22-1082

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

—against—

ZHONGSAN LIU, AKA Sealed Defendant 1,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF AND SPECIAL APPENDIX FOR DEFENDANT-APPELLANT ZHONGSAN LIU

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June 29, 2022

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PRELIMINARY STATEMENT

Liu came to the United States in 2017 on a lawfully issued L-1 visa to work at the Chinese Association for the International Exchange of Personnel ("CAIEP-NY"), located in Fort Lee, New Jersey. CAIEP-NY was established in 1987 as a not-for-profit corporation, which was typically staffed by one or two persons, and worked to promote China-to-U.S. exchanges and talent recruitment to China. CAIEP-NY was controlled by its China-based parent, CAIEP, which itself was controlled by the State Administration of Foreign Expert Affairs ("SAFEA"), a Chinese government agency. CAIEP-NY openly conducted its work, while partnering with many U.S. universities and institutions, for the thirty years prior to Liu's arrival.

Nonetheless, starting within days of his arrival, the government conducted blanket surveillance of Liu and his communications. What had changed from the last thirty years? Not CAIEP-NY or its work. Rather, the investigation and prosecution was part of the Department of Justice's later-announced and now-abandoned China Initiative, which targeted Chinese nationals, like Liu, as part of an effort to combat economic espionage.

After two-and-a-half years of blanket surveillance, the government uncovered no evidence of espionage activity or efforts to steal trade secrets, and instead charged a single-count conspiracy relating to two visas, neither of which was Liu's. The prosecution admits that Liu had no involvement with obtaining the first visa, for Liang Xiao, a CAIEP colleague, but claims that Liu agreed to conceal from the University of Georgia ("UGA"), her visa sponsor, that Liang broke visa rules, and thereby conspired to defraud the United States. No one ever applied for the second visa, but the government claims that when Liu made nascent inquiries to American university colleagues about whether different universities would sponsor his colleague, Sun Li, for a visa if she intended to both fulfill the requirements of her sponsor and perform some (unspecified) work for CAIEP-NY, those inquiries constituted knowing and willful participation in a conspiracy to commit visa fraud. Liu was found guilty after a jury trial of the sole conspiracy count alleging those two objects.

The government's theory and evidence were defective. The government's theory was that J-1 visa holders were absolutely forbidden from doing any work for CAIEP-NY—a prohibition that appears nowhere

in the applicable statute or regulations, and instead was presented through opinion testimony of a State Department expert and a UGA lay witness.

As to Liang, after alleging in the indictment, and in its opening statement, that the fraud consisted of Liang's intent to work "full-time" for CAIEP-NY, the government proved nothing more than a failure-to update-her-residence visa violation for a portion of her time in the United States, combined with her performance of sporadic and incidental tasks relating to CAIEP-NY. Liang's advisor, Dr. Rusty Brooks, a defense witness, confirmed that *all* of the J-1 visiting research scholars at UGA's Carl Vinson Institute of Government ("CVIG") were professionals and government employees, not students, for whom it was routine to perform tasks for their home-government employers (which provided funding for the exchange programs) during their visits. Brooks confirmed that Liang fulfilled all of the research activities he suggested to her.

With respect to the unapplied-for, unissued visa, the evidence showed that Liu never suggested that any of his interlocutors or Sun should or would make any false statements to obtain a sponsorship, let

alone a visa, and instead reflected Liu's understanding that Sun would fulfill both her J-1 responsibilities and concurrently perform some work.

With respect to all the essential acts in this prosecution, none occurred in the Southern District of New York.

The conviction should be reversed.

JURISDICTION

The District Court for the Southern District of New York had jurisdiction under 18 U.S.C. § 3231. The judgment was entered on May 13, 2022 (SPA.1), and Liu timely filed his notice of appeal on May 13, 2022. (A.105).[1] This Court has jurisdiction under 28 U.S.C. § 1291.

ISSUES PRESENTED FOR REVIEW

Whether the following errors, either individually or considered in combination, require reversal.

1. The government's evidence was legally insufficient to establish the charged conspiracy.

[1] Liu's special appendix, which is an addendum to this brief, is cited "SPA.", the appendix is cited "A.", excerpts from the trial transcript provided in the appendix (at A.109 *et seq*.) are cited by transcript page "Tr.," and filings below are cited as "ECF." ECF documents are cited by the page number in the ECF header.

2. The government failed to prove that any lawful government function was targeted.
3. Because no statue or regulation defines with clarity the activities permitted or forbidden for a bona fide research scholar, the conviction violates due process of law.
4. Venue was improperly laid in the Southern District of New York.

STATEMENT OF THE CASE

Zhongsan Liu appeals from a May 13, 2022 judgment of conviction entered in the United States District Court for the Southern District of New York (Caproni, J.) for a single-count conspiracy to defraud the United States and to commit visa fraud, in violation of Title 18, United States Code, Section 371. On March 22, 2022, Liu was convicted after a one-week jury trial and immediately detained. The defense requested an expedited sentencing because, in the defense's view, the applicable sentencing guidelines range was 0-6 months' in Zone A, and Liu had already spent two-and-a-half years on restrictive home confinement. *See* ECF 240. On May 13, 2022, Judge Caproni imposed a sentence of 10 months' imprisonment. Ten months from the date of Liu's detention is

January 22, 2023. By order dated June 8, 2022, this Court expedited the appeal.

I. BACKGROUND

A. The Charges

On January 22, 2020, the government obtained a Superseding Indictment charging Liu with a two-object conspiracy in violation of Title 18, United States Code, Section 371: (i) a *Klein* conspiracy to defraud the United States, and (ii) a conspiracy to commit visa fraud, in violation of Title 18, Section 1546(a). The Indictment alleged that Liu agreed with others to "defraud the United States by impairing, obstructing, and defeating the lawful functions of the State Department ("DOS") and [Department of Homeland Security ("DHS")]." A.2-3. The Indictment identified as purported "lawful functions" the DOS' function to "enforce the requirement that foreign nationals seeking entry into the United States provide truthful and accurate information to the government," and DHS's and DOS's functions "to administer the J-1 exchange visitor program based on truthful and accurate information." *Id*.

The Indictment alleged that Liu agreed to "caus[e] and attempt[] to cause the submission to the State Department of false and fraudulent

information" to obtain visas for Chinese officials, but did not identify those statements. A.38. The gravamen of the allegation was that Liu agreed to "arrange" for a university sponsor for a Chinese government employee "to come to the United States as a visiting research scholar, when, in truth and in fact, the . . . employee's primary purpose in the United States would consist of working full-time for the [Chinese] Government rather than conducting research at the sponsoring university," and that Liu "instructed" another Chinese government employee "to visit a particular U.S. university in order to bolster the false impression that his colleague was conducting research . . . in compliance with her visa requirements, rather than working full-time for the [Chinese] Government in the United States." A.39.

B. Motions to Dismiss and Suppress FISA-Obtained Evidence

On November 20, 2020, Liu moved to dismiss the Superseding Indictment, and other motions to suppress, based on the government's improper use of the fruits of Foreign Intelligence Surveillance Act ("FISA") intercepts and physical searches of Liu's home, and improper venue in the Southern District of New York. *See* ECF 87. The bulk of the government's opposition, and the District Court's decision denying the

FISA motion, were *ex parte* and classified. ECF 90, 91; ECF 135, 136. At the June 22, 2021 hearing at which the District Court heard argument on Liu's motions, it suggested that he "supplement" his legal team with "someone who has federal criminal experience and has tried cases in federal court." ECF 122 at 106.

On December 6, 2021, having retained additional counsel, Liu moved to dismiss the Superseding Indictment because it failed to state an offense under the "defraud clause" of Section 371,[2] no statute or regulation defines with clarity the permissible activities of a bona fide J-1 research scholar, and encouraging someone to follow the rules is not an overt act in furtherance of a conspiracy. *See* ECF 132. On February 14, 2022, the court denied the motion on the merits and because it was untimely, even though Liu filed it fourteen weeks before trial (indeed, the motion to suppress FISA evidence had not yet been decided), it resulted from the District Court's suggestion to add co-counsel, and the original

[2] In the alternative, the motion requested that the government be compelled to identify the law or regulation that was the source of the "lawful functions" alleged in the indictment. This was denied.

motions deadline had predated the trial by more than fifteen months. *See* ECF 151.

C. *In Limine* Motions and the Government's Abandonment of Claims

While the parties litigated *in limine* motions, the government abandoned its central allegation related to Liu's motive (a vestige of its hoped-for espionage case)—that he engaged in the charged conspiracy to further the Chinese government's talent recruitment efforts in the United States. First, the government reversed the position, taken in its expert disclosures and *in limine* motions, that it would elicit expert testimony from Alex Joske, a purported expert "in the talent-recruitment operations of the [Chinese] government," as well as in CAIEP and SAFEA, about the Chinese government's overseas talent-recruitment operations and objectives. ECF 149 at Exhibit 1; ECF 160, at 7-8 (stating less than a month before trial, in an opposition brief, that it no longer planned to elicit testimony regarding the Chinese government's "history of talent recruitment programs").

Second, the government abandoned, in its response to defense motions *in limine*, a charged overt act alleging that Liu attended a meeting at the Chinese consulate in Manhattan regarding obtaining

visas, and abandoned its claim that Jijun Xing, a consular official, was a co-conspirator. The defense's motion had explained that the discovery and 3500 material were devoid of evidence of (i) Xing's participation in the charged conspiracy or (ii) the subject matter of any meeting at the consulate on November 21, 2018. The defense also explained that it would be illegal for the government to intercept or interfere with consular communications. ECF 159 at 19, 39 n.8, 47-48 & n.13. Thus, venue for Liu's case was based on a single occurrence of passing-through the district.

In *in limine* motions, the defense objected to the government's effort to conduct a trial-by-expert, eschewing any witness with personal knowledge of the meaning of intercepted, FBI-translated communications or the activities of CAIEP and SAFEA, despite the ready availability of such witnesses. The government instead planned to present its own interpretation of selected Chinese-language communications together with opinion testimony about CAIEP, SAFEA, and J-1 visa requirements.

The defense argued:

> Even if, as the government now claims, it successfully avoids explicitly (or implicitly) eliciting from Mr. Joske . . . any view

> that these activities are "nefarious, unlawful, or threatening to the United States' national security," Mr. Joske's proposed testimony, combined with the surveillance information that will form the bulk of the government's case, will be akin to blowing a dog whistle to warn of exactly those threats.

ECF 163 at 6.

The defense also objected to the government's effort to present the law related to J-1 exchange visas through expert testimony, rather than relying on the court to instruct the jury on the law. ECF 149 at 21-26. Specifically, the defense noted that this not only invaded the province of the Court to instruct on matters of law, but permitted the government's witnesses to fill gaps in the legal framework of exchange visas with opinion testimony, and that this would be unhelpful to the jury, irrelevant, and prejudice Liu. *Id.* at 24. The defense argued:

> It is deeply unfair (and a due process violation) for the government to fill in gaps in that regulatory scheme with State Department witness testimony, who will purport to explain to the jury what, for example, a J-1 scholar is, or is not, permitted to do, based on their understanding of the law as distilled into everyday practices. The Court should not permit a State Department witness to opine on what the law means, which amounts to little more than a statement of what the law should (but does not) say.

ECF 163 at 13. The court denied the defense motions. ECF 188.

D. The Trial Evidence

Liu began trial on March 15, 2022. The government called sixteen witnesses, which included no co-conspirators or anyone at all who had ever interacted with Liu. The defense called two witnesses.

1. The Government's Evidence

(a) Expert Witness Testimony

The government called two expert witnesses, Joske and Michelle Biskup, an employee of DOS. Joske, an Australian who graduated from college in 2018, writes research and policy papers on China's efforts to recruit scientists and other talented experts to bring their expertise to China. Tr.66-74. He testified that CAIEP is a "public institution," subordinate to SAFEA, "that seeks to, among other things, further [those] talent recruitment activities" and has "offices around the world." *Id*. Joske testified that the China International Talent Exchange Foundation ("CITEF") is another entity established as subordinate to SAFEA. Tr.76 ("CAIEP is also known as the China International Talent Exchange Center.").

As the defense predicted, Joske sought to insert prejudicial testimony about Chinese espionage into the case. He gave unresponsive testimony referring to the title of a book, "Chinese Industrial Espionage," and talent recruitment entities serving as "fronts for the Chinese government," Tr.95, a notable shift from his voir dire testimony (outside the presence of the jury), in which he repeatedly denied that the core of his work was to expound on the threat posed by China.[3]

Joske testified that, for decades, since at least the 1980s, CAIEP has partnered worldwide with universities and other institutions to host SAFEA-sponsored Chinese training delegations. Tr.78, 82. In 2013, 2016, and 2018, prominent U.S. universities, such as Stanford and Harvard, partnered with SAFEA, and each had designated faculty members as SAFEA points of contact. *Id.* (discussing DX.2102-2104, SAFEA-published books containing annual lists of training partners).

Biskup, a non-lawyer DOS employee, testified regarding her experience in adjudicating visa applications, including for J-1 exchange

[3] Joske's status as an expert in this case was based on one paper that contains a single reference to CAIEP, which is contained in a single paragraph that paraphrases the government's press release about this case. ECF 149-1 at pdf 54; Tr.101.

program visas. *See* Tr.160. Biskup testified about the application process for a J-1 visa, including the completion of the DS-2019 form, which lists the type of exchange program, dates of the program, the name of the sponsoring institution, the location of the exchange program, and is signed by the applicant, sponsor and consular officer who adjudicates the visa. Tr.170.

She also stated that a consular officer interviews the applicant to determine whether her or she is a bona fide exchange program visitor. Tr.152-77. Biskup stated that for J-1 research scholars, consular officers do not make a determination about whether an institutional sponsor's exchange program is valid or the applicant's credentials as a researcher are sufficient; they only review the visa application (DS-160) and DS-2019 for accuracy of the information requested by the forms, and to make a credibility determination about the applicant in a face-to-face interview. *See* Tr.205-06. If a visa is issued, DOS found the applicant credible. *See* Tr.207-08. The government presented no evidence about what Liang discussed in her interview.[4] Biskup also testified that

[4] The government opted to call consular officer Gary Corse, who had no involvement with this case, rather than the consular officer who met with

sponsoring institutions have "been approved by DOS to be the sponsor of an exchange program. So this is the organization, such as a university . . . that's going to be in charge of this visitor's program." Tr.171.

On cross-examination, Biskup admitted that although the two-page DS-2019 form includes instructions related to J-1 visas, those instructions do not categorically forbid work (nor even discuss work), nor do they mention that some work is expressly permitted. Tr.212-14; A.613-14. Biskup testified that the particular activities permitted under different non-immigrant visa categories are not always obvious because there is overlap in permitted activities, such as work; that non-immigrant visa categories are complex; and that if a person qualifies for more than one visa category, the applicant can choose whichever has an easier application process. *See* Tr.193-95, 201.

On redirect, however, the prosecutor prompted Biskup to testify that it is "clear" that a J-1 research scholar is not permitted to work; that "working for a company or a non-profit organization in the United States" would not qualify as "incidental activity" (a term contained in a

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Liang and determined she was a credible research scholar (and whose name the government redacted, both in discovery and at trial).

regulation but not defined by statute or regulation); and that a research scholar "must" do research at the primary site of activity. Tr.208-11, 218-19.

(b) Non-Expert Testimony

The government elicited additional, un-noticed opinion testimony on the requirements and prohibitions of J-1 scholars.

The government called Raymond Sanicola, a Customs and Border Protection officer, who opined that an entry on a TECS I-94 border-crossing information form relating to Liang, A.615, constituted a representation by Liang about where she intended to reside throughout her time in the United States, Tr.277, even though the information on the I-94 is not provided by the traveler, but is instead electronically-generated "through the APIS manifest" prior to arrival. Tr.275-76.

The government called George Ioannidis, a special agent with Immigration and Customs Enforcement, who assisted in the FBI's investigation of Liu and Liang. *See* Tr.498-99, 503. He testified about his use of the Student Exchange Visitor Information System ("SEVIS") database and explained that "SEVIS contains biographical, residence, program, sponsor, and site of activity information relative to J visa

holders." Tr.495. He explained that this information is imported into SEVIS from the visa application, and then updated by the program sponsor. *See* Tr.495. Ioannidis stated that "[i]naccurate information in SEVIS could lead to a determination that the subject had violated the terms and conditions of their visa, and would be amenable to placement in removal proceedings for deportation from the United States based on the order of an immigration judge." Tr.498.

