

When Foreign Students or Their Family Members are Sexually Assaulted: Immigration Implications of the Student and Exchange Visitor System¹²

By Joanne Lin, Kavitha Sreeharsha and Naila McKenzie

Summary

Sexual assault on college and university campuses has been a longstanding problem. It occurs in many different ways, including: marital rape, acquaintance rape, date rape, gang rape, stranger rape, sexual harassment, incest, child sexual abuse, as well as in many other forms of sexual crimes. Sexual assault occurs in residential halls, professors' offices, science laboratories, fraternities, and elsewhere both on and off campus. Sexual assault survivors include students, faculty, staff, and family members of every race, ethnicity, economic class, national origin, sexual orientation, age, or disability. In short, the endemic problem of sexual assault affects every

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² In this Manual, the term "victim" has been chosen over the term "survivor" because it is the term used in the criminal justice system and in most civil settings that provide aid and assistance to those who suffer from domestic violence and sexual assault. Because this Manual is a guide for attorneys and advocates who are negotiating in these systems with their clients, using the term "victim" allows for easier and consistent language during justice system interactions. Likewise, The Violence Against Women Act's (VAWA) protections and help for victims, including the immigration protections are open to all victims without regard to the victim's gender identity. Although men, women, and people who do not identify as either men or women can all be victims of domestic violence and sexual assault, in the overwhelming majority of cases the perpetrator identifies as a man and the victim identifies as a woman. Therefore we use "he" in this Manual to refer to the perpetrator and "she" is used to refer to the victim. Lastly, VAWA 2013 expanded the definition of underserved populations to include sexual orientation and gender identity and added non-discrimination protections that bar discrimination based on sex, sexual orientation and gender identity. The definition of gender identity used by VAWA is the same definition as applies for federal hate crimes – "actual or perceived gender-related characteristics." On June 26, 2013, the U.S. Supreme Court struck down a provision of the Defense of Marriage Act (DOMA) (*United States v. Windsor*, 12-307 WL 3196928). The impact of this decision is that, as a matter of federal law, all marriages performed in the United States will be valid without regard to whether the marriage is between a man and a woman, two men, or two women. Following the Supreme Court decision, federal government agencies, including the U.S. Department of Homeland Security (DHS), have begun the implementation of this ruling as it applies to each federal agency. DHS has begun granting immigration visa petitions filed by same-sex married couples in the same manner as ones filed by heterosexual married couples (<http://www.dhs.gov/topic/implementation-supreme-court-ruling-defense-marriage-act>). As a result of these laws VAWA self-petitioning is now available to same-sex married couples (this includes protections for all spouses without regard to their gender, gender identity - including transgender individuals – or sexual orientation) including particularly:

- victims of battering or extreme cruelty perpetrated by a U.S. citizen or lawful permanent resident spouse against a same sex partner in the marriage is eligible to file a VAWA self-petition; and
- an immigrant child who is a victim of child abuse perpetrated by their U.S. citizen or lawful permanent resident step-parent is also eligible when the child's immigrant parent is married to a U.S. citizen or lawful permanent resident spouse without regard to the spouse's gender.

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segment of a campus community, including foreign or international students and faculty and their family members.²

This chapter focuses on recent changes in the foreign student visa system and explores how these changes affect the way academic institutions interact with sexual assault survivors who happen to be foreign students or family members of foreign students. Likewise, this chapter provides an overview for advocates and attorneys of immigration relief available to immigrant victims of sexual assault and domestic violence. Immigrant victims of sexual assault or their family members may qualify for other forms of immigration benefits unrelated to the victims' status as a student. These legal remedies are available to both documented and undocumented victims. This relief is available to immigrant victims with student visas, work-related visas, faculty members with work-related visas, and to victims' family members of students, faculty, or university staff.³

Since the tragic events of September 11, 2001, there have been significant changes in the laws and regulations governing the foreign student visa system. Specifically, the Departments of State ("DOS") and Homeland Security ("DHS") instituted a host of security measures aimed at keeping terrorists from entering the United States. The most important of these security measures with respect to foreign students was the creation of the Student and Exchange Visitor Information System ("SEVIS"), a new interagency information system created to track and monitor foreign students. Participation in the SEVIS program is now mandatory for all higher education institutions enrolling foreign students. The implementation of SEVIS has transformed the institutional role of academic institutions as well as the specific responsibilities of the Principal Designated School Officials ("PDSO") assigned to monitor foreign student enrollment and activities. The new mandatory reporting rules required of foreign students and schools have revolutionized inter-relationships among foreign students, their family members, PDSOs, and the Department of Homeland Security.

This chapter starts with an overview of the three visa classifications pertaining to foreign students and exchange visitors ("F", "M", and "J" visas). Part II describes the Student and Exchange Visitor Information System and the role of the PDSO. Part III concludes with a discussion of the impact of SEVIS on foreign students, their family members, and educational institutions. Understanding SEVIS' requirements and how it has been implemented at the victim's university is critical to knowing how to counsel foreign students and their family members who are sexually assaulted or raped.

