage if employers' policies expire between the time the sponsors vet the employer sand participants begins their programs?

Sponsors should obtain proof of current coverage at the time they initially vet employers. If the coverage expires before participants arrives or during the participants' programs, sponsors should obtain evidence of current coverage.

15. The 72 hour requirement for vetting jobs is problematic in cases where sponsors receive job offers on Friday as sponsors may not be able to reach employers over the weekend. Also, not all sponsors employ staff over the weekends. Could this be changed to "three business days"?

Not at this time. Sponsors should report their experiences with this requirement when filing comments in response to the IFR.

16. Is it necessary for sponsors to access the IRS e-services website to confirm employer EINs via the IRS website, as this method of EIN verification can weed out SSNs being inappropriately used as EINs?

Although the Department views this approach as a best practice, the 2012 IFR eliminates the requirement that sponsors verify EINs of potential host employers.

17. Does saving a screen shot of a state Secretary of State website listing an employer or obtaining a copy of a company's local (city or county) business license meet the requirements of 22 CFR §62.32(n)(2)(iii)?

Yes. This is what the Department had in mind when it replaced the requirement that sponsors verify EINs with the requirement that they obtain copies of potential host employers' business licenses.

AUSTRALIA AND NEW ZEALAND TWELVE-MONTH STUDENT WORK AND TRAVEL PILOT PROGRAMS (AUSTRALIA/NEW ZEALAND PILOT PROGRAM)

18. Will there be a separate Guidance Directive for the Australia/New Zealand Pilot Program?

No. With respect to pilot programs, all regulations governing the specific category of exchange (e.g., 22 CFR 62.32, Summer Work Travel) prevail except when the pilot program guidelines differ. For example, 22 CFR §62.32(j)(1) requires sponsors in the Summer Work Travel Program to monitor participants on a monthly basis. The guidelines for the administration of the Australia/New Zealand Pilot Program, however, require sponsors to monitor their participants every 60 days. Because the provisions differ, sponsors would adhere to the pilot program guidelines. However, sponsors must follow the overall monitoring regime set forth in 22 CFR §62.32(j) when conducting such monitoring every 60 days because the pilot program guidelines are silent on the details of routine monitoring.

Similarly, because the Australia/New Zealand Pilot Program guidelines allow "sponsors [to] determine whether a participant will obtain employment at a single location per the 12-month period," participants in the 12-month program are not required to have seasonal or temporary jobs. Sponsors, however, are cautioned to ensure that these participants do not displace American workers, as all other provisions in the 2012-IFR apply.

19. Do sponsors have to find new placements for participants in the Australia/New Zealand Pilot Program whose jobs are now prohibited by the 2012 IFR?

So long as participants in jobs now prohibited by the 2012 IFR obtained their visas prior to May 11, 2012 they can remain in those jobs. However, they cannot change to prohibited jobs and any additional or subsequent jobs must be vetted pursuant to the 2012 IFR.

20. Must participants in the 12-month Australia/New Zealand Pilot Program be placed in *seasonal or temporary* jobs and in those that require *minimal training*, e.g., unskilled positions?

Participants in the Australia/New Zealand Pilot Program that are currently placed in positions that are not seasonal or temporary or require more than minimal training are now in prohibited jobs. So long as such participants obtained their visas prior to May 11, 2012, they can remain in those jobs. However, they cannot change to prohibited

jobs or jobs that require more than minimal training and sponsors must fully vet any additional or subsequent jobs pursuant to the 2012 IFR.

21. Department of Labor's Hazardous Occupations for Minors, Sub Part E 570.61 (4), states:

> All occupations involved in the operation or feeding of the following power-driven machines, including setting up, adjusting, repairing, or oiling such machines or the cleaning of such machine or the individual parts or attachment of such machines, regardless of the product being processed by these machine (including, for example *the slicing in a retail delicatessen* of meat, poultry, seafood, bread, vegetables or cheese, etc.): meat patty forming machines, meat and bone cutting saws, *poultry scissors or shears; meat slicers, knives*. . . . (emphasis added)

Does this mean that kitchen prep work involving knives or kitchen cutting/slicing utensils are included on SWT prohibited jobs list?

Kitchen prep work is not prohibited so long as it does not involve power-driven industrial food slicing and saw machines.

PARTICIPANT SCREENING

22. To confirm participants' English language proficiency, is it necessary to obtain English language test scores *and* interview the applicants?

No. The regulations at 22 CFR §62.32(d)(2) allow sponsors the option of evaluating applicants' English proficiency through *either* "recognized language tests administered by academic institutions or English language schools" *or* through "the required documented interviews." Regardless of the method of screening, sponsors must ensure that participants are sufficiently proficient in English not to put at risk their health, safety, and welfare, and to be capable of performing in their jobs.

23. Please interpret "Sponsors must input job titles and sites of activity in the (SEVIS) prior to participants' visa interviews (and not prior to issuing the Forms DS-2019.)"