Despite providing no Rule 16 notice, the government elicited Ioannidis's opinion about what "site of activity" means for J-1 scholars. Tr.495. The court then blocked the defense from cross-examining Ioannidis regarding his unfounded opinion. Tr.507-10. The defense was also blocked from eliciting that Liang was administratively arrested for a visa violation and permitted to voluntarily depart, Tr.522, but elicited that "[i]naccurate information in SEVIS could lead to a determination that the subject had violated the terms and conditions of their visa," which would result in "removal proceedings for deportation from the United States based on the order of an immigration judge." Tr.498.

The government called Robin Catmur-Smith, the director of Immigration Services at UGA, who acts as the university's responsible

officer for its J-1 exchange program. Tr.785. She testified that as the responsible officer she does not supervise any J-1 research scholars; UGA faculty or department heads supervise research scholars. *Id*. Although the government admitted exhibits related to Liang's UGA exchange program, including her funding letter, invitation letter, DS-2019 and SEVIS record, and UGA forms and documents, *see* A.738-810, it objected to the admission of Liang's research plan. Tr.861-63. The government objected to the admission of Liang's research plan even though the prosecution laid the evidentiary foundation for the other documents in Liang's complete UGA file through Catmur-Smith. A.908-09; Tr.786-88 (admitting GX.1503 and 1512, which surround the research plan in the file that was admitted in full during the defense case as DX.2430 (A.904)).

The government provided no Rule 16 notice that it intended to offer Catmur-Smith's opinions on the requirements of, and restrictions on, J-1 scholars. Over objection, the government elicited from Catmur-Smith her interpretation that a "full-time" research scholar means 40 hours of research per week, *see* Tr.792, and that "the only work site" where Liang could pursue her research was the physical address listed on her forms, which was CVIG's office at UGA. *See* Tr.794-96.

On cross-examination, however, Catmur-Smith testified that it is "not uncommon" for a research scholar to have multiple sites of activity with department approval. Tr.804. It also became clear that her testimony regarding a 40-hour-per-week requirement was simply made up, as she conceded it is neither a requirement of the regulations, which she agreed list no hour requirement, nor a requirement of UGA, which never established nor suggested an hour-minimum for research scholars. *See* Tr.885. In addition, she testified that it is not "uncommon" for her office to seek "simpler options" for a visitor's visa category, stating, "if there's a way that we can do [it], that's much easier for the department and for the individual . . . we like to look at that." Tr.871.

Catmur-Smith testified that Liang's UGA forms disclosed that Liang's required funding would come from CITEF, and that her funding was "about the minimum that we require for an annual appointment." Tr.854-55; *see* Tr.798, A.738, A.743-44. Catmur-Smith also testified that Liang's J-1 exchange program extension request also stated that the "exchange visitor's government would be providing the funding," and Catmur-Smith identified Liang's government agency as CITEF. Tr.822-24; A.800-05. Catmur-Smith testified that it was typical at the CVIG for

government officials from other countries to come on J-1 exchange visas to the United States and receive funding from their governments. *See* Tr.845, 833.

Catmur-Smith testified that UGA Immigration Services confirms an individual's J-1 visa eligibility before UGA offers a sponsorship, but the faculty supervisor, not Catmur-Smith's office, monitors research progress. *See* Tr.795, 799, 888 (testifying that "[h]omework is not usually a part of a research program"). Once the sponsorship has been confirmed, Catmur-Smith testified that her office submits research scholars' information to SEVIS. Tr.790, 800-01. She testified that the information her office submits to SEVIS comes from different sources, including the sponsoring department, the scholar, the scholar's home employer, and other agencies. *Id*. Catmur-Smith testified that only her office submits information to SEVIS. *See* Tr.850.

Catmur-Smith testified that sometimes an exchange visitor's visit "would overlap into one or more visa categories," in terms of permitted activities. Tr.836. She testified that the DOS mandates that institutional sponsors of exchange programs provide visitors a cultural component; an

exchange program for a research scholar that only consisted of researching would violate the regulations. *See* Tr.835.

Catmur-Smith testified that research scholars are permitted to engage in incidental work. Tr.810. She testified that "there's no specific guidance in the regulations" regarding what "incidental" means, but she gave an example and stated that if the work were "related to the program of research," the scholar was paid "a stipend or honorarium," and it could be confirmed that the "progress of the research" was not impeded, the work would meet her definition of "incidental." Tr.810; *see also* Tr.858. The defense was blocked from admitting in evidence a list of UGA-approved J-1 work assignments as far-flung as California and New York, for institutions such as the Public Company Accounting Oversight Board and United HealthCare. A.406-09; Tr.866-69.

Catmur-Smith testified that Liang's invitation letter indicated that the CVIG would "be active in assisting" her maintain compliance with her visa, *see* Tr.841, but admitted that at the time Liang was an exchange visitor, UGA did that by providing exchange visitors an online orientation consisting of a PowerPoint presentation and a quiz that foreign-visitors independently completed by clicking through the presentation and

answering the quiz questions. *See* Tr.816-19, 876, 882. In a section of the PowerPoint called "Maintaining J-1 Exchange Visitor Status," UGA instructed exchange visitors to engage only in activities listed on the DS-2019. *Id*. The DS-2019 contains no guidance on prohibited activities. A.613-14. Catmur-Smith admitted that UGA's orientation quiz included no questions relating to an exchange visitor's employment or any requirement to update UGA regarding a change in residence, and that neither the orientation PowerPoint nor quiz gave detail about what constitutes a "site of activity" or where research should be conducted. *See* Tr.885-86.

Catmur-Smith testified that the PowerPoint provided specific steps exchange visitors were required and recommended to take upon arriving at UGA. *See* Tr.880. Those included: getting a UGA ID card, opening a bank account, and obtaining a Social Security number and driver's license. *Id*. There was no evidence that Liu ever saw UGA's PowerPoint or Liang's quiz, or that their contents were ever conveyed to him.

Catmur-Smith testified that the first time she interacted with Liang was after September 16, 2019 (the date on which she was arrested).

See Tr.842. Over objection, Catmur-Smith testified that she "came to learn" that Liang "was not engaging in any research," but she based that conclusion on "a charge document that was given to legal affairs" at UGA (i.e., the government's complaint). Tr.891. Catmur-Smith testified that she was given no indication by the prosecutors or agents that the CVIG did anything impermissible with their research scholars at UGA. *See* Tr.873.

(c) Surveillance Evidence

In addition to opinion testimony, the government presented the fruits of its surveillance. Records custodians from T-Mobile and the FBI's surveillance center testified about phone and broadband internet intercepts, and a custodian from Bank of America testified about Liang and CAIEP-NY's bank records. A prosecutor (adding dramatization) and an investigator from the U.S. Attorney's Office named Kevin Song read translations of selected communications, rather than calling any percipient witnesses to the communications. Of the many thousands of communications the government obtained as part of its two-and-a-half years of blanket surveillance of Liu, the government presented seventy-

one FBI transcriptions and translations of audio recordings, emails, and text messages. Tr.447, 472, 546, 560-61; *see* A.817-29.

The government presented evidence of Liu's work reports to CAIEP in China, in which Liu explained "visa issues facing [their] staff" in the United States A.848; A.850 at 2. Specifically, an L-1 visa for another CAIEP employee had not been approved. *Id*. This visa approval concern, along with the notion that Liu wanted another person to join him at CAIEP-NY because he was lonely and needed assistance with his considerable workload, A.836 (Liu stating he does not "want to stay here [i.e., the United States] any longer," and that he is "damn bored," and responds to a question about Sun, to which he reports "right now the school . . . is unwilling to do it [i.e., sponsor her] . . . It's not damn easy nowadays . . . I am also eager for her to come over promptly"), is the government's articulated impetus for Liu deciding to embark on the charged conspiracy. *See also* A.425 (Liu stating, in response to question from contact looking into potential sponsor for Sun, that timing was "faster the better"). The government admitted no evidence that Liu's workload was considerable.

Regarding Liu's efforts to find a sponsor for Sun, a prosecutor and special agent Song read into the record what the government apparently considered the most damning excerpts, such as Liu stating that he "ha[s] a colleague who may . . . want to come over with . . . the J-1," and asking, "is it easy to get a J-1[], the one for visiting scholars?," A.415, and Liu stating that "we can make an arrangement so that this person will do some research over there while assisting me with my work over here," and being told "[t]his might easily get you into trouble." A.422; *see also* A.427-28 (stating Liu had a "colleague" who wanted to come over "in the name of a visiting scholar,"); A.462 (stating Sun would "not attend any classes. She only goes there to do a project . . . work on a project . . . then . . . mainly stay at my place."). Three of Liu's four interlocutors responded to his inquiries positively, *see* A.432 (Mark states "work at the same time . . . . no problem"); A.465 (Wu states "OK. Why don't you send over her resume"); A.489 (Wendy responding to inquiry with "Uh, no problem"). The one who opined that the idea might "get you into trouble" went on to explain his concern: "Now the atmosphere is not the same as it was. Do

you know that? . . . After Trump came to power, in certain areas, his way of doing this is more stringent than before." A.423.[5]

Regarding Liu's efforts to conceal Liang's violation of her visa, the prosecutor read into the record with Song a conversation in which Liu stated that Liang "has to go . . . to Atlanta first" because "she needs to register" and "go through relevant procedures." A.443; *see also* A.454 (stating Liang "must complete all the procedures there [in Georgia] first, before coming here to work."). And they read conversations in which Liu stated that Liang would need to apply for her Social Security number and driver's license in Georgia, *see* A.471-81. This was the same advice provided by Catmur-Smith's office at UGA, *see* A.762, A.880, but the prosecutors characterized Liu's suggestion as helping to create a "fake paper trail," *see* Tr.40. The prosecution also highlighted Liu's statements

[5] The defense was precluded from calling an expert, Professor Jenny J. Lee, to present her study that identified, at rates significantly higher than non-Chinese survey respondents, Chinese or Chinese-American "scientists report feeling considerable fear and/or anxiety that they are surveilled by the U.S. government," A.937, among other things, and that as a result, they changed their behavior, A.939-40. The study results provide scientific data confirming that there was a perception in the community of hostility toward, or special scrutiny of, China and Chinese people during the time period covered by the investigation.

that Liang's funding (which UGA required Liang to have, *see* Tr.854-55, 798, 1070; A.738, A.743-44), should be paid "in the form of . . . the trainee's uh, living expenses," because "if I pay her salary, it would be illegal." A.445; *see also* A.456-57 (stating Liang's payment should "match her status"). Finally, the prosecutor highlighted that upon Liang's arrival Liu again told her that "[i]t would be best . . . to be able to meet with the advisor . . . [t]o see if he can explain it to you . . . assign you . . . a project . . . See how you should do it. This way, you can get down to your own business." A.478.

In an effort to prove Liu's understanding of J-1 exchange program rules, the prosecution presented excerpts of three recorded phone calls:

- *First*, a conversation in which Liu states that Cui Longfei, based in CAIEP's San Francisco office, "[d]oesn't do anything," and the other person says Cui is "very timid" because "he is afraid to be picked on. He says his status is not good," and Liu draws a distinction between Liu's status as an L-1 and Cui's as a J-1, A.513.
- *Second*, a conversation in which Liu sates that Cui's "legal status is not appropriate," and is "problematic," A.547.

- *Third*, a conversation between Liang and Liu in which Liu suggests they look into the possibility of other visa types, such as an H visa, for Sun, A.543.

The government elicited no evidence about whether Cui was successfully completing his J-1 program, or whether Liu had knowledge of whether Cui was doing so.

The government also admitted records showing that Liu successfully completed J-1 exchange programs at Duke and the University of Maryland more than 10 years before the charged crimes, *see* Tr.234-37; A.811-13, A.814-16, while having been employed by CAIEP, *see* A.573, which it argued showed Liu understood J-1 exchange visitors could *not* engage in work. However, Liu "*successfully completed*" his J-1 programs—"with outstanding participation"—regardless of any work he performed at CAIEP. A.658 (emphasis added), A.660.

In an effort to prove that Liang worked "full-time" for CAIEP, the prosecution offered evidence that Liang attended occasional events, helped prepare or send short reports, performed some translations and budgeting, and participated in sporadic phone calls. A.587 (Liang emailing one-paragraph update regarding Chinese delegation visit to the

United States to Liu); A.583 (Liu distributing same write-up, cc'ing Liang), A.590 (Liang reviewing, not drafting, Liu work report); A.831-34 (Liu asking Liang to translate CAIEP activities as listed on its website); A.529 (Liang calling an American who was set to deliver a speech in China because his emailed presentation had not been received); A.549-56 (Liu and Liang discussing budget and increased travel expenses for travel to Georgia and other places).

A great deal of the government's evidence of "work" related instead to home maintenance: a discussion about the water bill, A.593-94, a text message about car maintenance, specifically, about an emissions test and an ignitor being fixed, A.595-96, and a text message about using the big car, A.601-02. In rebuttal summation, in apparent acknowledgement that the evidence did not come close to establishing the "full-time work," as promised in opening, the government pivoted and argued: "it also doesn't matter whether she worked full time, a 40-hour workweek . . . She was working without approval." Tr.1367.

Likewise, the government's evidence of "talent recruitment" work was feeble: Liu mentioned that he discussed the idea of talent recruitment at an event in a work report, which comprised three

sentences, *see* A.582-83 ("The two sides exchanged views on the current financial investment environment and recruitment of financial talents under China-U.S. relations."), and one visit to Johns Hopkins University, *see* A.577-78, A.580-81, A.579 (during which Liu and Liang took a picture with a professor of geriatric medicine and reported that the school has "expressed the desire to further develop talent in collaboration with Chinese hospitals and universities in geriatric medicine").

The government also presented Special Agent Carmack to summarize pole cam footage and offer his opinion that it showed that Liang resided in Fort Lee, New Jersey for approximately 10 of the 20 months she was in the United States. Tr.334. Carmack's pattern-of-life analysis revealed "no discernible 9 to 5 job," Tr.350, and he never observed this woman (who he said could be Liang) going into the townhouse where Liu lived and worked. *See* Tr.356.

The government also presented cell-site analysis to show that Liu's cellphone passed through the Southern District of New York while traveling from New Jersey to Boston on February 6, 2018, *see* GX.350; and a records custodian to describe the (valid) Georgia driver's license

issued to Liang and the (valid) supporting documents she presented to obtain it, *see* Tr.305-11.

2. The Defense's Evidence

The defense called Liang's advisor, Dr. Rusty Brooks, Associate Director of the CVIG at UGA, and Stephanie Liu, a Mandarin interpreter.

Stephanie Liu testified about alternative, more accurate translations of the FBI translations and transcriptions relied upon by the government. Tr.1236-46; *id*. at 1244-45 (referring to DX.2322 (A.898) and demonstrating that the phrase "on the pretext" in GX.114 (A.487) "is not found in the original Chinese at all"); *see, e.g.*, A.896 (demonstrating that phrase "we can make an agreement" in GX.103 (A.422) is inaccurate; transcribing the phrase as "(she can) without extra effort"); A.897 (finding phrase "you can get down to your own business" in GX.113 (A.478) is inaccurate and translating it as "you can start your own affairs steadily and certainly").[6]

[6] The District Court precluded the vast majority of defense translations. *See* Tr.1008-54; A.817-49 (precluded exhibits).

Brooks testified that the CVIG at UGA hosted short-term training delegations of foreign government employees, including Chinese delegations, and charged around $175,000 for a three week training program," and hosted long-term visiting research scholars "who were *all* government employees." Tr.1062, 1065, 1070 (emphasis added). Brooks testified that these programs benefited UGA because they brought prestige (and money) to the university. Tr.1064-65. Brooks testified that during the period 2017 to 2019, six people worked at 1224 South Lumpkin (the small office where the CVIG was housed and the address listed on Liang's DS-2019 as primary site of activity, *see* A.746) and that visiting research scholars typically conducted their research at home online, not at CVIG's office. *See* Tr.1069, 1136.

Brooks testified that "it was always the case" that visiting research scholar funding came from their home government. Tr.1070. It was *typical* for research scholars to have some responsibilities for their home office while they were in the United States as visiting research scholars, including drafting policy papers. *See* Tr.1070-71. He also explained that sometimes visiting scholar fees were waived for a person (as they were for Liang) if they "represented an organization . . . that had the potential

for generating a lot of potential short-term training delegations." *See* Tr.1072.