Part I: The Most common student visas: F, M, J Programs

There are three avenues for foreign students to come to the United States to study temporarily:

- the "F" visa for academic study
- the "M" visa for vocational study
- the "J" visa for cultural exchange.

In Fiscal Year 2005, Department of State issued 565,790 F, M, and J visas to international students and scholars wishing to come to the United States to study and/or work as part of a cultural exchange program.⁴ In that same year, these three visa categories constituted 10.5 percent of all the nonimmigrant visas issued.⁵

It should be noted that nonimmigrant students are not necessarily required to possess a F, M, or J visa to study in the United States. Rather, individuals holding H-1B (specialty occupation), L-1 (multinational manager or executive), or O-1 ("extraordinary" aliens in sciences, arts, education, business, or athletics) are likewise permitted to attend school on a part-time basis. In addition, certain accompanying family members of visa

² See appendix for chart of sexual assault scenarios and immigration options and how many are granted.

³ For more detail, see other chapters on VAWA self-petitioning, The U-visa for victims of criminal activity, the T-visa for victims of human trafficking, gender-based asylum, and VAWA Cancellation of Removal.

⁴ The immigration law term to describe a person legally admitted to the United States for a specific purpose and a temporary period of time is a *nonimmigrant*. There are more than 20 nonimmigrant visa categories, and they are commonly referred to by the alphabet letter that denotes their subsection in the Immigration and Nationality Act section 101(a)(15). Nonimmigrants do not have permission to remain permanently in the United States without changing their status.

⁵ Chad Haddal, *Foreign Students in the United States: Policies and Legislation*, in CRS Report for Congress (2006).

holders who receive visas as dependents, such as those in E-2 (treaty investor), H-4 (specialty occupation)⁶, and L-2 (multinational manager or executive) can attend school on a part-time or full-time basis. Such students in non-F, M, or J status are not tracked by SEVIS.

Moreover, schools are not precluded from enrolling individuals who may be out of status or originally entered the United States without being admitted or paroled by an immigration official.⁷ Nor are they precluded from enrolling individuals not otherwise authorized under the immigration laws to engage in full- or part-time study.⁸ However, many schools have established administrative policies that preclude enrollment of such individuals or deny them certain benefits such as in-state tuition rates, on-campus housing, or access to highly competitive programs.

“F” Visa: F-1 student status is based on full-time attendance at a DHS-authorized school in addition to a showing that the student is making continued progress toward an educational goal.³ F-1 visas may also include a period of practical training.⁹ Schools that may be approved for attendance by F-1 students include:

- Colleges or universities, i.e., an institution of higher learning that award recognized bachelor’s, master’s, doctoral, or other professional degrees;
- Community colleges or junior colleges that provide instruction in the liberal arts or in the professions and that award recognized associate degrees; or
- Seminaries, conservatories, academic high schools, elementary schools, or institutions that provide language training, instruction in the liberal arts or fine arts, instruction in the professions, or instruction or training in more than one of these disciplines.¹⁰

The F-1 student is generally admitted as an F-1 visa holder for the period of the program of study, referred to as the “duration of status.” The F-1 student’s spouse and unmarried children under the age of 21 may accompany the F-1 student under a F-2 visas as dependents. F-2 dependents may remain in the United States for the duration of the F-1 student’s valid immigration status.⁴

F-1 and F-2 visa holders are generally barred from off-campus employment. F-1 students are permitted to engage in on-campus employment if the employment does not displace a United States resident. In addition, F-1 students are permitted to work in practical training that relates to their academic degree program, such as paid research and teaching assistantships. An F-1 or F-2 visa holder who otherwise accepts off-campus employment violates the terms of the F visa and is subject to deportation and other immigration penalties.

⁶ Under the Violence Against Women Act of 2005, a dependent family member of A, E(iii), H, and G non-immigrant visa holders may apply for employment authorization if s/he meets the requirement of being abused or subject to extreme cruelty during the marriage. The Violence Against Women and Department of Justice Reauthorization Act of 2005, PL 109-162, January 5, 2006 *amending* 8 U.S.C. § 1105a. For further discussion, see Chapter 7 on VAWA self-petitioning.

⁷ Although there exists no statute or regulation specifically barring undocumented persons from attending college, institutions maintain varying policies with respect to the issue of accepting undocumented persons. See Catherine Hausman & Victoria Goldman, *Great Expectations*, N.Y. TIMES, Apr. 8, 2001, Education Life Section, at 26. See also E. Badger, B. Ericksen & S. Yale-Loehr, *Betwixt and Between: Undocumented Aliens and Access to U.S. Higher Education*, INTERNATIONAL EDUCATION (Fall 2000).

⁸ Memorandum from the INS Central Office, CO 214f-P/CO-214m-P (Jan. 14, 1994), *reprinted in* 71 INTERPRETER RELEASES 261 (Mar. 14, 1994).

³ See I.N.A. § 101(a)(15)(F)(i); 8 U.S.C 1101(a)(15)(F)(i). For a list of current DHS approved schools, U.S. Immigration and Customs Enforcement, Student Exchange and Visitors Program Approved Schools, <http://www.ice.gov/sevis/students/>

⁹ Practical training presents the F-1 student with an opportunity to apply classroom theory to a real world setting, rounding out an educational stay with relevant work experience.