Sponsors may issue Forms DS-2019 without inputting job titles and sites of activity, but they must enter such information into SEVIS prior to applicants' visa interviews.

24. Is it acceptable to issue Forms DS-2019 that show employers' main addresses along with supporting letters listing possible locations of where the participants might be placed?

No. While sponsors may issue Forms DS-2019 without inputting job titles and sites of activity, they must enter such information into SEVIS prior to applicants' visa interviews.

25. Some sponsors currently require applicants to verify their school vacation dates. Instead of collecting this vacation date information from individual applicants, may they rely on each country's program duration as set by the Department for all participants from the respective countries?

No. The country-specific dates define program participation windows by indicating the earliest start date and the latest end date for programs. In order to ensure that participants do not miss any school, however, sponsors must make certain that the dates of their programs allow them both to complete the prior term and start the next term on time.

PARTICIPANT PLACEMENT

26. Could the Department clarify how to define a "season" or a "temporary need"? For example, what is the maximum continuous length of time that a "season" may last? Is there any minimum break that a host employer must have between "seasons"? Clear direction on this point would help to ensure consistent implementation across all sponsors and limit employers moving from sponsor to sponsor on a staggered season basis.

22 CFR §62.32(b) states:

> Employment is of a seasonal nature when the required service is tied to a certain time of the year by an event or pattern and *requires labor levels above and beyond existing worker levels.* Employment is of a temporary nature when an employer's need for the duties to be performed is a *one-time occurrence, a peak load need, or an intermittent need*. It is the nature of employers' needs, not the nature of the duties that is controlling.

It is difficult to specifically answer this question as every situation is fact specific. Sponsors should keep in mind, however, that the Department intends that J-1 visa holders participating in the Summer Work Travel Program do not displace American workers (see 22 CFR §62.32(g)(7). It will be monitoring program data to determine whether individual employers hire J-1s on a year-round basis, and it will be able to identify any sponsors that might opt to rotate seasons with each other.

Some resort areas have multiple peak seasons, but do not have sufficient local population to fill all positions. For example, in a recent meeting in the Wisconsin Dells, we learned that there are approximately 6,000 full-time residents, but at peak season, there are nearly 25,000 positions to be filled. Such jobs, even if filled by J-1 participants for multiple seasons, are appropriate jobs for the Exchange Visitor Program.

27. May participants from non-visa waiver countries quit their current jobs and search for new employment, or must they first secure new jobs?

Although there is no regulatory requirement that participants have new jobs prior to leaving their initial jobs, they should leave jobs only after discussions with their

sponsors. The 2012 IFR states: "[s]ponsors must not pose obstacles to job changes, but must offer reasonable assistance to participants wishing to change jobs regardless of whether their jobs were secured by the sponsors (direct-placed) or by the participants (self-placed)." (22 CFR §62.32(g)(2)) Moreover, sponsors must vet subsequent or additional jobs before participants can start work (see 22 CFR §62.32(d)(6)).

Participants with pre-placed jobs are expected to report to the jobs listed on their Forms DS-2019 (and to which they committed) and to start work. Sponsors who suspect that participants did not intend to work at those jobs should t*erminate* their programs in SEVIS or risk being implicated themselves in visa fraud. However, there are a number of legitimate reasons that participants who have started jobs may wish to change jobs. Such participants should contact their sponsors to express their concerns and attempt to resolve their situations.

28. Are job fairs held at domestic locations at which sponsors organize Skype interviews between host employers and program applicants considered "pay" or "incentive" under 22 CFR §62.32(g)(1).

No. The Department considers these to be employment fairs, which are not considered pay or incentives.

29. Can sponsors fund meetings where large Summer Work Travel employers come together to discuss best practices related to topics such as cultural exchange, managing international exchange visitors, and the regulatory environment, or would that be considered an *incentive* pursuant to 22 CFR§62.32(f)?

The regulations do not prohibit sponsors from funding such informational sharing meetings.

MISCELLANEOUS

30. Will the Department supply a form to sponsors to report program fees?

We have not made this determination yet.

31. Is the Department planning to release a new version of the Foreign Entity Report?

We do not have plans for changing the requirements for this report at this time.

32. Is a sponsor in compliance with the regulations if it requires participants to validate their programs within ten days of their program start dates and then check-in with the sponsor by the last day of every month thereafter?

No. The scenario is non-compliant because participants must report to their sponsors within ten days of *arrival,* not within ten days following their *program start*

dates. However, the Department interprets “monthly personal contact” to mean that 30 days should not elapse between contact between the sponsor and participants. In other words, checking in on the 15th of May and the 15th of June is acceptable; checking in on the 1st of May and the 30th of June is not. Similarly, checking in on the 30th of each month is acceptable.

33. Will the cap number reset annually, or is it rather set firmly at the numbers received in 2011?

The cap will remain in place until further notice.