Brooks also testified about how the CVIG exchange program worked. He explained that research scholars proposed their own research topics, and that "90 percent of the time" research topics reflected "some responsibility [research scholars] had in their job assignment, and they were given that task to go to the United States and research this topic and come back and implement it." Tr.1075-76. Brooks testified that his role in facilitating the research was "to try to suggest maybe some things they could read, maybe set up meeting . . . that I thought would be relevant to what they [were] doing . . . If there was someplace else in the U.S., another city, another state or another U.S. university, I would suggest you need to go visit Duke or you need to visit Ohio State or you need to visit San Francisco . . . that was my role." Tr.1078.

He also explained that researchers did not attend class and there were no homework assignments because most of these individuals "were senior government officials." Tr.1078. In terms of requirements, Brooks testified that he told visiting scholars that they should meet with him on a quarterly basis and that he had an open-door policy, something that

particularly Asian research scholars, "from a cultural standpoint," felt uncomfortable utilizing. *See id.*; Tr.1079, 1091. Brooks stated that visiting research scholars did not typically complete a research project prior to leaving the United States because the audience for their research was their home employer or their colleagues back home and any presentation they prepared would not be in English but in their native language. *See* Tr.1079, 1133. It was not "atypical" for a research scholar to extend their visa, and as long as the person had "approval from [their home] work unit," and it would help them improve their research, he would approve extension requests. Tr.1097.

Brooks testified that he was Liang's advisor when she was a visiting scholar at UGA. Tr.1080. The defense admitted DX.2430, which included Liang's research plan (A.908-09), which Brooks characterized as "better than most" Chinese research plans. *See* Tr.1083. Brooks testified that he understood Liang to be associated with SAFEA when he invited her to be a research scholar at UGA, and that he was familiar with SAFEA and the role it plays in approving training partners for Chinese government delegations. *See* Tr.1085-86. Brooks confirmed that if UGA was not approved by SAFEA, UGA would be unable to send people on exchanges

to China or host the training of government officials from China. *See* Tr.1086 (otherwise, "we wouldn't have a program").

Brooks also testified that Liang met her requirements. She met with him quarterly to discuss her research. *See* Tr.1091, 1096. Brooks remembered informing Liang that "the United States['] universities [are] non-profits, and it would be good for her to look at universities as non-profits because non-profits were—or universities were a critical partner to SAFEA." Tr.1092-93. Brooks testified that during the course of his meetings with Liang, he gave her a book to read on the history of land grant universities in the United States, and later when he met with Liang, it appeared that she had read it. *See* Tr.1093. Brooks testified that he suggested to Liang that "the best way that [she] could learn about this university-as-a-non-profit is go visit some universities in the U.S. . . . It will give you a better sense for why this function is important." Tr.1094. Overall, it appeared to Brooks that Liang was progressing in her understanding of the administration of non-profits in the United States when he met with her, Tr.1094, and he was "under the direct impression she was conducting research." Tr.1141.

Brooks testified that he understood Liang to be living at a SAFEA townhouse in Alpharetta, Georgia, rather than on UGA's campus. *See* Tr.1094. Brooks testified that he did not know that Liang had moved to the CAIEP townhouse in New Jersey. *See* Tr.1095-96. Brooks testified that other visiting research scholars had moved to other states before, and he gave an example of a Korean scholar who moved to San Francisco while on an exchange program at UGA. Tr.1096. Brooks testified that he had advised Liang "that it would be in her best interest and our best interest that if she was going to make travel . . . she should let us know," but that he had not told her it was a requirement to let them know. Tr.1119.

Brooks testified that he met Liu on two or three occasions with Liang. *See* Tr.1096. Brooks explained that it was his, and his team's, understanding that Liu was with the New York office of SAFEA. *Id*. Brooks testified that in his meetings with Liu they never discussed either Liu or Brooks' understanding of Liang's J-1 visa requirements. *See* Tr.1106. Brooks testified that he did not instruct Liang regarding her J-1 visa requirements because that was not his job, but he informed her that "she should be aware of all the rules and regulations that [UGA] had

pertaining to visiting scholars." Tr.1117-18. Brooks testified that he understood that Liang's J-1 visa was cancelled. *See* Tr.1131. Prior to arresting Liang for a visa violation, the government did not ask Brooks whether Liang met CVIG exchange program requirements. Tr.1101-02.

E. The Verdict and Sentencing

The government and the defense presented closing arguments on March 22, 2022. The government's summation argument, like its opening, was replete with references to the Chinese government—approximately 23 in the roughly 15-minute opening statement, and approximately 20 in the summation. The jury convicted after approximately one hour of deliberations.

The defense renewed its motion for a judgement of acquittal on April 21, 2022, *see* ECF 235, which the Court denied orally at sentencing. A.967-68. At sentencing, the court stated that "this case is not and never has been an espionage case," but then called Liu "an agent of a foreign government," referred to his supervisors in China as his "handlers," made reference to unidentified "agents" of Liu, and hypothesized that Liu might be "deployed to another country." A.970-75.

ARGUMENT

I. THE EVIDENCE IS LEGALLY INSUFFICIENT

The evidence fails to establish anything more than the fact that Liu, at all times, encouraged Liang's compliance with the requirements of her J-1 visa, that he neither made nor proposed false statements with respect to Sun's hypothetical visa, and that he lacked any intent to defraud the United States or commit visa fraud.[7]

A. Standard of Review

"A criminal defendant who challenges the sufficiency of evidence shoulders a heavy burden, but not an impossible one." *United States v. Jones*, 393 F.3d 107, 111 (2d Cir. 2004). This Court considers the trial evidence in its totality, and in the light most favorable to the government. *United States v. Connolly*, 24 F.4th 821, 832 (2d Cir. 2022). If the evidence "gives equal or nearly equal circumstantial support to a theory of guilt and a theory of innocence, then a reasonable jury must necessarily

[7] Although there were, in our view, errors below that warrant vacating the conviction and granting a new trial, it is not in Liu's interest to receive such a result, as it would only prolong his enforced time away from home and his family. *See* ECF 240 at 9-10. We request reversal and dismissal, not a new trial.

entertain a reasonable doubt." *United States v. Lorenzo*, 534 F.3d 153, 159 (2d Cir. 2008) (quoting *United States v. Glenn*, 312 F.3d 58, 70 (2d Cir. 2002)).

B. The Government Failed to Establish that Liu Engaged in a Conspiracy with Respect to Liang's Visa

The government concedes that Liu had no involvement in obtaining Liang's J-1 visa. The conviction instead hangs on the government's theory that Liu conspired to conceal a divergence between what Liang's immigration documents stated and the truth about her activities in the United States. At trial, the government pointed to the purported divergence between Liang's work for CAIEP—or the Chinese government—and being a bona fide scholar, between the "primary site of activity" listed in her DS-2019 and her residence (for part of her time in the United States) in a CAIEP-owned apartment in Fort Lee, New Jersey and a CAIEP-owned apartment in Alpharetta, Georgia—about 1.5 hours away from UGA—which it argued signaled she did no research. The government's evidence failed because there was no divergence between Liang's activities and her being a bona fide scholar, or between the "site of activity" listed on her form and her activities, and the government failed to prove that Liu had any fraudulent knowledge or intent relating

to Liang's residence. In any event, Liu had no duty to disclose information to UGA (let alone the United States) regarding any purported divergence, so a conspiracy to conceal fails.

1. Liang Disclosed Her Work and Affiliation

Liang's visa application disclosed the following information: she planned to enter the United States on a Chinese government passport for public affairs; she intended to research the administration of non-profits; her arrival city would be Athens, GA; she would partake in "work/education/training"; her primary occupation was in government, and her present employer was CITEF (i.e., like CAIEP, another SAFEA affiliate, *see* Tr.76), for which she had worked since 2014; and CITEF was funding her stay in the United States. *See* A.605-12; *see also* Tr.241-43. She also openly described her duties and work for the Chinese government in her visa application. *See* A.608. Liang's DS-2019 similarly listed truthful pedigree information, and stated that UGA would serve as her program sponsor, that she would research the administration of non-profits, and that she would receive financial support (as UGA required) from CITEF, her employer. *See* A.746. Thus, Liang's affiliation with, and

work for, the Chinese government were fully disclosed and known to UGA, DHS, and DOS.

2. The Evidence Did Not Show that Liang Lacked a Primary Purpose to Be a Research Scholar

The government set out to prove that Liang was not a bona fide scholar because she worked full-time, but the trial evidence showed that Liang met her J-1 exchange program requirements. The government's opinion testimony claiming that no work whatsoever was permitted had no basis in law or fact, and the government utterly failed to prove anything like full-time work or that Liang was not a bona fide research scholar.

First, the government presented extra-legal opinion testimony to fill gaps in the exchange program rules. The relevant statute states that a J-1 visa holder must be a "bona fide" research scholar, and does not prohibit work. *See* 8 U.S.C. § 1101(a)(15)(J); SPA.15. Moreover, the regulation says that "research scholars" must have a "primary purpose" of "conducting research," and likewise does not prohibit work. 22 C.F.R. § 62.4(f); SPA.39. Neither the statue nor regulations define the other purposes permitted or forbidden to a person whose "primary purpose" is to be a research scholar, however, further regulations specifically

contemplate and approve of certain work: "Professors and research scholars may participate in occasional lectures and short-term consultations, if authorized to do so by [their] sponsor," which are "incidental to the exchange visitor's primary program activities," and the exchange visitor can be paid "wages or other remuneration" for this work as long as they "act as an independent contractor." 22 C.F.R. § 62.20(g); SPA.43. The term "incidental" in undefined by regulation. Thus, although imprecise, the regulations clearly permit work that is not incompatible with a research scholar's primary purpose of being a research scholar.[8]

The government, however, presented and relied on opinion testimony about what is required of, and forbidden to, exchange visitors. Specifically, it attempted to fill a vital gap by eliciting that "working for a company or a non-profit organization in the United States" would not qualify as "incidental activity," from Biskup. Tr.208-11. And that "full-

[8] Moreover, it appears, though it is unclear, that 22 C.F.R. § 62.20(g), which refers to "short-term," "incidental" "consultations," refers only to a J-1 visa holder's consultations with U.S. employers, and not to the work relationship of research scholars and their home employers who fund their exchange program.

time" research (i.e., research that is one's primary purpose) means 40 hours per week, from Catmur-Smith. Tr.792. Catmur-Smith's 40-hour a week requirement was entirely made up. Tr.889.

This type of gap filling with opinion testimony is improper and requires reversal of Liu's conviction. This Court, in *United States v. Connolly*, 24 F.4th 821, 835-36 (2d Cir. 2022), in reversing a fraud-conspiracy conviction based on manipulating Deutsche Bank's LIBOR submissions, held that opinion testimony about the "spirit" of the rules could not substitute for the language of the rules themselves for purposes of proving that the defendants' submissions were false. *Id.* at 841-42. Reversal is required here too for the same reason.

Second, setting aside the legal error of substituting opinion testimony for clear law and regulations defining what is, and is not, a bona fide research scholar, the evidence failed. The prosecution charged and opened on Liang's "full-time employment" for CAIEP to establish she violated the exchange program rules. *See* Tr.37; A.39. By the end of trial, having proved nothing close to "full-time" work, the prosecution shifted the goalpost:

> And it also doesn't matter whether she [Liang] worked full time, a 40-hour workweek, an 80-hour workweek, 25 hours.

> She was working without approval. She didn't get approval from her sponsoring institution, like she needs to do under the rules.

Tr.1367. That distinction makes all the difference, and shows that the government failed to prove any incompatibility between Liang's activities and the legal requirements. For a J-1 visa holder to not have a primary purpose of being a research scholar (i.e., pretending to be a research scholar) is distinct from being a research scholar who also engaged in other activities, even if those activities were not approved by her program sponsor. And, this is the case regardless of whether Liu subjectively believed that J-1 status was "problematic" or "not appropriate" (for Cui's intended activities whatever they were (which was not proven)). *See Connolly*, 24 F.4th at 835-36 (rejecting as insufficient evidence of falsity that three cooperating witnesses testified that they "knew" that making LIBOR submissions that favored their bank's trading positions was "wrong" or "intuitively wrong," where the applicable standards did not clearly forbid such submissions if they otherwise fell within the LIBOR submission instructions).

There was ample evidence that Liang *was* a research scholar, and any transgression of not seeking necessary approvals from UGA does not

negate that fact, and neither does the character of the work she performed for CAIEP-NY. Categorically, her advisor, Brooks, testified that Liang was a bona fide research scholar. He said she submitted a detailed research plan, A.908-09; Tr.1083, which she pursued—this fact was evident to him because she met him quarterly, as he requested, and seemed to be making progress when they met. Tr.1091, 1096, 1092-94; A.577-78, A.579, A.580-81 (visiting universities as suggested by Brooks). Moreover, Brooks and UGA knew (and valued) that Liang was a Chinese government employee affiliated with SAFEA. Tr.1085-88. And, even if Liang would have also qualified as another visa category, such an L-1, both Biskup and Catmur-Smith testified that there is nothing wrong with choosing between overlapping visa categories one qualifies for based on whichever is easiest to obtain. Tr.871, 193-95, 201.

The government's only response to this evidence is that Brooks was "duped," Tr.1369, but that is not proof that Liang was not a bona fide research scholar, but an attempt to shift the burden to the defense to prove Liang's research. That burden shifting was especially pernicious because the government could have, but did not, keep Liang in the United States, either as a co-defendant or a material witness. *See United States*

v. Valenzuela-Bernal, 458 U.S. 858, 872 (1982) (the government must make a good faith determination that a person possesses no evidence favorable to the defendant in a criminal prosecution before deporting her).

The government argued that the fact that Liang did not complete a research project prior to her administrative arrest—nearly a year before her visa term was due to expire—showed that she did no research, but there is no basis for that inference. The evidence showed that CVIG research scholars did not complete their research projects prior to leaving the United States because the target audience was not their sponsor, but their home government employer and colleagues. Therefore, any finalized project was in their native tongue, not English, and presented at home, after (sometimes long after) completion of their visit. Tr.1079, 1133. The research scholar exchange program does not envision or require completion of some sort of research paper or demonstration to classmates or a faculty member, like a student completing a homework project. The suggestion, therefore, that the jury could infer that Liang was not a bona fide researcher from the absence of evidence she

completed a project that was not required or expected to be completed is wrong and an invitation to speculation, not reasonable inference.

For all these reasons, the divergence the government claims between Liang being a research scholar and Liang being an employee of the Chinese government is spurious—there was nothing necessarily incompatible in her being both. Brooks testified that "[i]t was *typical* for research scholars to have some responsibilities for their home office while they were in the United States as visiting research scholars," including drafting policy papers, because CVIG research scholars were always employees of foreign governments. Tr.1070-71. And the evidence showed just that—limited tasks for her home employer (disclosed on her visa application and DS-2019) that were compatible with being a research scholar:

- Carmack, who summarized his review of pole camera footage of the two CAIEP-owned Fort Lee townhomes, testified that the woman he identified as living in the apartment at 809 Anderson Avenue had "no discernible 9 to 5 job," Tr.350, and that he never saw this woman enter 807 Anderson Avenue, where Liu lived and the CAIEP office was located. Tr.356.

- From many thousands of communications, the government points to the fact Liang attended an event for a Dezhou city finance delegation visiting the United States and drafted a four-sentence summary of the event, A.586-87, A.588; she visited Johns Hopkins University and drafted a three-sentence write-up, A.580; she reviewed one of Liu's work reports before he sent it, A.589; she called to ask someone for a copy of a presentation he planned to give in China, A.529; she worked on the CAIEP budget and discussed with Liu upcoming transportation expenses, including travel to Atlanta, A.549; she helped arrange air travel for Liu on one occasion; and she texted with Liu about a password for the computer Liu said he used for accounting, A.597.
- The government also points to mundane housekeeping communications as evidence of "work" for CAIEP, including a discussion about the water bill, A.593; a text message about car maintenance, specifically about an emissions test and fixing an ignitor, A.595; and a text about using the "big car," A.601.

No reasonable jury could have found that Liang's limited, intermittent work tasks were incompatible with having a primary purpose of being a visiting research scholar.

3. "Primary Site of Activity" Is Not a False Representation

The government also argued that Liang's listed primary site of activity—given her residence for part of her stay in the United States was in New Jersey—was a misrepresentation that revealed her true status as a mere employee of CAIEP, and not a research scholar. This argument is wrong and without evidentiary support.