¹⁰ 8 C.F.R. § 214.3(a)(2)(i) (2003). Note: F-1 students may *not* attend *public* elementary schools nor publicly-funded adult education programs; nor may F-1 students attend a public high school for more than one year. Those attending a public high school must pay the school the “reasonable and realistic estimates” of the actual cost to attend, generally paid in advance. See I.N.A § 214(m); 8 U.S.C. § 1184(m).

⁴ See I.N.A. § 101(a)(15)(F)(ii); 8 U.S.C 1101(a)(15)(F)(ii).

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An F-2 child may pursue full-time studies in a primary or secondary school but may not pursue full-time studies at the post-secondary level.¹¹ F-2 spouses are prohibited from engaging in full-time studies at any level.⁵

“M” Visa: Foreign students who wish to pursue a vocational course of study may qualify for an “M” visa. Like with F-1 visa holders, an M-1 student’s spouse and unmarried children under the age of 21 may accompany the M-1 visa holder as M-2 dependent family members. All M nonimmigrants, including derivatives, are barred from working in the United States including on-campus employment. Unlike the F-1 student who is granted duration of status for his or her studies, an M-1 student is admitted for a specified date certain.

An M-2 child may pursue full-time studies in a primary or secondary school. No M-2 spouse or child may pursue full-time studies at the postsecondary level.

Schools that may be approved for attendance by M-1 students include:

- Community colleges or junior colleges that provide vocational or technical training and that award recognized associate degrees;
- Vocational high schools; or
- Schools that provide vocational or nonacademic training other than language training.¹²

“J” Visa: Foreign students admitted as recipients of the cultural exchange J-1 visa include Fulbright scholars, professors, teachers, trainees, specialists, medical graduates, au pairs, and participants in travel/work programs. The J-1 visa recipient’s spouse and unmarried children under 21 years of age may accompany the J-1 visa holders on J-2 visas.

Many J-1 students are required to return to their country of origin for two years before they can return to the United States in another legal immigrant or nonimmigrant status.¹³ There are few exceptions to the foreign residency requirement for J-1 nonimmigrants.⁶ Even J-1 nonimmigrants who marry United States citizens are required to return home for two years.¹⁴ Among the limited exceptions to the two year requirement are: if a J-1 visa holder’s US citizen or legal permanent resident spouse or child would experience extreme hardship if the J-1 visa holder were required to leave the United States¹⁵; in cases of persecution on the basis of race, religion, political option, national origin, or social group¹⁶; or if it is the national interest for the J visa holder not to return to their home country¹⁷.

Part II: Student and Exchange Visitor Information System (“SEVIS”)

SEVIS refers to the regulations governing F, M, and J student visa holders, their dependents, and educational institutions that admit them as well as the interagency, integrated computer information system that tracks F, M, and J students.

DHS’ enforcement branch, US Immigration and Customs Enforcement (“ICE”), manages the SEVIS program, which can only be accessed by DHS-approved schools and by government employees at the Department of State and the Department of Homeland Security. DHS’ Citizenship and Immigration Services (USCIS) approves the

¹¹ Post secondary includes junior and community colleges, four year colleges and universities for the purposes of bachelor’s or post-graduate degrees.

⁵ 8 C.F.R. § 214.2(f)(15)(ii)(B).

¹² 8 C.F.R. § 214.3(a)(2)(ii) (2003).

¹³ This foreign residency requirements applies to J nonimmigrants who meet any of the three following conditions: (i) an agency of the United States government or their home government financed in whole or in part, directly or indirectly, the J-1’s participation in the program; (ii) the country of origin clearly requires the services or skills in the field of academic study; or (iii) the J-1 is coming to the United States to receive graduate medical training.

⁶ INA § 212(e); 8 U.S.C. §1182(e). For example, a J-1 nonimmigrant may apply for a visitor visa, without having to return home for two years.

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.* U-visa applicants may also apply for a waiver of the two-year requirement.

schools that students are authorized to attend while in F, M, and J status. These schools are responsible for filing requests with USCIS. As of August 2003, all continuing foreign students were entered into SEVIS.¹⁸

The most important change introduced by SEVIS is the new mandatory institutional reporting requirements placed on all schools participating in the SEVIS program. Prior to SEVIS, schools had not been required to make regular reports to the Immigration and Naturalization Service on students in F and M status. Now that SEVIS is in place, schools are required to report virtually *all* changes or “events” requiring action by a student, including:

- monitoring of student status;
- reporting violations;
- issuing SEVIS I-20 Certificates of Eligibility;
- transferring schools;
- seeking reinstatement of foreign student status;
- reporting address changes; and
- tracking students’ movements inside and outside the United States.