The government argued that the "primary site of activity" listed on Liang's visa forms (documents Liu had no involvement in completing or submitting) represented the exact location she was required to conduct exchange program activities. Although the regulations provide that "research scholars must conduct their exchange activity at the site(s) of activity identified in SEVIS," 22 C.F.R. § 62.20(f), they also provide that the "site of activity" may be specified as "the location of the exchange visitor program sponsor or the site of a third party facilitating the exchange with permission of the sponsor." *Id*. There is no regulation regarding how the sponsor should specify the "site of activity" of a

research scholar who does research using open-source materials on the internet or remotely, for example, with library credentials from the sponsoring university. Still less do they discuss observational or experiential research on topics such as municipal management or the administration of non-profits. That is, the regulations do not specify whether the site of activity, in such a case, should be listed as the physical location of the researcher, the physical location of the resources he or she is accessing remotely, or the location of the exchange visitor sponsor.

The government again filled regulatory gaps with opinion testimony from Biskup and Catmur-Smith. *See* Tr.208-211, 218-19 (eliciting that a research scholar "must" do research at the primary site of activity); Tr.794, 796 (eliciting that "the only work site" where Liang could pursue her research was the physical address listed on her forms, which was CVIG's office at UGA); *but see* Tr.804 (Catmur-Smith testifying that it is "not uncommon" for a research scholar to have multiple sites of activity with department approval). Based on *Connolly*, 24 F.4th at 835-36, this Court should reverse.

Moreover, the trial evidence regarding "site of activity" revealed that it does not and cannot mean the exact location where one engages in

research, nor is it a representation by Liang. Initially, the visa *sponsor*, not the visa *applicant*, inputs the site-of-activity information into SEVIS, and the information from the sponsor auto-populates into the DS-160 and DS-2019 forms. Tr.800-01. Thus, Liang's primary site of activity was not even her representation, let alone Liu's. No rational jury could have found that Liu knew what UGA had input as Liang's site of activity, much less that he conspired to conceal, in the face of a known duty to report, a change in it. *See United States v. Coplan*, 703 F.3d 46, 64 (2d Cir. 2012) (holding that absent a known duty to report facts to the United States, an agreement to conceal those facts is not a conspiracy to defraud the United States).

Furthermore, Liang's "primary site of activity" was listed as the CVIG. Tr.800-01. Brooks testified that the CVIG, located at 1224 South Lumpkin, was a small office where Brooks and the small number of other administrators worked, not where visiting scholars conducted their research. Tr.1069, 853. Brooks also testified that he knew, and was okay with, Liang living at what he understood to be a SAFEA townhouse in Alpharetta, GA—not on UGA campus. Tr.1094. The only reasonable inference this evidence permits is that the "primary site of activity"

represents where an exchange visitor's sponsor is located, not the only place where the visitor may conduct research. This is consistent with the regulatory definition, which states that the "site of activity" may be specified as "the location of the exchange visitor program sponsor," 22 C.F.R. § 62.20(f); SPA.43,[9] and for this reason too the Court should reverse.

4. There Was No Intentional Falsity Regarding Liang's Residence

The government failed to prove that Liu had any obligation to report to UGA Liang's change of address or the fact that she performed sporadic tasks for CAIEP, or that he conspired to violate such an obligation. Neither Liang's failure to update her sponsor regarding where she lived nor her failure to obtain express permission to perform incidental work for CAIEP is inherently incompatible with having a primary purpose of being a research scholar, as discussed above. Thus, even if Liang's actions did not comply with her sponsor's requirements (her visa was cancelled as a result, Tr.1131)—and even if she or Liu

[9] Any ambiguity in the regulations must be interpreted in Liu's favor, consistent with the rule of lenity.

subjectively believed them to be wrong in some sense—it does not suffice to prove that Liang was only pretending to be a research scholar or that Liu engaged in a conspiracy to defraud the United States in that respect. *See Connolly*, 24 F.4th at 835-36 (reversing because though the government may have proved that the defendants' manipulation of the LIBOR rates was "wrong," or even that the defendants *believed* their actions were wrongful, that did not suffice to prove the falsity of the LIBOR submissions).

5. No Scheme Targeted the United States

Even if Liang's primary purpose was not to be a research scholar, the government's theory and evidence were insufficient because any concealment relating to her visa targeted UGA, not the United States. The law is clear that to prove a conspiracy to defraud the United States, the government must prove that the "*target* of the conspiracy" is the United States, not a third party, like UGA. *See Tanner v. United States*, 483 U.S. 107, 129-32 (1987). Indeed, in *Tanner*, the Supreme Court rejected the government's argument that a scheme to defraud a third party receiving federal funds and serving as "an intermediary performing official functions on behalf of the Federal Government" constitutes a

conspiracy to defraud the United States. *Id.* at 129. While *Tanner* recognized that a scheme targeting the United States might be effected through the use of a third party, it nevertheless refused to permit a Section 371 conviction to rest on a fraud targeting a third party, even if such a fraud caused injury to the United States. *Id.* at 130.[10] None of the government's comprehensive surveillance provided any evidence that Liu or Liang or anyone else knowingly and intentionally concealed information from UGA *in order to* target the United States or its agencies. And, as explained below, the government did not prove any

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[10] The District Court refused the defense request (citing *Tanner* and other authority) that the Court instruct the jury as follows:

> Dishonestly obstructing the lawful function of a government agency must be a purpose of the conspiracy, not merely a foreseeable consequence of it. In order to have agreed to defraud the Department of State or the Department of Homeland Security, as alleged, the conspirators must have agreed that fraud, deceit, or other dishonest means would be targeted at those agencies. Fraudulent conduct directed solely at a third party, such as a university that is a visa sponsor, is not a fraud against the United States, unless the conspirators intended to use that third-party as a go-between, with the intent that the third-party make false statements to the government agency—the ultimate target of the conspiracy.

A.72.

intended falsehood to obtain a university sponsor for Sun, let alone any falsehood intended to target the United States.

C. The Evidence Related To Sun's Visa Was Insufficient

The government argued that Liu "knew that Sun Li would have to falsely represent to the State Department that she was coming to the U.S. to do research. Liu knew that Sun Li would have to hide her intent to work at CAIEP New York. It was all part of the plan." Tr.1252. The evidence established the exact opposite.

As an initial matter, the evidence related to Sun's (never-applied-for) visa suffers from the same fundamental deficiencies as the evidence related to Liang's visa. As discussed above, there was nothing necessarily incompatible about Sun having a primary purpose of being a research scholar and performing some work for CAIEP while in the United States, and the government presented no evidence showing that the extent of Sun's intended work would in practice conflict with satisfying her research scholar requirements. The evidence also did not show that Liu and Sun shared an intent that Sun would *not* get approval from her sponsor for her work, location, or residence.

Nor did Liu perceive anything improper, much less criminal or false, about that arrangement—his nascent inquiries to schools about a sponsor for Sun all expressly stated that she would perform work for CAIEP while completing her research scholar program. *See* A.432 ("No, she may do some research with you there or set up a project. And then she mainly concurrently works right here."); A.438-41 (call between Chen Shufeng and Liu: "The representative office can make unified arrangements *based on the requirements of her school*. As far as our office is concerned, I have reported it to the leaders, however, *we don't have any special requests. It is up to her school*." (emphasis added)); A.460-66 (Liu stating that "she, she will not attend any classes. She only goes there to do a project, uh, work –" "Work on a project and then, that, that is, mainly stay at, at, at, at my place."); A.482-95 (Liu states Ms. Sun will "com[e] over to work at my place in the name of the visiting scholar."; in response to a question regarding whether this means "to get someone from SAFEA over here as a visiting scholar on the pretext of working?"[11] Liu clarifies, "*Uh, well, will do a project with them*. At the time, I -didn't I do this thing

[11] The defense expert linguist testified that the phrase "on the pretext" is not found in the original Chinese at all." Tr.1244-45.

at that, that Maryland at the time? Because right now, I don't know anyone at Maryland. I can't approach them either, you know." (emphasis added)).

These communications permit no reasonable inference that Liu intended anyone to lie to obtain a J-1 sponsorship, let alone a visa for Sun. Instead, they reflect Liu's belief that Sun's visa arrangement *would* comply with the rules. Indeed, Liu asked Liang to confirm with her advisors at UGA about whether there were changes to J-1 visa rules that would affect the propriety of the proposed sponsorship for Sun. *See* A.468-70; *see also* A.567, A.569.

Moreover, the communications do not show any participation by Liu in any unlawful agreement. Liu's conversations amounted to nothing more than nascent inquiries, not steps toward any proposed fraudulent application. Even when the University of Massachusetts Boston indicated that it would sponsor Sun, Liu did not pursue the sponsorship or request an invitation; he simply reported the information back to China. A.564. At the same time, Liu repeatedly advocated other strategies (that nowhere mentioned J-1 visas) to address the challenges

in obtaining work visas—the alleged motive for the conspiracy.[12] He participated in sending a report that made three suggestions, none of which involved J-1 visas. A.557-63. Notably, while taking no concrete steps to secure an invitation letter for Sun, Liu did take concrete steps to pursue the solution of hiring local personnel, including finding proposed office space to rent in Fort Lee. A.901.

Lastly, even if one of Liu's interlocutors (or even Liu) believed it was wrong or could get Liu into "trouble" to ask about a J-1 sponsorship where Sun intended to perform work for CAIEP during her exchange program, the evidence runs squarely into the same *Connolly* problems as the evidence regarding Liang: the government failed to prove that the conspiracy intended to use statements that the evidence proved would be false. *See Connolly*, 24 F.4th at 835-36 (rejecting as insufficient to prove falsity the cooperators' testimony that the LIBOR submissions were "wrong"). This Court should reverse.

[12] Biskup and Catmur-Smith testified that there is nothing wrong with choosing between visa categories based on which is easier to get. Tr.871, 193-95, 201.

D. No Evidence Established that Liu Joined the Conspiracy

The trial evidence was insufficient to establish Liu's criminal *mens rea* because the government's only evidence of Liu's purported state of mind either demonstrates the opposite—that he lacked criminal intent—or, at a minimum, supports a theory of innocence as much as guilt.

The intercepted communications the government relied on as evidence of the conspiracy show only that Liu advocated that Liang *comply* with the requirements of her visa, as he understood them, and that his advice was substantially similar to that given by UGA's Immigration Services. *See* Tr.880 (stating UGA PowerPoint recommended that exchange visitors open a bank account, obtain a Social Security number and driver's license); A.443; A.452; A.471-81; ("As soon as you receive that, that driver's license, you should start booking a flight." . . . "you need to check in, show up, show up." . . . "Yes. To see if he can explain it to you, assign you a project." "See how you should do it. This way, you can get down to your own business.");[13] A.500-04 ("I think

[13] The defense expert linguist testified that "you can get down to your own business" is inaccurate and translated it as "you can start your own affairs steadily and certainly." DX.2321.

you need to show up in person." "Exactly. It is because – because of your status. It is not appropriate if you don't show up in person."); A.455 (other person: "Certain things indeed . . . it's better to comply with [the rules]," Liu: "Right! Follow the U.S. rules . . . We, we should behave ourselves").

The government argued that these communications revealed an effort to create a "fake paper trail" or "bolster" a false impression. This Court's decision in *Coplan* demonstrates the insufficiency of that argument. In *Coplan*, the Court reversed the *Klein* conspiracy conviction of an Ernst & Young partner as legally insufficient because the defendant advocated *lawful* conduct, even though the government argued that conduct was "deceptive" or "inherently deceptive" in the context of the case. 703 F.3d at 64-65. Here, the government's evidence is even weaker. In *Coplan*, the Court reversed even when it determined it was "equivocal" whether the defendant instructed his colleague to lie to the IRS, *id.* at 63-64; Liu unequivocally did not give any such instruction to Liang—he told her to show up and follow the rules. In addition, in Liu's communications regarding a potential sponsor, he explained that Sun's plans in the United States included doing a project and working at CAIEP. Thus, as in *Coplan*, Liu's advice to Liang and inquiries about a

sponsor for Sun counseled only lawful conduct and the evidence does not establish that he joined any conspiracy.

Moreover, Liu had no obligation or reporting requirements to Brooks or UGA, let alone the United States. *See Coplan*, 703 F.3d at 64 (holding that discouraging personnel from leaving materials with clients to avoid disclosure to the IRS, where IRS did not request copies of materials, and there was no duty to provide them, was not a crime). For this reason as well, the evidence regarding Liu's purported role in the conspiracy is insufficient.

The government also argued that Liu's criminal *mens rea* was established by communications in which he said if he paid what was translated as Liang's "salary," it would be "illegal," and that Liang's payment should "match her status." A.445, A.456-57. Biskup, Catmur-Smith, and Brooks all testified that Liang was required to have funding (identified as a "stipend or honorarium"), and Catmur-Smith testified Liang disclosed she would be paid by CITEF, her employer. Tr.207-08, 810, 854-55, 1070. In addition, most of the documents that referred to Liang's money as a "salary" also referred to it as a "cost of living subsidy." *See* A.592; *see Coplan*, 703 F.3d at 66 (evidence that defendant obscured

the "real reason" for a transaction was insufficient to demonstrate *Klein* conspiracy where it was equally consistent with effort towards compliance). However, even if these communications reflect Liu's efforts to avoid 'getting caught,' they do not constitute overt acts in furtherance of a conspiracy. *See Grunewald v. United States*, 353 U.S. 391, 401-02 (1957). The trial evidence in this regard simply does not prove the charged conspiracy.

The government also points to a conversation in which Liu says that Cui, who was also in the United States on a J-1 visa, had a "legal status [that was] not appropriate," and that it was "[expletive] problematic." A.547. Although the government's evidence was silent on all facts related to Cui's compliance with his visa, or whether Liu had knowledge of whether Cui was complying with his visa, it argued that this bare statement showed Liu knew that working was forbidden to a J-1 visa and therefore that he joined the charged conspiracy—an argument premised entirely on a wrong legal conclusion, as discussed above. This communication, however, does not prove that Liu had knowledge and understanding of permitted activities under J-1 visas, it only reflects the government's assumptions and is insufficient to support the conviction.

Lastly, the government argued that Liu's guilty *mens rea* was demonstrated by his own experience as a J-1 scholar. *See, e.g.*, Tr.1274 ("[H]e was no stranger to the rules of that program. He knew exactly what he was doing."). This argument is exactly backwards. The evidence showed only that Liu performed unspecified work for CAIEP while he was a J-1 scholar at Duke and the University of Maryland more than a decade before the charged conspiracy, and that he *successfully completed* those programs. A.658, A.660. That supports the inference that he believed Liang or Sun doing the same was okay, or, at a minimum, the evidence equally supports Liu's innocent state of mind as it does his criminal intent, and for that reason it is insufficient. *See* A.487 ("[D]idn't I do this thing at that, that Maryland at the time?").

Other evidence showed that Liu did not understand the J-1 rules (and no evidence showed that he understood the unwritten J-1 requirements posited by the government's opinion testimony). A.468-70 (Liu asking Liang to ask her UGA advisors to explain the J-1 rules); A.567-71 (Liang reporting on her discussion with "teacher Zeng," one of Brooks' colleagues, that there are no new rules for J-1 scholars).

The government waited until rebuttal summation—thus blocking any ability of Liu to respond—to argue that the jury should convict based not on knowledge, but based on conscious avoidance. Not only was this surprise tactic improper, *United States v. Russo*, 74 F.3d 1383, 1396 (2d Cir. 1996) ("last minute" argument raised for the first time on rebuttal was improper); *United States v. Giovanelli*, 945 F.2d 479, 493 (2d Cir. 1991) (raising argument for the first time in rebuttal deprived the defense of an opportunity to respond), but it also invited the jury to convict Liu based on a theory that he was indifferent about whether lawful or unlawful means would be used to obtain visas. But only if Liu willfully joined an agreement that he *knew* to be unlawful could he be guilty of criminal conspiracy, and the government's argument invited the jury to convict even if that was not so.[14]

[14] The prosecutor argued: "he so badly wanted someone to come work for him at CAIEP New York that he put his head in the sand. He decided not to confirm whether, in fact, the object of the conspiracy was to commit visa fraud or to obstruct the functions of the U.S. government and its agencies, that he consciously avoided knowing those goals of the conspiracy to make sure that he got his colleagues to come work for him in New Jersey, to make sure that he could have someone helping him out there." Tr.1372-73.

For all of these reasons, the government failed to prove Liu knowingly joined the conspiracy with the requisite intent.

II. NO LAWFUL GOVERNMENT FUNCTION WAS TARGETED

The government failed to show a *Klein* conspiracy because no law or regulation establishes as a "lawful function" of DOS or DHS to ensure that they rely on "truthful and accurate" information. To adopt the government's overbroad theory would convert Section 371 into an omnibus honesty crime.

This Court has held that conspiracy to defraud prosecutions must be carefully scrutinized because "[t]he courts must be alert to subtle 'attempts to broaden the already pervasive and wide-sweeping nets of conspiracy prosecutions.'" *United States v. Rosenblatt*, 554 F.2d 36, 40 (2d Cir. 1977) (quoting *Grunewald*, 353 U.S. at 404). There is nothing subtle about the government's effort here—it openly seeks to expand the "defraud clause" of 18 U.S.C. § 371 to reach *every* decision or action by a federal agency employee that seeks to rely on "truthful and accurate

information." The attempt should be rejected and the conviction should be reversed.[15]

A. "Lawful Government Function"

The "defraud clause" of 18 U.S.C. § 371 criminalizes conspiracies "to defraud the United States, or any agency thereof in any manner or for any purpose . . . ." Although the statute itself does not contain any additional gloss on this language, courts have interpreted the statute to reach "any conspiracy for the purpose of impairing, obstructing, or defeating the lawful function of any department of government," *Haas v. Henkel*, 216 U.S. 462, 479 (1910), where the interference is "by deceit, craft or trickery, or at least by means that are dishonest." *United States*

[15] Although the jury found both objects of the conspiracy to have been proven—i.e., the *Klein* conspiracy relating to Liang and the visa fraud conspiracy relating to Sun—the infirmity of the *Klein* conspiracy requires reversal of the conviction. Without the *Klein* conspiracy object, none of the Liang-related evidence would be admissible, and the government's evidence of a conspiracy to commit visa fraud would be even less sufficient.

v. Klein, 247 F.2d 908, 916 (2d Cir. 1957) (quoting *Hammerschmidt v. United States*, 265 U.S. 182, 188 (1924)).[16]

These *Klein* conspiracy cases "have a peculiar susceptibility to a kind of tactical manipulation which shields from view very real infringements on basic values of our criminal law. Accordingly, conspiracy-to-defraud prosecutions are scrutinized carefully." *Rosenblatt*, 554 F.2d at 40 (quotations and citations omitted). The "broad language of the general conspiracy statute" creates the "inherent" possibility "that its wide net may ensnare the innocent as well as the culpable." *Dennis v. United States*, 384 U.S. 855, 860 (1966).

The Supreme Court's gloss on the statutory language is not limitless, but rather contains specific requirements. The judicial articulation of the crime has repeatedly emphasized that a scheme falls

[16] For the reasons explained in *Coplan*, the *Klein* conspiracy theory applied therein is binding law in this Circuit, but is unmoored from any statute and is therefore invalid. *See Coplan*, 703 F.3d at 59-62 (noting the government's implicit concession that "the *Klein* conspiracy is a common law crime, created by courts rather than by Congress" but that challenges to it should be directed to a higher authority). We preserve for *en banc* or Supreme Court review the argument that the *Klein* theory applied in this Circuit is invalid.

within the "defraud clause" only if it is a scheme to impair or defeat a "lawful function." *Haas*, 216 U.S. at 479; *Hammerschmidt*, 265 U.S. at 188 (same). The Supreme Court has never abandoned the "*lawful* function" requirement or otherwise broadened it to include anything at all that a government actor may do. The use of the modifier "lawful" to define the "function" targeted by an unlawful conspiracy should be interpreted, according to its plain meaning, as something a government agency does pursuant to a command or authorization set forth in law. *See* Governmental Function, *Black's Law Dictionary* (11th ed. 2019) ("A government agency's conduct that is expressly or impliedly mandated or authorized by [law]").

Haas itself supports that assertion. In *Haas*, the government charged a conspiracy to defraud the United States based on a scheme to bribe a government official to obtain secret crop information to permit speculation on the cotton market. 216 U.S. at 477-80. The *Haas* decision framed the targeted "lawful function" as the Department of Agriculture's "lawful right and duty of promulgating or diffusing the information so officially acquired in the way and at the time required by law or departmental regulation." *Id.* at 479-80. The word "lawful" in the phrase

"lawful function," therefore, refers to a function established by statute or regulation.[17]

It is no surprise that courts have not often been called upon to analyze the *Haas* requirement that the government function targeted be a lawful one, since the law at issue is normally obvious. The heartland *Klein* conspiracy case is a conspiracy to obstruct the Internal Revenue Service in the "ascertainment, computation and collection of federal income taxes." *See United States v. Vogt*, 910 F.2d 1184, 1191 (4th Cir. 1990); *Klein*, 247 F.2d at 910 (analyzing a "conspiracy to obstruct the Treasury Department in its collection of the revenue"). To call those "lawful functions" in the sense of government conduct established or required by law or regulation is obvious: the Internal Revenue Code fills an entire Title of the United States Code supported by volumes of promulgated regulations; and the Treasury Department's statutory authority to ascertain and collect taxes dates to 1789. *See* "An Act to Establish the Treasury Department," 1 Stat. 65 (Sept. 2, 1789) ("it shall

[17] *Hammerschmidt* had no occasion to analyze the requirement that the scheme target a "lawful function" of the government because the function—the military draft—was clearly established by statute. *See* 265 U.S. at 185.

be the duty of the Secretary of the Treasury . . . to superintend the collection of the revenue . . . .").

We do not argue that there can be no violation of the defraud clause unless there is a concurrent violation of another criminal statute. Rather, our argument stands for what should be an unremarkable proposition that the "lawful function" targeted by a conspiracy must actually be a "function" of the government established by "law"—in the words of the Supreme Court, a function "required by law or departmental regulation." *Haas*, 216 U.S. at 479-80. The "lawful function" targeted cannot be crafted by prosecutors, as it was here, to meet whatever generalized dishonesty they ascribe to the defendant's conduct and defined for the first time in the indictment itself.

B. The Unbounded "Inaccuracy" Theory Is Invalid

Here, in the indictment and at trial, the government argued that Liu "obstructed the [DOS's] function of issuing visas to foreign nationals based on truthful and accurate information," and the functions of the DOS and DHS to administer "the J-1 Research Scholar Program based on truthful and accurate information." Tr.1004. The government had Ioannidis testify that his unit at DHS relies on "information in SEVIS as

being accurate and truthful," Tr.496,[18] and elicited from Biskup that DOS relies on accurate information in visa applications to adjudicate them, Tr.165.

While program sponsors and exchange visitors may be required, under various statutes and regulations, to provide "truthful and accurate" information, that is not part of the "lawful function" of DOS or DHS. Any aspiration that federal employees carry out their jobs based on "truthful and accurate information" does not mean that any agreed-upon course of action that restricts or inaccurately presents information to a government employee (in a prosecutors' hindsight view) is a conspiracy to obstruct a "lawful function." If it did, that would establish in the defraud clause of Section 371 a catch-all, omnibus "inaccuracy" crime that would "clear[] a garden path for prosecutorial abuse." *See United States v. Marinello*, 855 F.3d 455, 455 (2d Cir. 2017) (Jacobs, J., dissenting from the denial of *en banc*); *see Marinello v. United States*, 138 S. Ct. 1101, 1108-09 (2018) (recognizing that "to rely upon prosecutorial discretion to narrow the scope of a criminal statute's highly abstract

[18] Ioannidis testified that sponsors input information into SEVIS. Tr.495.

general statutory language places great power in the hands of the prosecutor . . . . [I]t risks undermining necessary confidence in the criminal justice system."). Such an "inaccuracy" crime would permit prosecutors to prosecute persons as to whom it cannot prove any specific false statement. *See Marinello*, 855 F.3d at 455 ("Indiscriminate application of [26 U.S.C. § 7212] serves only to snag citizens who cannot be caught in the fine-drawn net of specified offenses, or to pile on offenses when a real tax cheat is convicted.").[19]

If the evidence at trial that DOS and DHS rely on "truthful and accurate information" sufficed to establish a lawful function here, then no meaningful limitation on the government's theory exists. For example, if campers cut the line at a first-come-first-served campground operated by the National Park Service, they could be found guilty of conspiring to

[19] In *United States v. Atilla*, 966 F.3d 118 (2d Cir. 2020), this Court rejected a defendant's invocation of *Marinello* in support of his argument that Section 371's defraud clause should be limited to common law frauds and income-tax-related conspiracies. *Id.* at 130-31. *Atilla* does nothing to refute the Supreme Court's recognition in *Marinello* that vague, omnibus crimes open the door to prosecutorial abuse.

obstruct the Park Service's "lawful function" of allocating campgrounds based on "truthful and accurate information."[20]

Such a limitless theory also upsets Congress's calibration of the seriousness of various accuracy-related conduct. Congress has defined civil actions, offenses, misdemeanors, and felonies relating to inaccuracies directed at the government, all of which could be converted, at a prosecutor's whim, into a five-year felony (assuming the involvement of two or more persons) if the lawful function defined here is permitted to stand. *See, e.g.*, 18 U.S.C. § 1722 (establishing fine for submitting false evidence to secure second-class rate from Postal Service); 18 U.S.C. § 35(a) (establishing civil liability up to $1,000 for false statements related to tampering with or bombing motor vehicles or aircraft); 18 U.S.C. § 219(a) (establishing two-year felony for public official who fails to register as an agent of a foreign principal).

This action provides a case-in-point. The government asserted at trial that Liang and Liu conspired to have her change her residence

[20] *See, e.g.*, Bowman Lake Campground, Glacier National Park, National Park Service, available at https://www.nps.gov/glac/planyourvisit/first-come-first-served-campgrounds.htm (last visited June 22, 2022) (stating that campsite is first-come-first-served).

without informing UGA (which reported residence information in SEVIS). But Congress has specifically defined a misdemeanor that applies to such conduct; Title 8, United States Code, Section 1306(b) provides: "Any alien . . . who fails to give written notice to the Attorney General [of a change of address as required by Section 1305] shall be guilty of a misdemeanor and shall, upon conviction thereof, *be fined not to exceed $200 or be imprisoned not more than thirty days, or both*." 8 U.S.C. § 1306(b) (emphasis added). The government's unbounded "truthful and accurate information" theory thus permits the government to convert a conspiracy to commit a misdemeanor, punishable by no more than *thirty days* in jail into a felony punishable by *five years'* imprisonment. All a prosecutor has to do to accomplish this switch, in the government's view, is have an agency official testify, like Ioannidis and Biskup, that they rely on "truthful and accurate information" at their job.

That kind of maneuver represents the exact sort of "tactical manipulation which shields from view very real infringements on basic values of our criminal law." *Rosenblatt*, 554 F.2d at 40. Through "prosecutorial sleight of hand," the government makes the requirement of affirmative, materially false statements under Section 1546 vanish,

and obscures its effort to criminalize "concealment" devoid of any established duty to disclose. *Id*. at 41; *Coplan*, 703 F.3d at 64. Similarly, the government's concealment theory obscures the fact that its opinion-testimony-based J-1 requirements—the violation of which Liu purportedly conspired to conceal—are nowhere established by clear laws. *See Johnson v. United States*, 576 U.S. 591, 595 (2015).

Because the evidence presented did not establish any conspiracy to obstruct a "function" that was "lawful," the conviction should be reversed.

III. No Statute or Regulation Defines with Clarity the Permissible Activities of a Bona Fide J-1 Research Scholar

The conviction should be reversed, and the indictment dismissed, because there are no clear standards defining the permissible activities of a bona fide J-1 research scholar. No person may knowingly conspire to commit visa fraud or defraud the United States with respect to the ill-defined J-1 visa program.

As explained above, *see supra* Part I(B)(2), the relevant statute on J-1 visas requires only that a visitor be "bona fide" but does not define the phrase or forbid work. *See* 8 U.S.C. § 1101(a)(15)(J). A regulation that defines "research scholars" requires only that they have a "primary

purpose" of doing so, and does not define or forbid work or secondary or tertiary purposes. 22 C.F.R. § 62.4(f).

Since a visiting scholar term may last as long as five years, 22 C.F.R. § 62.20(i)(1), J-1 visiting research scholars necessarily will have multiple motivating purposes (both initially and as they evolve over time) for moving to (or remaining in) the United States as a J-1 scholar, such as conducting research, learning from academic or professional colleagues, experiencing another culture, meeting new people, living somewhere new, improving language skills, sightseeing, shopping or eating, etc. Those interlocking motivations are entirely compatible with being a "bona fide" scholar. *Cf. United States v. Orellano-Blanco*, 294 F.3d 1143, 1151-52 (9th Cir. 2002) (noting, in context of marriage fraud, that individuals often have a number of interlocking purposes for getting married, which even if not romantic may be consistent with a purpose "to establish a life together").

In any event, neither the statute nor any regulation unambiguously forbids work, and especially not the sporadic, incidental work Liang performed, according to the evidence, or whatever work Sun was intended to perform, which the evidence did not specify. For this reason,

and consistent with the rule of lenity, *see United States v. Bass*, 404 U.S. 336, 347 (1971) ("[A]mbiguity concerning the ambit of criminal statutes should be resolved in favor of lenity" (internal quotation marks omitted)), Liu requested that the jury be instructed that "a research scholar's 'primary activity' broadly means that the research scholar is permitted to engage in other activities as long as those other activities do not prevent them from conducting their research scholar activities." ECF 169 at 44. The government objected, clearing the path for it to rely on opinion testimony about the requirements of the J-1 program that are nowhere defined by law. Tr.1367.

This setting of standards mid-trial—recall that the indictment and the government's opening claimed that the fraud inhered in the intent to work "full-time" instead of doing any research, and devolved by the end of trial into an argument that no work was permitted—is not a permissible method of imposing criminal liability. *See Johnson*, 576 U.S. at 595 (due process is violated by a conviction under a "criminal statute so vague that it fails to give ordinary people fair notice of the conduct it punishes, or so standardless that it invites arbitrary enforcement.").

Liang performed limited work for CAIEP while in the United States, but Brooks testified that she met his research requirements. Plus, Liang's sporadic tasks for CAIEP, a United States non-profit organization, augmented her research into the administration of non-profits. Even if those tasks did not, they were the typical sorts of incidental work that CVIG J-1 research scholars—all of whom were government officials funded by their employers—routinely performed for their home offices while they were in the United States. Tr.1070-71. For that reason, 22 C.F.R. § 62.20(g), which permits research scholars to engage in "short-term," "incidental" "consultations" appears to refer to a J-1 visa holder's outside consultations in the United States, not to the work relationship of those research scholars, like Liang, whose employers sponsor and fund their exchange program in the United States as part of their job. And, even if Regulation 62.20(g) applies to those relationships, it too fails to provide clear standards of what work a research scholar may engage in before it affects her "bona fide" status or "primary purpose." Neither "short-term," "incidental," nor even "consultations" is defined, let alone with clarity. *See* 22 C.F.R. § 62.20(g). And, Brooks' knowledge of, and acquiescence in, the incidental work of CVIG J-1

research scholars demonstrates at least tacit approval of that work by UGA.

Given the absence of clear standards, it is impossible for any person to knowingly violate the rules regarding the performance of work while being a research scholar. *See United States v. Pirro*, 212 F.3d 86, 91 (2d Cir. 2000) (affirming dismissal of a false tax return charge because the law provided no discernible requirement to report a beneficial owner as a "shareholder" on an S-Corporation return). Accordingly, both objects of the conspiracy—which rest on the government's opinion testimony to supply clarity where the law provides only ambiguity—should be reversed.