Principal Designated School Official (“PDSO”): In light of the new school reporting requirements under SEVIS, it is critical to understand the responsibilities placed on PDSO. PDSOs are the only individuals authorized to sign SEVIS Forms or to act officially on behalf of the school in carrying out the institution’s responsibilities under the immigration regulations. Foreign students have frequent contact with PDSOs on issues including the student’s school records, immigration applications, and proof of financial responsibility. The PDSO must ensure that the school maintains all appropriate records and must update SEVIS within 21 to 30 days of a specified event¹⁹, depending on the nature of the occurrence.²⁰ This information – whether reporting a student’s failure to maintain status or simply an address change – becomes part of the student’s permanent SEVIS record and will follow the student wherever he or she goes. Failure of the PDSO to ensure compliance with SEVIS requirements may result in the prosecution of the PDSO under federal law²¹ and/or in the withdrawal of school approval to participate in SEVIS. Grounds for withdrawal of school approval include:

- Failure to maintain certain information on students or failure to provide it on written notice;
- Failure to comply with DHS/Citizenship Immigration Services (“CIS”) reporting requirements regarding students;
- Failure to inform CIS of a student’s intent to transfer to another school;
- Willful issuance of a false statement in connection with a school transfer or an application for employment or practical training; and
- Issuance of certificates of eligibility to individuals who will not be enrolled in or carry full courses of study consistent with maintenance of student status.

Within 21 days of occurrence, institutions must report the following changes in SEVIS:

- Changes in information included on SEVIS I-20 Certificate of Eligibility including name, country of birth, country of residence, country of citizenship, date of birth, field of study, financial support requirements, intended field of study, degree objectives, and start/end dates of program;
- Student falling below full course load without PDSO’s prior authorization *or* for any other status violations;
- Optional practical training, curricular practical training, and/or academic training beginning and ending dates;
- Program termination date and reason, if known;
- Any disciplinary actions taken by the school against the student due to a criminal conviction;
- Enrollment date at the school or commencement of a program, or failure to enroll or begin program;
- Name or address changes for students or their dependents; and

¹⁸ 76 Fed. Reg. 76256-76280 (Dec. 11, 2002).

¹⁹ This will be discussed more fully below.

²⁰ 8 C.F.R. § 214.3(g) (2003).

²¹ I.N.A. §101; 18 U.S.C. § 1001.

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- Changes in numbers and/or names of dependents.

No later than 30 days after deadline for class registration or the beginning of the program, institutions must also report additional information, both for newly enrolled and newly arrived students and their dependents:

- Continuing student's current address if it has changed;
- Start date of continuing student's next term if it has changed; and
- Any student who fails to enroll or start participation in the program if he or she entered the United States or transferred using the institution's SEVIS I-20 Certificate of Eligibility.

Name and Address Changes: Foreign students must report any legal name change or change of address within 10 days of the change to the PDSO.²² J exchange visitors must also report address changes to DHS using Form AR-11 within 10 days of any change of address.

Maintaining student status: As a general matter, it is critical for foreign students to maintain their student status in order to remain in a valid F or M status. There is no longer a grace period for students who fail to maintain status or who withdraw without PDSO authorization. Failure to maintain student status can result in severe, permanent immigration consequences.²³

An F-1 student is required to maintain a full-time course load. At the undergraduate level this generally means registration for at least 12 academic credit hours per term.²⁴ Graduate level "full-time" is more flexible and left essentially to the school to define. Regardless of level, students are expected to be making normal progress toward the educational goal stated on the face of the certificate of eligibility.²⁵

The PDSO may permit the student to enroll for or drop to less than a full-time course load where it is recommended for academic reasons (e.g., to allow a student to adjust to a United States educational program methodology or because of initial language difficulties) or due to the student's illness.²⁶ SEVIS regulations severely restrict the number of times a student may reduce his or her course load. Specifically, a student may drop below a full course load only *once* during a particular program level for academic reasons but must still maintain at least six semester or quarter hours, or half the clock hours required for a full course of study during that term.²⁷ The only exception to the one-time rule is during the final term if the student needs less than a full course to graduate.²⁸ Furthermore, if a student *fails* to obtain authorization from the PDSO prior to reducing his or her course load, or he or she drops below a full course load more than once, he or she will be considered out of status and must seek reinstatement of student status.²⁹

Dropping below a full course load for medical reasons is a bit more flexible, however, such drops are limited to 12 months in the aggregate at one program level and must be approved, where practicable, by the PDSO ahead of time by providing medical documentation from a medical doctor, doctor of osteopathy, or a licensed clinical psychologist to substantiate the illness or medical condition.³⁰

²² 8 C.F.R. § 214.2(f)(17) (2003).

²³ Nonimmigrant visa holders who fail to maintain status may still be eligible for VAWA self-petitions, VAWA cancellation of removal, some family petitions when the sponsor is an immediate relative, asylum, U-visas for victims of criminal activity and T-visas for victims of human trafficking. J visa holders with the two year residence requirement are not eligible for a waiver under VAWA but are eligible for waivers when applying for U-visa or T-visa. T-visas will have limited availability to student visa holders because an applicant must prove that she is physically present in the United States on account of the trafficking. Asylum is also a less likely option because applicants are required to file an asylum petition within one year of arriving in the United States. For a more extensive discussion about these options for immigration relief, please see chapters on VAWA self-petitioning, VAWA cancellation, U-visas, T-visas, and gender-based asylum.