IV. VENUE WAS IMPROPER

The only basis for venue is that on February 6, 2018, Liu passed through the district for a few miles while driving from New Jersey to Boston, where he held a meeting with a colleague that included a discussion of a J-1 sponsorship for Sun.[21] The government relies on

[21] There was no venue to support the concealment object of the conspiracy related to Liang. For this reason, if the Court finds that evidence of the visa-fraud object (Sun) was insufficient, but evidence of the *Klein*

United States v. Tzolov, 642 F.3d 314, 320 (2d Cir. 2011), which itself relied on four drug-conspiracy cases to support a passing-through theory of venue.[22] In a case, such as this one, that does not involve a conspiracy to transport contraband (or persons), such a passing-through theory should not suffice to satisfy the Constitution, statute, or rule, because it is merely preparatory. *See United States v. Cabrales*, 524 U.S. 1, 6–7 (1998) ("the locus delicti of a charged offense—is determined from the nature of the crime alleged and the location of the act or acts constituting it." (internal quotation marks and citation omitted)); *United States v. Beech-Nut Nutrition Corp.*, 871 F.2d 1181, 1190 (2d. Cir. 1989); *United States v. Saavedra*, 223 F.3d 85, 88 (2d Cir. 2000); *United States v. Naranjo*, 14 F.3d 145, 147–48 (2d Cir.1994) (substantial contacts satisfied if co-conspirator committed acts inside the venue).

Moreover, in contrast to *Tzolov*, which the Court emphasized included as a "regular part of the fraudulent scheme" travel through JFK airport to face-to-face meetings with investors, 642 F.3d at 320, there was

---

conspiracy object (Liang) was sufficient, the Court must still reverse for lack of venue.

[22] We preserve for potential *en banc* or Supreme Court review the argument that *Tzolov* was incorrectly decided.

nothing typical or essential about the in-person meeting on February 6, 2019. Indeed, the only evidence presented regarding the substance of the meeting came in the form of a one-sentence write-up in Liu's work report, A.565, every other communication relating to a J-1 sponsorship for Sun—including others with one of the participants in the Boston meeting—took place by telephone outside the Southern District of New York.

The government could have prosecuted this case in at least three separate venues—New Jersey, Georgia, Massachusetts—and New York is not one of them. This Court should reverse Liu's conviction because venue was improperly laid.

CONCLUSION

For the foregoing reasons, the Court should reverse Liu's conviction.

Dated: June 29, 2022
New York, New York

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATIONS, TYPEFACE REQUIREMENTS, AND TYPE STYLE REQUIREMENTS

1. The undersigned counsel of record for Defendant-Appellant Zhongsan Liu certifies pursuant to Federal Rules of Appellate Procedure 32(g) and Local Rule 32.1 that the foregoing brief contains 15,927 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f), according to the word count feature of Microsoft Word. This length is within the 16,000 word-limit set by this Court's June 16, 2022 order (Document 26).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared using Microsoft Word in 14-point Century Schoolbook font, a proportionally-spaced typeface.

Dated: New York, New York
June 29, 2022

By: /s/ Justin S. Weddle

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SPECIAL APPENDIX

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AO 245B (Rev. 09/19) Judgment in a Criminal Case Sheet 1 (form modified within District on Sept. 30, 2019)

UNITED STATES DISTRICT COURT

Southern District of New York

UNITED STATES OF AMERICA
v.
Zhongsan Liu

JUDGMENT IN A CRIMINAL CASE

Case Number: 1:19CR00804- 001

USM Number: 87168-054

Justin Weddle
Defendant's Attorney

THE DEFENDANT:

☐ pleaded guilty to count(s)

☐ pleaded nolo contendere to count(s) which was accepted by the court.

☑ was found guilty on count(s) 1 after a plea of not guilty.

The defendant is adjudicated guilty of these offenses:

Title & Section	Nature of Offense	Offense Ended	Count
18 U.S.C. § 371	Conspiracy to Defraud the United States	9/16/2019	1

The defendant is sentenced as provided in pages 2 through 6 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

☐ The defendant has been found not guilty on count(s)

☑ Count(s) open and underlying ☐ is ☑ are dismissed on the motion of the United States.

It is ordered that the defendant must notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of material changes in economic circumstances.

5/13/2022
Date of Imposition of Judgment

Valerie Caproni
Signature of Judge

Hon. Valerie Caproni, U.S.D.J.
Name and Title of Judge

5.13.22
Date

AO 245B (Rev. 09/19) Judgment in Criminal Case
Sheet 2 — Imprisonment

DEFENDANT: Zhongsan Liu
CASE NUMBER: 1:19CR00804- 001

IMPRISONMENT

The defendant is hereby committed to the custody of the Federal Bureau of Prisons to be imprisoned for a total term of:

Ten (10) months.

☑ The court makes the following recommendations to the Bureau of Prisons:

The Court recommends that the defendant be designated to the minimum security satellie camp at FCI Fort Dix.

☐ The defendant is remanded to the custody of the United States Marshal.

☐ The defendant shall surrender to the United States Marshal for this district:

☐ at _____ ☐ a.m. ☐ p.m. on _____ .

☐ as notified by the United States Marshal.

☐ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

☐ before 2 p.m. on _____ .

☐ as notified by the United States Marshal.

☐ as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

Defendant delivered on _____ to _____

at _____ , with a certified copy of this judgment.

_____
UNITED STATES MARSHAL

By _____
DEPUTY UNITED STATES MARSHAL

AO 245B (Rev. 09/19) Judgment in a Criminal Case
Sheet 3 — Supervised Release

DEFENDANT: Zhongsan Liu
CASE NUMBER: 1:19CR00804- 001

SUPERVISED RELEASE

Upon release from imprisonment, you will be on supervised release for a term of:

None. Defendant will be deported at the end of the sentence.

MANDATORY CONDITIONS

1. You must not commit another federal, state or local crime.
2. You must not unlawfully possess a controlled substance.
3. You must refrain from any unlawful use of a controlled substance. You must submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.
   - ☐ The above drug testing condition is suspended, based on the court's determination that you pose a low risk of future substance abuse. *(check if applicable)*
4. ☐ You must make restitution in accordance with 18 U.S.C. §§ 3663 and 3663A or any other statute authorizing a sentence of restitution. *(check if applicable)*
5. ☐ You must cooperate in the collection of DNA as directed by the probation officer. *(check if applicable)*
6. ☐ You must comply with the requirements of the Sex Offender Registration and Notification Act (34 U.S.C. § 20901, *et seq.*) as directed by the probation officer, the Bureau of Prisons, or any state sex offender registration agency in the location where you reside, work, are a student, or were convicted of a qualifying offense. *(check if applicable)*
7. ☐ You must participate in an approved program for domestic violence. *(check if applicable)*

You must comply with the standard conditions that have been adopted by this court as well as with any other conditions on the attached page.

DEFENDANT: Zhongsan Liu
CASE NUMBER: 1:19CR00804- 001

SPECIAL CONDITIONS OF SUPERVISION

AO 245B (Rev. 09/19) Judgment in a Criminal Case
Sheet 5 — Criminal Monetary Penalties

DEFENDANT: Zhongsan Liu
CASE NUMBER: 1:19CR00804- 001

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the schedule of payments on Sheet 6.

	Assessment	Restitution	Fine	AVAA Assessment*	JVTA Assessment**
TOTALS	$ 100.00	$	$	$	$

☐ The determination of restitution is deferred until _____. An *Amended Judgment in a Criminal Case (AO 245C)* will be entered after such determination.

☐ The defendant must make restitution (including community restitution) to the following payees in the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid before the United States is paid.

Name of Payee	Total Loss***	Restitution Ordered	Priority or Percentage

TOTALS	$ 0.00	$ 0.00

☐ Restitution amount ordered pursuant to plea agreement $ _____

☐ The defendant must pay interest on restitution and a fine of more than $2,500, unless the restitution or fine is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 6 may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).

☐ The court determined that the defendant does not have the ability to pay interest and it is ordered that:

☐ the interest requirement is waived for the ☐ fine ☐ restitution.

☐ the interest requirement for the ☐ fine ☐ restitution is modified as follows:

* Amy, Vicky, and Andy Child Pornography Victim Assistance Act of 2018, Pub. L. No. 115-299.
** Justice for Victims of Trafficking Act of 2015, Pub. L. No. 114-22.
*** Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

DEFENDANT: Zhongsan Liu
CASE NUMBER: 1:19CR00804- 001

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties is due as follows:

A ☑ Lump sum payment of $ 100.00 due immediately, balance due

☐ not later than _____, or
☐ in accordance with ☐ C, ☐ D, ☐ E, or ☐ F below; or

B ☐ Payment to begin immediately (may be combined with ☐ C, ☐ D, or ☐ F below); or

C ☐ Payment in equal _____ *(e.g., weekly, monthly, quarterly)* installments of $ _____ over a period of _____ *(e.g., months or years)*, to commence _____ *(e.g., 30 or 60 days)* after the date of this judgment; or

D ☐ Payment in equal _____ *(e.g., weekly, monthly, quarterly)* installments of $ _____ over a period of _____ *(e.g., months or years)*, to commence _____ *(e.g., 30 or 60 days)* after release from imprisonment to a term of supervision; or

E ☐ Payment during the term of supervised release will commence within _____ *(e.g., 30 or 60 days)* after release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time; or

F ☐ Special instructions regarding the payment of criminal monetary penalties:

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during the period of imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

☐ Joint and Several

Case Number Defendant and Co-Defendant Names *(including defendant number)*	Total Amount	Joint and Several Amount	Corresponding Payee, if appropriate

☐ The defendant shall pay the cost of prosecution.

☐ The defendant shall pay the following court cost(s):

☐ The defendant shall forfeit the defendant's interest in the following property to the United States:

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) AVAA assessment, (5) fine principal, (6) fine interest, (7) community restitution, (8) JVTA assessment, (9) penalties, and (10) costs, including cost of prosecution and court costs.

United States Code Annotated
Constitution of the United States
Annotated
Amendment V. Grand Jury; Double Jeopardy; Self-Incrimination; Due Process; Takings

U.S.C.A. Const. Amend. V

Amendment V. Grand Jury Indictment for Capital Crimes; Double Jeopardy; Self-Incrimination; Due Process of Law; Takings without Just Compensation

Currentness

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

<Historical notes and references are included in the full text document for this amendment.>

<For Notes of Decisions, see separate documents for clauses of this amendment:>

<USCA Const. Amend. V--Grand Jury clause>

<USCA Const. Amend. V--Double Jeopardy clause>

<USCA Const. Amend. V--Self-Incrimination clause>

<USCA Const. Amend. V-- Due Process clause>

<USCA Const. Amend. V--Takings clause>

U.S.C.A. Const. Amend. V, USCA CONST Amend. V
Current through P.L. 117-154. Some statute sections may be more current, see credits for details

End of Document

United States Code Annotated
Title 18. Crimes and Criminal Procedure (Refs & Annos)
Part I. Crimes (Refs & Annos)
Chapter 19. Conspiracy

18 U.S.C.A. § 371

§ 371. Conspiracy to commit offense or to defraud United States
[Statutory Text & Notes of Decisions subdivisions I to VIII]

Currentness

<Notes of Decisions for 18 USCA § 371 are displayed in multiple documents.>

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined under this title or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.

CREDIT(S)

(June 25, 1948, c. 645, 62 Stat. 701; Pub.L. 103-322, Title XXXIII, § 330016(1)(L), Sept. 13, 1994, 108 Stat. 2147.)

18 U.S.C.A. § 371, 18 USCA § 371
Current through P.L. 117-154. Some statute sections may be more current, see credits for details

End of Document

United States Code Annotated
Title 18. Crimes and Criminal Procedure (Refs & Annos)
Part I. Crimes (Refs & Annos)
Chapter 75. Passports and Visas (Refs & Annos)

18 U.S.C.A. § 1546

§ 1546. Fraud and misuse of visas, permits, and other documents

Effective: November 2, 2002
Currentness

(a) Whoever knowingly forges, counterfeits, alters, or falsely makes any immigrant or nonimmigrant visa, permit, border crossing card, alien registration receipt card, or other document prescribed by statute or regulation for entry into or as evidence of authorized stay or employment in the United States, or utters, uses, attempts to use, possesses, obtains, accepts, or receives any such visa, permit, border crossing card, alien registration receipt card, or other document prescribed by statute or regulation for entry into or as evidence of authorized stay or employment in the United States, knowing it to be forged, counterfeited, altered, or falsely made, or to have been procured by means of any false claim or statement, or to have been otherwise procured by fraud or unlawfully obtained; or

Whoever, except under direction of the Attorney General or the Commissioner of the Immigration and Naturalization Service, or other proper officer, knowingly possesses any blank permit, or engraves, sells, brings into the United States, or has in his control or possession any plate in the likeness of a plate designed for the printing of permits, or makes any print, photograph, or impression in the likeness of any immigrant or nonimmigrant visa, permit or other document required for entry into the United States, or has in his possession a distinctive paper which has been adopted by the Attorney General or the Commissioner of the Immigration and Naturalization Service for the printing of such visas, permits, or documents; or

Whoever, when applying for an immigrant or nonimmigrant visa, permit, or other document required for entry into the United States, or for admission to the United States personates another, or falsely appears in the name of a deceased individual, or evades or attempts to evade the immigration laws by appearing under an assumed or fictitious name without disclosing his true identity, or sells or otherwise disposes of, or offers to sell or otherwise dispose of, or utters, such visa, permit, or other document, to any person not authorized by law to receive such document; or

Whoever knowingly makes under oath, or as permitted under penalty of perjury under section 1746 of title 28, United States Code, knowingly subscribes as true, any false statement with respect to a material fact in any application, affidavit, or other document required by the immigration laws or regulations prescribed thereunder, or knowingly presents any such application, affidavit, or other document which contains any such false statement or which fails to contain any reasonable basis in law or fact--

Shall be fined under this title or imprisoned not more than 25 years (if the offense was committed to facilitate an act of international terrorism (as defined in section 2331 of this title)), 20 years (if the offense was committed to facilitate a drug trafficking crime (as defined in section 929(a) of this title)), 10 years (in the case of the first or second such offense, if the offense was not committed to facilitate such an act of international terrorism or a drug trafficking crime), or 15 years (in the case of any other offense), or both.

(b) Whoever uses--

(1) an identification document, knowing (or having reason to know) that the document was not issued lawfully for the use of the possessor,

(2) an identification document knowing (or having reason to know) that the document is false, or

(3) a false attestation,

for the purpose of satisfying a requirement of section 274A(b) of the Immigration and Nationality Act, shall be fined under this title, imprisoned not more than 5 years, or both.

(c) This section does not prohibit any lawfully authorized investigative, protective, or intelligence activity of a law enforcement agency of the United States, a State, or a subdivision of a State, or of an intelligence agency of the United States, or any activity authorized under title V of the Organized Crime Control Act of 1970 (18 U.S.C. note prec. 3481). For purposes of this section, the term "State" means a State of the United States, the District of Columbia, and any commonwealth, territory, or possession of the United States.

CREDIT(S)

(June 25, 1948, c. 645, 62 Stat. 771; June 27, 1952, c. 477, Title IV, § 402(a), 66 Stat. 275; Pub.L. 94-550, § 5, Oct. 18, 1976, 90 Stat. 2535; Pub.L. 99-603, Title I, § 103(a), Nov. 6, 1986, 100 Stat. 3380; Pub.L. 100-525, § 2(c), Oct. 24, 1988, 102 Stat. 2610; Pub.L. 101-647, Title XXXV, § 3550, Nov. 29, 1990, 104 Stat. 4926; Pub.L. 103-322, Title XIII, § 130009(a)(4), (5), Title XXXIII, § 330011(p), Sept. 13, 1994, 108 Stat. 2030, 2145; Pub.L. 104-208, Div. C, Title II, §§ 211(a)(2), 214, Sept. 30, 1996, 110 Stat. 3009-569, 3009-572; Pub.L. 104-294, Title VI, § 607(m), Oct. 11, 1996, 110 Stat. 3512; Pub.L. 107-273, Div. B, Title IV, § 4002(a)(3), Nov. 2, 2002, 116 Stat. 1806.)

18 U.S.C.A. § 1546, 18 USCA § 1546
Current through P.L. 117-154. Some statute sections may be more current, see credits for details

End of Document

United States Code Annotated
Title 8. Aliens and Nationality (Refs & Annos)
Chapter 12. Immigration and Nationality (Refs & Annos)
Subchapter I. General Provisions (Refs & Annos)

8 U.S.C.A. § 1101

§ 1101. Definitions

Effective: July 30, 2021
Currentness

(a) As used in this chapter--

(1) The term "administrator" means the official designated by the Secretary of State pursuant to section 1104(b) of this title.

(2) The term "advocates" includes, but is not limited to, advises, recommends, furthers by overt act, and admits belief in.

(3) The term "alien" means any person not a citizen or national of the United States.

(4) The term "application for admission" has reference to the application for admission into the United States and not to the application for the issuance of an immigrant or nonimmigrant visa.

(5) The term "Attorney General" means the Attorney General of the United States.

(6) The term "border crossing identification card" means a document of identity bearing that designation issued to an alien who is lawfully admitted for permanent residence, or to an alien who is a resident in foreign contiguous territory, by a consular officer or an immigration officer for the purpose of crossing over the borders between the United States and foreign contiguous territory in accordance with such conditions for its issuance and use as may be prescribed by regulations. Such regulations shall provide that (A) each such document include a biometric identifier (such as the fingerprint or handprint of the alien) that is machine readable and (B) an alien presenting a border crossing identification card is not permitted to cross over the border into the United States unless the biometric identifier contained on the card matches the appropriate biometric characteristic of the alien.

(7) The term "clerk of court" means a clerk of a naturalization court.

(8) The terms "Commissioner" and "Deputy Commissioner" mean the Commissioner of Immigration and Naturalization and a Deputy Commissioner of Immigration and Naturalization, respectively.

(9) The term "consular officer" means any consular, diplomatic, or other officer or employee of the United States designated under regulations prescribed under authority contained in this chapter, for the purpose of issuing immigrant or nonimmigrant visas or, when used in subchapter III, for the purpose of adjudicating nationality.

(10) The term "crewman" means a person serving in any capacity on board a vessel or aircraft.

(11) The term "diplomatic visa" means a nonimmigrant visa bearing that title and issued to a nonimmigrant in accordance with such regulations as the Secretary of State may prescribe.

(12) The term "doctrine" includes, but is not limited to, policies, practices, purposes, aims, or procedures.

(13)(A) The terms "admission" and "admitted" mean, with respect to an alien, the lawful entry of the alien into the United States after inspection and authorization by an immigration officer.

(B) An alien who is paroled under section 1182(d)(5) of this title or permitted to land temporarily as an alien crewman shall not be considered to have been admitted.

(C) An alien lawfully admitted for permanent residence in the United States shall not be regarded as seeking an admission into the United States for purposes of the immigration laws unless the alien--

(i) has abandoned or relinquished that status,

(ii) has been absent from the United States for a continuous period in excess of 180 days,

(iii) has engaged in illegal activity after having departed the United States,

(iv) has departed from the United States while under legal process seeking removal of the alien from the United States, including removal proceedings under this chapter and extradition proceedings,

(v) has committed an offense identified in section 1182(a)(2) of this title, unless since such offense the alien has been granted relief under section 1182(h) or 1229b(a) of this title, or

(vi) is attempting to enter at a time or place other than as designated by immigration officers or has not been admitted to the United States after inspection and authorization by an immigration officer.

(14) The term "foreign state" includes outlying possessions of a foreign state, but self-governing dominions or territories under mandate or trusteeship shall be regarded as separate foreign states.

(15) The term "immigrant" means every alien except an alien who is within one of the following classes of nonimmigrant aliens--

(A)(i) an ambassador, public minister, or career diplomatic or consular officer who has been accredited by a foreign government, recognized de jure by the United States and who is accepted by the President or by the Secretary of State, and the members of the alien's immediate family;

(ii) upon a basis of reciprocity, other officials and employees who have been accredited by a foreign government recognized de jure by the United States, who are accepted by the Secretary of State, and the members of their immediate families; and

(iii) upon a basis of reciprocity, attendants, servants, personal employees, and members of their immediate families, of the officials and employees who have a nonimmigrant status under (i) and (ii) above;

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

(C) an alien in immediate and continuous transit through the United States, or an alien who qualifies as a person entitled to pass in transit to and from the United Nations Headquarters District and foreign countries, under the provisions of paragraphs (3), (4), and (5) of section 11 of the Headquarters Agreement with the United Nations (61 Stat. 758);

(D)(i) an alien crewman serving in good faith as such in a capacity required for normal operation and service on board a vessel, as defined in section 1288(a) of this title (other than a fishing vessel having its home port or an operating base in the United States), or aircraft, who intends to land temporarily and solely in pursuit of his calling as a crewman and to depart from the United States with the vessel or aircraft on which he arrived or some other vessel or aircraft;

(ii) an alien crewman serving in good faith as such in any capacity required for normal operations and service aboard a fishing vessel having its home port or an operating base in the United States who intends to land temporarily in Guam or the Commonwealth of the Northern Mariana Islands and solely in pursuit of his calling as a crewman and to depart from Guam or the Commonwealth of the Northern Mariana Islands with the vessel on which he arrived;

(E) an alien entitled to enter the United States under and in pursuance of the provisions of a treaty of commerce and navigation between the United States and the foreign state of which he is a national, and the spouse and children of any such alien if accompanying or following to join him; (i) solely to carry on substantial trade, including trade in services or trade in technology, principally between the United States and the foreign state of which he is a national; (ii) solely to develop and direct the operations of an enterprise in which he has invested, or of an enterprise in which he is actively in the process of investing, a substantial amount of capital; or (iii) solely to perform services in a specialty occupation in the United States if the alien is a national of the Commonwealth of Australia and with respect to whom the Secretary of Labor determines and certifies to the Secretary of Homeland Security and the Secretary of State that the intending employer has filed with the Secretary of Labor an attestation under section 1182(t)(1) of this title;

(F) (i) an alien having a residence in a foreign country which he has no intention of abandoning, who is a bona fide student qualified to pursue a full course of study and who seeks to enter the United States temporarily and solely for the purpose of pursuing such a course of study consistent with section 1184(l) of this title at an established college, university, seminary, conservatory, academic high school, elementary school, or other academic institution or in an accredited language training program in the United States, particularly designated by him and approved by the Attorney General after consultation with the Secretary of Education, which institution or place of study shall have agreed to report to the Attorney General the termination of attendance of each nonimmigrant student, and if any such institution of learning or place of study fails to make reports promptly the approval shall be withdrawn, (ii) the alien spouse and minor children of any alien described in clause (i) if accompanying or following to join such an alien, and (iii) an alien who is a national of Canada or Mexico, who maintains actual residence and place of abode in the country of nationality, who is described in clause (i) except that the alien's qualifications for and actual course of study may be full or part-time, and who commutes to the United States institution or place of study from Canada or Mexico;

(G)(i) a designated principal resident representative of a foreign government recognized de jure by the United States, which foreign government is a member of an international organization entitled to enjoy privileges, exemptions, and immunities as an international organization under the International Organizations Immunities Act (59 Stat. 669), accredited resident members of the staff of such representatives, and members of his or their immediate family;

(ii) other accredited representatives of such a foreign government to such international organizations, and the members of their immediate families;

(iii) an alien able to qualify under (i) or (ii) above except for the fact that the government of which such alien is an accredited representative is not recognized de jure by the United States, or that the government of which he is an accredited representative is not a member of such international organization; and the members of his immediate family;

(iv) officers, or employees of such international organizations, and the members of their immediate families;

(v) attendants, servants, and personal employees of any such representative, officer, or employee, and the members of the immediate families of such attendants, servants, and personal employees;

(H) an alien (i) (a) [Repealed. Pub.L. 106-95, § 2(c), Nov. 12, 1999, 113 Stat. 1316] (b) subject to section 1182(j)(2) of this title, who is coming temporarily to the United States to perform services (other than services described in subclause (a) during the period in which such subclause applies and other than services described in subclause (ii)(a) or in subparagraph (O) or (P)) in a specialty occupation described in section 1184(i)(1) of this title or as a fashion model, who meets the requirements for the occupation specified in section 1184(i)(2) of this title or, in the case of a fashion model, is of distinguished merit and ability, and with respect to whom the Secretary of Labor determines and certifies to the Attorney General that the intending employer has filed with the Secretary an application under section 1182(n)(1) of this title, or (b1) who is entitled to enter the United States under and in pursuance of the provisions of an agreement listed in section 1184(g)(8)(A) of this title, who is engaged in a specialty occupation described in section 1184(i)(3) of this title, and with respect to whom the Secretary of Labor determines and certifies to the Secretary of Homeland Security and the Secretary of State that the intending employer has filed with the Secretary of Labor an attestation under section 1182(t)(1) of this title, or (c) who is coming temporarily to the United States to perform services as a registered nurse, who meets the qualifications described in section 1182(m)(1) of this title, and with respect to whom the Secretary of Labor determines and certifies to the Attorney General that an unexpired attestation is on file and in effect under section 1182(m)(2) of this title for the

facility (as defined in section 1182(m)(6) of this title) for which the alien will perform the services; or (ii)(a) having a residence in a foreign country which he has no intention of abandoning who is coming temporarily to the United States to perform agricultural labor or services, as defined by the Secretary of Labor in regulations and including agricultural labor defined in section 3121(g) of Title 26, agriculture as defined in section 203(f) of Title 29, and the pressing of apples for cider on a farm, of a temporary or seasonal nature, or (b) having a residence in a foreign country which he has no intention of abandoning who is coming temporarily to the United States to perform other temporary service or labor if unemployed persons capable of performing such service or labor cannot be found in this country, but this clause shall not apply to graduates of medical schools coming to the United States to perform services as members of the medical profession; or (iii) having a residence in a foreign country which he has no intention of abandoning who is coming temporarily to the United States as a trainee, other than to receive graduate medical education or training, in a training program that is not designed primarily to provide productive employment; and the alien spouse and minor children of any such alien specified in this paragraph if accompanying him or following to join him;

(I) upon a basis of reciprocity, an alien who is a bona fide representative of foreign press, radio, film, or other foreign information media, who seeks to enter the United States solely to engage in such vocation, and the spouse and children of such a representative, if accompanying or following to join him;

(J) an alien having a residence in a foreign country which he has no intention of abandoning who is a bona fide student, scholar, trainee, teacher, professor, research assistant, specialist, or leader in a field of specialized knowledge or skill, or other person of similar description, who is coming temporarily to the United States as a participant in a program designated by the Director of the United States Information Agency, for the purpose of teaching, instructing or lecturing, studying, observing, conducting research, consulting, demonstrating special skills, or receiving training and who, if he is coming to the United States to participate in a program under which he will receive graduate medical education or training, also meets the requirements of section 1182(j) of this title, and the alien spouse and minor children of any such alien if accompanying him or following to join him;

(K) subject to subsections (d) and (p) of section 1184 of this title, an alien who--

(i) is the fiancee or fiance of a citizen of the United States (other than a citizen described in section 1154(a)(1)(A)(viii)(I) of this title) and who seeks to enter the United States solely to conclude a valid marriage with the petitioner within ninety days after admission;

(ii) has concluded a valid marriage with a citizen of the United States (other than a citizen described in section 1154(a)(1)(A)(viii)(I) of this title) who is the petitioner, is the beneficiary of a petition to accord a status under section 1151(b)(2)(A)(i) of this title that was filed under section 1154 of this title by the petitioner, and seeks to enter the United States to await the approval of such petition and the availability to the alien of an immigrant visa; or

(iii) is the minor child of an alien described in clause (i) or (ii) and is accompanying, or following to join, the alien;

(L) subject to section 1184(c)(2) of this title, an alien who, within 3 years preceding the time of his application for admission into the United States, has been employed continuously for one year by a firm or corporation or other legal entity or an affiliate or subsidiary thereof and who seeks to enter the United States temporarily in order to continue to render his services to the same employer or a subsidiary or affiliate thereof in a capacity that is managerial, executive, or involves specialized knowledge, and the alien spouse and minor children of any such alien if accompanying him or following to join him;

(M) (i) an alien having a residence in a foreign country which he has no intention of abandoning who seeks to enter the United States temporarily and solely for the purpose of pursuing a full course of study at an established vocational or other recognized nonacademic institution (other than in a language training program) in the United States particularly designated by him and approved by the Attorney General, after consultation with the Secretary of Education, which institution shall have agreed to report to the Attorney General the termination of attendance of each nonimmigrant nonacademic student and if any such institution fails to make reports promptly the approval shall be withdrawn, (ii) the alien spouse and minor children of any alien described in clause (i) if accompanying or following to join such an alien, and (iii) an alien who is a national of Canada or Mexico, who maintains actual residence and place of abode in the country of nationality, who is described in clause (i) except that the alien's course of study may be full or part-time, and who commutes to the United States institution or place of study from Canada or Mexico;

(N)(i) the parent of an alien accorded the status of special immigrant under paragraph (27)(I)(i) (or under analogous authority under paragraph (27)(L)), but only if and while the alien is a child, or

(ii) a child of such parent or of an alien accorded the status of a special immigrant under clause (ii), (iii), or (iv) of paragraph (27)(I) (or under analogous authority under paragraph (27)(L));

(O) an alien who--

(i) has extraordinary ability in the sciences, arts, education, business, or athletics which has been demonstrated by sustained national or international acclaim or, with regard to motion picture and television productions a demonstrated record of extraordinary achievement, and whose achievements have been recognized in the field through extensive documentation, and seeks to enter the United States to continue work in the area of extraordinary ability; or

(ii)(I) seeks to enter the United States temporarily and solely for the purpose of accompanying and assisting in the artistic or athletic performance by an alien who is admitted under clause (i) for a specific event or events,

(II) is an integral part of such actual performance,

(III) (a) has critical skills and experience with such alien which are not of a general nature and which cannot be performed by other individuals, or (b) in the case of a motion picture or television production, has skills and experience with such alien which are not of a general nature and which are critical either based on a pre-existing longstanding working relationship or, with respect to the specific production, because significant production (including pre- and post-production work) will take place both inside and outside the United States and the continuing participation of the alien is essential to the successful completion of the production, and

(IV) has a foreign residence which the alien has no intention of abandoning; or

(iii) is the alien spouse or child of an alien described in clause (i) or (ii) and is accompanying, or following to join, the alien;

(P) an alien having a foreign residence which the alien has no intention of abandoning who--

(i) (a) is described in section 1184(c)(4)(A) of this title (relating to athletes), or (b) is described in section 1184(c)(4)(B) of this title (relating to entertainment groups);

(ii)(I) performs as an artist or entertainer, individually or as part of a group, or is an integral part of the performance of such a group, and

(II) seeks to enter the United States temporarily and solely for the purpose of performing as such an artist or entertainer or with such a group under a reciprocal exchange program which is between an organization or organizations in the United States and an organization or organizations in one or more foreign states and which provides for the temporary exchange of artists and entertainers, or groups of artists and entertainers;

(iii)(I) performs as an artist or entertainer, individually or as part of a group, or is an integral part of the performance of such a group, and

(II) seeks to enter the United States temporarily and solely to perform, teach, or coach as such an artist or entertainer or with such a group under a commercial or noncommercial program that is culturally unique; or

(iv) is the spouse or child of an alien described in clause (i), (ii), or (iii) and is accompanying, or following to join, the alien;

(Q) an alien having a residence in a foreign country which he has no intention of abandoning who is coming temporarily (for a period not to exceed 15 months) to the United States as a participant in an international cultural exchange program approved by the Secretary of Homeland Security for the purpose of providing practical training, employment, and the sharing of the history, culture, and traditions of the country of the alien's nationality and who will be employed under the same wages and working conditions as domestic workers;

(R) an alien, and the spouse and children of the alien if accompanying or following to join the alien, who--

(i) for the 2 years immediately preceding the time of application for admission, has been a member of a religious denomination having a bona fide nonprofit, religious organization in the United States; and

(ii) seeks to enter the United States for a period not to exceed 5 years to perform the work described in subclause (I), (II), or (III) of paragraph (27)(C)(ii);

(S) subject to section 1184(k) of this title, an alien--

(i) who the Attorney General determines--

(I) is in possession of critical reliable information concerning a criminal organization or enterprise;

(II) is willing to supply or has supplied such information to Federal or State law enforcement authorities or a Federal or State court; and

(III) whose presence in the United States the Attorney General determines is essential to the success of an authorized criminal investigation or the successful prosecution of an individual involved in the criminal organization or enterprise; or

(ii) who the Secretary of State and the Attorney General jointly determine--

(I) is in possession of critical reliable information concerning a terrorist organization, enterprise, or operation;

(II) is willing to supply or has supplied such information to Federal law enforcement authorities or a Federal court;

(III) will be or has been placed in danger as a result of providing such information; and

(IV) is eligible to receive a reward under section 2708(a) of Title 22,

and, if the Attorney General (or with respect to clause (ii), the Secretary of State and the Attorney General jointly) considers it to be appropriate, the spouse, married and unmarried sons and daughters, and parents of an alien described in clause (i) or (ii) if accompanying, or following to join, the alien;

(T)(i) subject to section 1184(o) of this title, an alien who the Secretary of Homeland Security, or in the case of subclause (III)(aa) the Secretary of Homeland Security, in consultation with the Attorney General, determines--

(I) is or has been a victim of a severe form of trafficking in persons, as defined in section 7102 of Title 22;

(II) is physically present in the United States, American Samoa, or the Commonwealth of the Northern Mariana Islands, or at a port of entry thereto, on account of such trafficking, including physical presence on account of the alien having been allowed entry into the United States for participation in investigative or judicial processes associated with an act or a perpetrator of trafficking;

(III)(aa) has complied with any reasonable request for assistance in the Federal, State, or local investigation or prosecution of acts of trafficking or the investigation of crime where acts of trafficking are at least one central reason for the commission of that crime;

(bb) in consultation with the Attorney General, as appropriate, is unable to cooperate with a request described in item (aa) due to physical or psychological trauma; or

(cc) has not attained 18 years of age; and

(IV) the alien [1] would suffer extreme hardship involving unusual and severe harm upon removal; and

(ii) if accompanying, or following to join, the alien described in clause (i)--

(I) in the case of an alien described in clause (i) who is under 21 years of age, the spouse, children, unmarried siblings under 18 years of age on the date on which such alien applied for status under such clause, and parents of such alien;

(II) in the case of an alien described in clause (i) who is 21 years of age or older, the spouse and children of such alien; or

(III) any parent or unmarried sibling under 18 years of age, or any adult or minor children of a derivative beneficiary of the alien, as of an alien described in subclause (I) or (II) who the Secretary of Homeland Security, in consultation with the law enforcement officer investigating a severe form of trafficking, determines faces a present danger of retaliation as a result of the alien's escape from the severe form of trafficking or cooperation with law enforcement.