²⁴ 8 C.F.R. § 214.2(f)(6)(i)(B) (2003).

²⁵ 8 C.F.R. § 214.2(f)(5) (2003).

²⁶ 8 C.F.R. § 214.4(f)(6)(iii) (2003).

²⁷ *Id.* The clock hour requirement enforces attendance for those hours per week rather than just be enrolled in the minimum units.

²⁸ 8 C.F.R. § 214.2(f)(6)(iii)(C) (2003).

²⁹ *Id.*

³⁰ 8 C.F.R. § 214.2(f)(6)(iii)(B) (2003). Medical conditions related to sexual assault or domestic violence will be discussed further below.

Extension of Stay: Prior to SEVIS’s implementation, PDSOs were permitted to indicate an additional period of up to one year longer than the normal period required to complete the program when calculating the completion date placed on the I-20. The SEVIS regulations no longer permit this. Any necessary program extension must be requested by the student *prior* to the date listed on the I-20 as the date by which the program will be completed. Otherwise, the student will be out of status and must seek reinstatement of student status.

An F-1 student is eligible for an extension of their stay if the application is timely, the student has continuously maintained status, and the student can demonstrate that the need for the extension is caused by compelling medical or academic reasons.³¹ A change of major or program may constitute a valid reason for seeking an extension of stay. However, academic probation or suspension from school is not considered a compelling academic reason warranting an extension.³² The PDSO authorizes an extension by updating the information in SEVIS and issuing a new I-20 noting the new expected completion date.³³ A student who does not qualify for an extension of stay must seek reinstatement of student status.

Transfer of Schools: When an F-1 student seeks a transfer from one SEVIS school to another, the student must notify the PDSO at the current school of the *intent* to transfer, upon which the student and the PDSO establish a “transfer out” date. This is the date when the current school releases its SEVIS records to the transfer school, allowing the transfer school to issue a new SEVIS I-20. Under no circumstances may an F-1 student remain in the United States while waiting to transfer to the other school *if* the start date for the new school is more than five months from the program completion date at the former school.³⁴ The transferring student must report to the PDSO at the new school no later than 15 days after the reporting date listed on the new school’s I-20 Certificate of Eligibility.

M-1 students are only permitted to transfer schools within the first six months of beginning their program unless circumstances beyond the student’s control³⁵ necessitate a later transfer and only with DHS/U.S. Citizenship and Immigration Services prior permission through adjudication of a change of status. The DHS form that the M-1 student must complete in order to obtain DHS permission to transfer schools is an I-539.

Reinstatement of student status: Reinstatement is only available to students who have been out of status for no more than five months, unless the student can show exceptional circumstances warranting an extended period of time.³⁶ Reinstatement will not be permitted unless the student never worked without authorization, is pursuing or intends to pursue a full-course of study, does not have a record of repeated and willful violations, and is not deportable on any ground other than overstaying status.

In addition, in order to be eligible for reinstatement of student status, the student must show that the violation of status was due to circumstance beyond his or her control such as serious injury or illness; closure of institution; a natural disaster; the inadvertence, oversight, or neglect of the PDSO; or that the violation relates to a reduction in the student’s course load that would have been within a PDSO’s power to authorize and failure to approve reinstatement would result in extreme hardship to the student. The student visa holder’s reinstatement application must be filed with CIS. If CIS denies the reinstatement application, the student will become undocumented and start accruing unlawful presence.

Part III: Impact of SEVIS on Foreign Students, Their Family Members, and Schools

WHEN A FOREIGN STUDENT IS SEXUALLY ASSAULTED OR RAPED:

³¹ 8 C.F.R. § 214.2(f)(7)(iii) (2003).

³² *Id.*

³³ 8 C.F.R. § 214.2(f)(7)(iv) (2003).

³⁴ 8 C.F.R. § 214.2(f)(8)(i) (2003).

³⁵ 8 C.F.R. § 214.2(m)(11)(i) (2003). A student may argue to DHS that sexual assault or domestic violence are situations beyond her control necessitating the transfer.

³⁶ 8 C.F.R. § 214.2(f)(16)(i)(A) (2003). A student may argue to DHS that sexual assault or domestic violence constitute exceptional circumstances.

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Dropping below full course load: If a foreign student is sexually assaulted or raped, she may find it difficult or impossible to maintain a full course load. In these cases, the student must seek the PDSO's approval to drop below a full-course of study prior to dropping any courses or credits. If the student drops below full-time for any reason without the PDSO's prior approval, the student will fall out of status and will be terminated in SEVIS. While this harsh rule places the foreign student in an extremely difficult situation by having to share the deep pain of being assaulted with the PDSO, there are no extenuating circumstances or exceptions. In cases like this, it may be helpful for the student to enlist the assistance of a counselor, residential advisor, pastor, advocate, attorney or other trusted confidante to approach the PDSO on the student's behalf. It is not required that the student tell the PDSO about the sexual assault; however, omitting this information may cause the PDSO to wonder why it is necessary for the student to drop below a full course load and may lead to the PDSO denying the student's request.

The student may drop to a half-time course load if she or he is experiencing **academic difficulties**³⁷, provided she or he resumes full-time studies the following semester. A reduced course load due to academic difficulties may only be granted one time during the course of studies.³⁸ The immigration regulations define "academic difficulties" to include initial difficulty with English or reading requirements, unfamiliarity with United States teaching methods, or improper course level placement.³⁹ Although the regulations do not contemplate situations where the student has been sexually assaulted or otherwise suffered severe trauma, foreign students who are sexually assaulted by a professor, teaching assistant, or fellow classmate should argue that the sexual assault was the direct cause of the "academic difficulties" which thereby prevented the foreign student from completing a particular course.

Furthermore, a foreign student may drop to less than half-time due to the student's *temporary illness or medical condition* provided the reduction is limited to an aggregate of 12 months within one course of studies. In this case, the student will need to furnish documentation from a licensed medical doctor, doctor of osteopathy, or licensed clinical psychologist to the PDSO to substantiate the illness or medical condition.⁴⁰ This will require the foreign student to seek medical or psychological treatment, and will require the student to disclose the sexual assault and medical treatment to the PDSO. In addition to advocates, victims may turn to a variety of support services on campus. This may include informal networks of friends, peer sexual assault counselors, campus health centers, campus police or others. Any of these individuals may be helpful in collecting and providing the PDSO with documentation in support of the student's request.

Sexual assault may have significant impacts on an individual's physical and mental health, necessitating medical treatment and time to recover.⁴¹ Advocates should assist victims in obtaining necessary health treatment. This may be available on-campus, but it may be necessary to look for available treatment through a private health care plan or with crisis service centers that provide free or reduced rate medical services to sexual assault victims.⁴² Advocates should encourage victims to obtain health care treatment in that the victim will likely need to provide documentation of such medical services to the PDSO when asking to be allowed to drop below a full course of study. Especially when the victim is experiencing trauma, advocates can aid victims by assisting them in collecting such documentation for the PDSO. A victim may also be experiencing sufficient trauma to prevent her from being able to communicate with the PDSO. In such instances, advocates can help victims to communicate with the PDSOs so that all relevant information is provided and that critical school deadlines are met.

³⁷ 8 C.F.R. § 214.2(f)(6)(iii)(A) (2003).

³⁸ 8 C.F.R. § 214.2(f)(6) (2003). A course of study is the completion of a specific educational or professional objective at an undergraduate, postgraduate or postdoctoral study at a college, university, conservatory or religious seminary, postsecondary language schools, nonvocational training programs, elementary, middle, and high schools if these education institutions meet the required criteria set forth in the regulations.

³⁹ 8 C.F.R. § 214.2(f)(6)(iii)(A) (2003).

⁴⁰ 8 C.F.R. § 214.2(f)(6)(iii)(B) (2003).

⁴¹ Health consequences from domestic violence and sexual assault related injuries include much more than treatment from a specific incident and may include long-term physical health effects like chronic back pain and migraines as well as vision loss, stammering, sexually transmitted diseases and other effects. Coker, A., Smith, P., Bethea, L., King, M., McKeown, R. *Physical Health Consequences of Physical and Psychological Intimate Partner Violence*, 9 ARCHIVES OF FAMILY MEDICINE (2000).

⁴² See Health care chapter for a student visa holder's access to health services.

Name and Address Changes: A foreign student who has been sexually assaulted may need to move, especially if the assault occurred at or near her residence. F and M visa holders must report any change of address to the PDSO within 10 days of the move. Likewise, J visa holders must report any change of address to DHS as soon as possible. Similarly, if the foreign student makes a legal name change, she will need to report that change to the PDSO within 10 days of the change.

Extension of Stay: A foreign student who has been sexually assaulted may find that she needs additional time to complete her course requirements. If she seeks an extension of stay, she must ensure that she requests this extension to the PDSO before the expiration date on the SEVIS I-20 Certificate of Eligibility. She is eligible for an extension of stay if she submitted the application timely, has continuously maintained status, and can demonstrate that compelling medical or academic reasons create the need for the extension.⁴³ Documentation of compelling medical or academic reasons for extensions of stay is similar to the documentation requirements for dropping below a full course load. For example, if a student changes her major or research topic – which may be necessary if she was sexually assaulted by her dissertation/thesis advisor or departmental chair – that change in program should constitute a valid reason for seeking an extension of stay. To make the case for compelling academic reasons, the student will likely need the assistance and cooperation of a faculty member within the department who can help make a change in program or research topic.

A student who does not qualify for an extension of stay must apply for reinstatement of student status with United States Citizenship and Immigration Services of DHS as discussed below

Transfer of Schools: A foreign student who has been sexually assaulted on campus may find that she needs to transfer to a new school for her own safety or in order to get the distance she needs for emotional and psychological healing. When an F-1 student seeks a transfer from one SEVIS school to another, she must notify the PDSO at the current school of her intent to transfer. At this time, the student and the PDSO will establish a “transfer out” date. The transferring student must then report to the PDSO at the new school no later than 15 days after the reporting date listed on the new school’s SEVIS I-20 Certificate of Eligibility. The student may not remain in the United States while waiting to transfer to the other school *if* the start date for the new school is more than five months from the program completion date at the former school.⁴⁴

Advocates and attorneys can play a critical role in advocating for victims in this respect. Victims may experience physical and/or emotional trauma that prevent them from following through on the steps necessary to facilitate transfer between schools. Advocates may assist by identifying and helping students to prioritize the PDSO requirements, accompany them to meetings with the PDSO, and advocate on their behalf to ensure that the PDSO has a complete understanding of the hardship faced by the victim.

Reinstatement of student status: As stated above, if a foreign student falls out of status, she may apply for reinstatement with CIS provided that she has not been out of status for more than five months. She must show that she never worked without authorization, is pursuing or intends to pursue a full course of study, does not have a record of repeated and willful violations of her immigration status, and is not deportable on any ground other than overstaying her present student status. In addition, she must show that the violation of status was due to circumstance beyond her control, such as serious injury or illness; closure of the educational institution; a natural disaster; the inadvertence, oversight, or neglect of the PDSO; **or** that the violation relates to a reduction in the student’s course load that would have been within a PDSO’s power to authorize **and** failure to approve reinstatement would result in extreme hardship to the student.

If the student is seeking reinstatement based on serious injury or illness caused by the sexual assault, she will need to disclose and share this information with CIS. If possible, the student should submit any information corroborating the sexual assault in the form of medical records, psychological records, police reports, photographs, or third-party statements.

Alternate immigration options for the foreign student who has been sexually assaulted: Because the new SEVIS rules are so complex and harsh, it is critical for foreign students to explore alternate immigration options in the

⁴³ 8 C.F.R. § 214.2(f)(7)(iii) (2003).

⁴⁴ 8 C.F.R. § 214.2(f)(8)(i) (2003).

When Foreign Students or Their Family Members are Sexually Assaulted: Immigration Implications of the Student and Exchange Visitor System

event they fall out of student status. Foreign students should meet in person with an experienced immigration attorney who can assess them of all possible immigration options. Victims should likewise seek immigration attorneys who have experience handling VAWA cases involving immigrant victims of violence. Some of these immigration options may be based on the sexual assault or rape itself; other immigration options may have nothing to do with the sexual assault but are instead based on the student's employment skills, market demand, experience in the country of origin, and familial relations. To find a local immigration attorney, foreign students should contact the American Immigration Lawyers Association (www.aila.org) and ask for referrals to local immigration lawyers.⁴⁵

IMMIGRATION OPTIONS BASED ON SEXUAL ASSAULT:

(1) U-Visa for victims of criminal activity⁴⁶: In order to apply for a U-visa, a victim must obtain a certification from the federal, state, or local agency investigating or prosecuting the criminal activity.⁴⁷ University and campus law enforcement certifications may likely qualify. Likewise, the regulations explicitly state that the Equal Employment Opportunity Commission ("EEOC") may certify for the U-visa.⁴⁸ Because sexual harassment in the workplace is typically investigated by the EEOC, one may conclude that, where sexual harassment violates federal, state, or local laws, sexual harassment may qualify for a U visa in certain circumstances. Therefore, students and their advocates should look for evidence of criminal activity, such as threats of violence and physical assaults, which may make a victim eligible to apply for a U-visa.

(2) Violence Against Women Act ("VAWA") self-petitioning⁴⁹: This form of immigration relief is available to foreign students who have been sexually assaulted by their United States citizen or permanent resident spouse or parent or by their United States citizen adult son or daughter. In addition, the foreign student, among other requirements, must show that she resided with the abusive family member, that the marriage was entered into in good faith (not for the purpose of obtaining permanent resident status), and that she has good moral character.⁵⁰ The VAWA self-petition is available to student visa holders who marry United States citizen or lawful permanent resident students, faculty or on-campus staff in addition to individuals not affiliated with an educational institution. A student who is married to a lawful permanent resident or a United States Citizen may already have a nonimmigrant visa status and therefore have elected not to obtain permanent status through her spouse. Alternatively, a student visa holder may seek permanent status but her spouse who perpetrated sexual assault may not have sponsored his spouse in a timely manner or failed to sponsor as a mechanism to perpetuate power and control. In both situations, a student visa holder is eligible to self-petition under VAWA.

(3) VAWA cancellation of removal: This form of immigration relief is available to foreign students already in immigration removal proceedings who have been sexually assaulted by a United States citizen or permanent resident spouse or parent. VAWA cancellation is also available to foreign students with a child who has been sexually assaulted by that child's United States citizen or permanent resident parent, regardless of whether or not the parents were ever married. Unlike the U visa which is available to many categories of sexual assault survivors, VAWA cancellation is limited to those individuals who have been assaulted by their United States citizen or permanent resident spouse or parent or to individuals whose child has been sexually assaulted by that child's United States citizen or permanent resident parent. In addition, the foreign student must show that she has been physically present in the United States for a continuous period of at least three years immediately preceding the date of her cancellation application; that she has had good moral character during that three-year period; that she is not inadmissible and has not been convicted

⁴⁵ Technical assistance is also available to immigration attorneys through National Immigrant Women's Advocacy Project at (202) 274-4457, niwap@wcl.american.edu and ASISTA at (515) 244-2469, questions@asistaonline.org.

⁴⁶ For a more detailed discussion of U-visas, see Chapter 10 on U-visas.

⁴⁷ 8 C.F.R. § 214.14(a)(2) (2007).

⁴⁸ *Id.*

⁴⁹ For a more detailed discussion, see chapter 7 on VAWA self-petitioning.

⁵⁰ "Good moral character" is defined at I.N.A § 101(f); I.N.A. §1101(f).

of an aggravated felony conviction; and that her deportation would result in extreme hardship⁵¹ to her, her child, or her parents.⁵²

IMMIGRATION OPTIONS NOT BASED ON SEXUAL ASSAULT:

In addition to the above-mentioned immigration options, foreign students should explore all other forms of immigration relief, whether in nonimmigrant status or permanent resident status. Many foreign students, in particular graduate students, may qualify for a nonimmigrant visa that permits them to work in the United States as:

- E-1 (treaty trader)
- E-2 (treaty investor)
- H-1B (specialty occupation)
- L (multinational executive or manager)
- O (extraordinary alien)
- P (athlete, entertainer)
- R (religious worker)

However, J-1 exchange visitors subject to the two-year foreign residency requirement will most likely be barred from seeking H-1B status unless they obtain a waiver of the requirement. Foreign students will need to consult with an experienced business immigration lawyer to explore these options.

WHEN A FOREIGN STUDENT SEXUALLY ASSAULTS HIS SPOUSE OR CHILD:

These cases are very difficult since they often involve marital rape and/or incest. In addition, they pose complicated immigration consequences since the sexual assault survivor's immigration status can be intertwined with the perpetrator's status.

For example, if an F-1 student sexually assaults or rapes his spouse or child, DHS could revoke his F-1 status, thereby resulting in the revocation of the F-2 dependent's status *even if* the F-2 dependent was the victim of the sexual assault. The F-1 student would most likely be barred from applying for reinstatement of student status with DHS if the sexual assault conduct renders him deportable. In cases like these, it is critical that the sexual assault survivor who is an F-2 dependent be informed of her option to pursue a U visa so that she can obtain immigration status for her and her children apart from the status she has received from her abusive spouse, the F-1 student. In these situations, the survivor needs the counsel of an experienced immigration attorney who can assist her in obtaining a law enforcement certification form. The U-visa regulations provide guidance encouraging law enforcement certifying agencies to develop protocols to help victims through the U-visa certification process.⁵³ However, most law enforcement agencies are still unfamiliar with the U-visa certification process. Consequently, advocates, especially those with established relationships with law enforcement, should work closely with law enforcement to develop these protocols so that victims may access the services and law enforcement protection available to them.

Since a victim's ability to lawfully remain in the country may be dependent on an abuser maintaining valid F, M, or J visa status, rape crisis counselors, peer counselors, and other victim advocates need to inform the victim that one possible consequence of calling the police after an assault is the potential deportation of both the perpetrator and victim. The victim should understand this potential consequence ahead of time to empower the victim to explore other immigration options separate from the abusive family member. In working closely with victims to coordinate services and protection, it is critical that advocates understand all the immigration consequences of reporting abuse before making reports to law enforcement or DHS. Given the complexities of both SEVIS and VAWA, advocates should connect student victims to immigration attorneys and advocate early in the process.

⁵¹ Extreme hardship requires factors beyond deportation. Adjudicators look to the totality of the circumstances and may include multiple factors contributing to the hardship. 8 C.F.R. § 1240.20(c) (1999).

⁵² The three-year period is not cut off by the filing of a Notice to Appear but rather by the filing of the VAWA cancellation of removal application.

⁵³ *New Classification for Victims of Criminal Activity: Eligibility for "U" Nonimmigrant status* DHS Docket No. USCIS-2006-0069, Preamble at 37.

Part IV: Recommendations for Best Practices

- (1) Sexual assault coordinators/counselors should proactively train PDSOs in their area on sexual assault and violence against women issues as they pertain to immigrant victims. This will help in promoting a greater sensitivity to these issues.
- (2) Learn how to identify situations in which a victim might be eligible for VAWA self-petitioning, VAWA cancellation, T-visas and U-visas.
- (3) Sexual assault coordinators/counselors should reach out to local immigration non-profit organizations and immigration lawyers so they can establish referral systems for foreign students who have potential U visa and/or VAWA claims.
- (4) Sexual assault coordinators/counselors, residential advisors, academic advisors, and others aiding sexual assault survivors should familiarize themselves with the new SEVIS rules. They need to educate foreign students on the increased reporting requirements placed on PDSOs by DHS.

National Immigrant Women's Advocacy Project (NIWAP, pronounced *new-app*)
American University, Washington College of Law
4910 Massachusetts Avenue NW · Suite 16, Lower Level · Washington, DC 20016
(o) 202.274.4457 · (f) 202.274.4226 · niwap@wcl.american.edu · wcl.american.edu/niwap