(U)(i) subject to section 1184(p) of this title, an alien who files a petition for status under this subparagraph, if the Secretary of Homeland Security determines that--

(I) the alien has suffered substantial physical or mental abuse as a result of having been a victim of criminal activity described in clause (iii);

(II) the alien (or in the case of an alien child under the age of 16, the parent, guardian, or next friend of the alien) possesses information concerning criminal activity described in clause (iii);

(III) the alien (or in the case of an alien child under the age of 16, the parent, guardian, or next friend of the alien) has been helpful, is being helpful, or is likely to be helpful to a Federal, State, or local law enforcement official, to a Federal, State, or local prosecutor, to a Federal or State judge, to the Service, or to other Federal, State, or local authorities investigating or prosecuting criminal activity described in clause (iii); and

(IV) the criminal activity described in clause (iii) violated the laws of the United States or occurred in the United States (including in Indian country and military installations) or the territories and possessions of the United States;

(ii) if accompanying, or following to join, the alien described in clause (i)--

(I) in the case of an alien described in clause (i) who is under 21 years of age, the spouse, children, unmarried siblings under 18 years of age on the date on which such alien applied for status under such clause, and parents of such alien; or

(II) in the case of an alien described in clause (i) who is 21 years of age or older, the spouse and children of such alien; and

(iii) the criminal activity referred to in this clause is that involving one or more of the following or any similar activity in violation of Federal, State, or local criminal law: rape; torture; trafficking; incest; domestic violence; sexual assault; abusive sexual contact; prostitution; sexual exploitation; stalking; female genital mutilation; being held hostage; peonage; involuntary servitude; slave trade; kidnapping; abduction; unlawful criminal restraint; false imprisonment; blackmail; extortion; manslaughter; murder; felonious assault; witness tampering; obstruction of justice; perjury; fraud in foreign labor contracting (as defined in section 1351 of Title 18); or attempt, conspiracy, or solicitation to commit any of the above mentioned crimes; or

(V) subject to section 1184(q) of this title, an alien who is the beneficiary (including a child of the principal alien, if eligible to receive a visa under section 1153(d) of this title) of a petition to accord a status under section 1153(a)(2)(A) of this title that was filed with the Attorney General under section 1154 of this title on or before December 21, 2000, if--

(i) such petition has been pending for 3 years or more; or

(ii) such petition has been approved, 3 years or more have elapsed since such filing date, and--

(I) an immigrant visa is not immediately available to the alien because of a waiting list of applicants for visas under section 1153(a)(2)(A) of this title; or

(II) the alien's application for an immigrant visa, or the alien's application for adjustment of status under section 1255 of this title, pursuant to the approval of such petition, remains pending.

(16) The term “immigrant visa” means an immigrant visa required by this chapter and properly issued by a consular officer at his office outside of the United States to an eligible immigrant under the provisions of this chapter.

(17) The term “immigration laws” includes this chapter and all laws, conventions, and treaties of the United States relating to the immigration, exclusion, deportation, expulsion, or removal of aliens.

(18) The term “immigration officer” means any employee or class of employees of the Service or of the United States designated by the Attorney General, individually or by regulation, to perform the functions of an immigration officer specified by this chapter or any section of this title.

(19) The term “ineligible to citizenship,” when used in reference to any individual, means, notwithstanding the provisions of any treaty relating to military service, an individual who is, or was at any time permanently debarred from becoming a citizen of the United States under section 3(a) of the Selective Training and Service Act of 1940, as amended (54 Stat. 885; 55 Stat. 844), or under section 4(a) of the Selective Service Act of 1948, as amended (62 Stat. 605; 65 Stat. 76), or under any section of this chapter, or any other Act, or under any law amendatory of, supplementary to, or in substitution for, any of such sections or Acts.

(20) The term "lawfully admitted for permanent residence" means the status of having been lawfully accorded the privilege of residing permanently in the United States as an immigrant in accordance with the immigration laws, such status not having changed.

(21) The term "national" means a person owing permanent allegiance to a state.

(22) The term "national of the United States" means (A) a citizen of the United States, or (B) a person who, though not a citizen of the United States, owes permanent allegiance to the United States.

(23) The term "naturalization" means the conferring of nationality of a state upon a person after birth, by any means whatsoever.

(24) Repealed. Pub.L. 102-232, Title III, § 305(m)(1), Dec. 12, 1991, 105 Stat. 1750.

(25) The term "noncombatant service" shall not include service in which the individual is not subject to military discipline, court martial, or does not wear the uniform of any branch of the armed forces.

(26) The term "nonimmigrant visa" means a visa properly issued to an alien as an eligible nonimmigrant by a competent officer as provided in this chapter.

(27) The term "special immigrant" means--

(A) an immigrant, lawfully admitted for permanent residence, who is returning from a temporary visit abroad;

(B) an immigrant who was a citizen of the United States and may, under section 1435(a) or 1438 of this title, apply for reacquisition of citizenship;

(C) an immigrant, and the immigrant's spouse and children if accompanying or following to join the immigrant, who--

(i) for at least 2 years immediately preceding the time of application for admission, has been a member of a religious denomination having a bona fide nonprofit, religious organization in the United States;

(ii) seeks to enter the United States--

(I) solely for the purpose of carrying on the vocation of a minister of that religious denomination,

(II) before September 30, 2015, in order to work for the organization at the request of the organization in a professional capacity in a religious vocation or occupation, or

(III) before September 30, 2015, in order to work for the organization (or for a bona fide organization which is affiliated with the religious denomination and is exempt from taxation as an organization described in section 501(c)(3) of Title 26) at the request of the organization in a religious vocation or occupation; and

(iii) has been carrying on such vocation, professional work, or other work continuously for at least the 2-year period described in clause (i);

(D) an immigrant who--

(i) is an employee, or an honorably retired former employee, of the United States Government abroad, or of the American Institute in Taiwan, and who has performed faithful service for a total of fifteen years, or more, and his accompanying spouse and children: *Provided*, That the principal officer of a Foreign Service establishment (or, in the case of the American Institute in Taiwan, the Director thereof), in his discretion, shall have recommended the granting of special immigrant status to such alien in exceptional circumstances and the Secretary of State approves such recommendation and finds that it is in the national interest to grant such status; or

(ii) is the surviving spouse or child of an employee of the United States Government abroad: *Provided*, That the employee performed faithful service for a total of not less than 15 years or was killed in the line of duty;

(E) an immigrant, and his accompanying spouse and children, who is or has been an employee of the Panama Canal Company or Canal Zone Government before the date on which the Panama Canal Treaty of 1977 (as described in section 3602(a)(1) of Title 22) enters into force [October 1, 1979], who was resident in the Canal Zone on the effective date of the exchange of instruments of ratification of such Treaty [April 1, 1979], and who has performed faithful service as such an employee for one year or more;

(F) an immigrant, and his accompanying spouse and children, who is a Panamanian national and (i) who, before the date on which such Panama Canal Treaty of 1977 enters into force [October 1, 1979], has been honorably retired from United States Government employment in the Canal Zone with a total of 15 years or more of faithful service, or (ii) who, on the date on which such Treaty enters into force, has been employed by the United States Government in the Canal Zone with a total of 15 years or more of faithful service and who subsequently is honorably retired from such employment or continues to be employed by the United States Government in an area of the former Canal Zone;

(G) an immigrant, and his accompanying spouse and children, who was an employee of the Panama Canal Company or Canal Zone Government on the effective date of the exchange of instruments of ratification of such Panama Canal Treaty of 1977 [April 1, 1979], who has performed faithful service for five years or more as such an employee, and whose personal safety, or the personal safety of whose spouse or children, as a direct result of such Treaty, is reasonably placed in danger because of the special nature of any of that employment;

(H) an immigrant, and his accompanying spouse and children, who--

(i) has graduated from a medical school or has qualified to practice medicine in a foreign state,

(ii) was fully and permanently licensed to practice medicine in a State on January 9, 1978, and was practicing medicine in a State on that date,

(iii) entered the United States as a nonimmigrant under subsection (a)(15)(H) or (a)(15)(J) before January 10, 1978, and

(iv) has been continuously present in the United States in the practice or study of medicine since the date of such entry;

(I)(i) an immigrant who is the unmarried son or daughter of an officer or employee, or of a former officer or employee, of an international organization described in paragraph (15)(G)(i), and who (I) while maintaining the status of a nonimmigrant under paragraph (15)(G)(iv) or paragraph (15)(N), has resided and been physically present in the United States for periods totaling at least one-half of the seven years before the date of application for a visa or for adjustment of status to a status under this subparagraph and for a period or periods aggregating at least seven years between the ages of five and 21 years, and (II) applies for a visa or adjustment of status under this subparagraph no later than his twenty-fifth birthday or six months after October 24, 1988, whichever is later;

(ii) an immigrant who is the surviving spouse of a deceased officer or employee of such an international organization, and who (I) while maintaining the status of a nonimmigrant under paragraph (15)(G)(iv) or paragraph (15)(N), has resided and been physically present in the United States for periods totaling at least one-half of the seven years before the date of application for a visa or for adjustment of status to a status under this subparagraph and for a period or periods aggregating at least 15 years before the date of the death of such officer or employee, and (II) files a petition for status under this subparagraph no later than six months after the date of such death or six months after October 24, 1988, whichever is later;

(iii) an immigrant who is a retired officer or employee of such an international organization, and who (I) while maintaining the status of a nonimmigrant under paragraph (15)(G)(iv), has resided and been physically present in the United States for periods totaling at least one-half of the seven years before the date of application for a visa or for adjustment of status to a status under this subparagraph and for a period or periods aggregating at least 15 years before the date of the officer or employee's retirement from any such international organization, and (II) files a petition for status under this subparagraph no later than six months after the date of such retirement or six months after October 25, 1994, whichever is later; or

(iv) an immigrant who is the spouse of a retired officer or employee accorded the status of special immigrant under clause (iii), accompanying or following to join such retired officer or employee as a member of his immediate family;

(J) an immigrant who is present in the United States--

(i) who has been declared dependent on a juvenile court located in the United States or whom such a court has legally committed to, or placed under the custody of, an agency or department of a State, or an individual or entity appointed by a State or juvenile court located in the United States, and whose reunification with 1 or both of the immigrant's parents is not viable due to abuse, neglect, abandonment, or a similar basis found under State law;

(ii) for whom it has been determined in administrative or judicial proceedings that it would not be in the alien's best interest to be returned to the alien's or parent's previous country of nationality or country of last habitual residence; and

(iii) in whose case the Secretary of Homeland Security consents to the grant of special immigrant juvenile status, except that--

(I) no juvenile court has jurisdiction to determine the custody status or placement of an alien in the custody of the Secretary of Health and Human Services unless the Secretary of Health and Human Services specifically consents to such jurisdiction; and

(II) no natural parent or prior adoptive parent of any alien provided special immigrant status under this subparagraph shall thereafter, by virtue of such parentage, be accorded any right, privilege, or status under this chapter;

(K) an immigrant who has served honorably on active duty in the Armed Forces of the United States after October 15, 1978, and after original lawful enlistment outside the United States (under a treaty or agreement in effect on October 1, 1991) for a period or periods aggregating--

(i) 12 years and who, if separated from such service, was never separated except under honorable conditions, or

(ii) 6 years, in the case of an immigrant who is on active duty at the time of seeking special immigrant status under this subparagraph and who has reenlisted to incur a total active duty service obligation of at least 12 years,

and the spouse or child of any such immigrant if accompanying or following to join the immigrant, but only if the executive department under which the immigrant serves or served recommends the granting of special immigrant status to the immigrant;

(L) an immigrant who would be described in clause (i), (ii), (iii), or (iv) of subparagraph (I) if any reference in such a clause--

(i) to an international organization described in paragraph (15)(G)(i) were treated as a reference to the North Atlantic Treaty Organization (NATO);

(ii) to a nonimmigrant under paragraph (15)(G)(iv) were treated as a reference to a nonimmigrant classifiable under NATO-6 (as a member of a civilian component accompanying a force entering in accordance with the provisions of the NATO Status-of-Forces Agreement, a member of a civilian component attached to or employed by an Allied Headquarters under the "Protocol on the Status of International Military Headquarters" set up pursuant to the North Atlantic Treaty, or as a dependent); and

(iii) to the Immigration Technical Corrections Act of 1988 or to the Immigration and Nationality Technical Corrections Act of 1994 were a reference to the American Competitiveness and Workforce Improvement Act of 1998 [2]

(M) subject to the numerical limitations of section 1153(b)(4) of this title, an immigrant who seeks to enter the United States to work as a broadcaster in the United States for the International Broadcasting Bureau of the Broadcasting Board of Governors, or for a grantee of the Broadcasting Board of Governors, and the immigrant's accompanying spouse and children.

(28) The term "organization" means, but is not limited to, an organization, corporation, company, partnership, association, trust, foundation or fund; and includes a group of persons, whether or not incorporated, permanently or temporarily associated together with joint action on any subject or subjects.

(29) The term "outlying possessions of the United States" means American Samoa and Swains Island.

(30) The term "passport" means any travel document issued by competent authority showing the bearer's origin, identity, and nationality if any, which is valid for the admission of the bearer into a foreign country.

(31) The term "permanent" means a relationship of continuing or lasting nature, as distinguished from temporary, but a relationship may be permanent even though it is one that may be dissolved eventually at the instance either of the United States or of the individual, in accordance with law.

(32) The term "profession" shall include but not be limited to architects, engineers, lawyers, physicians, surgeons, and teachers in elementary or secondary schools, colleges, academies, or seminaries.

(33) The term "residence" means the place of general abode; the place of general abode of a person means his principal, actual dwelling place in fact, without regard to intent.

(34) The term "Service" means the Immigration and Naturalization Service of the Department of Justice.

(35) The term "spouse", "wife", or "husband" do not include a spouse, wife, or husband by reason of any marriage ceremony where the contracting parties thereto are not physically present in the presence of each other, unless the marriage shall have been consummated.

(36) The term "State" includes the District of Columbia, Puerto Rico, Guam, the Virgin Islands of the United States, and the Commonwealth of the Northern Mariana Islands.

(37) The term "totalitarian party" means an organization which advocates the establishment in the United States of a totalitarian dictatorship or totalitarianism. The terms "totalitarian dictatorship" and "totalitarianism" mean and refer to systems of government not representative in fact, characterized by (A) the existence of a single political party, organized on a dictatorial basis, with so close an identity between such party and its policies and the governmental policies of the country in which it exists, that the party and the government constitute an indistinguishable unit, and (B) the forcible suppression of opposition to such party.

(38) The term "United States", except as otherwise specifically herein provided, when used in a geographical sense, means the continental United States, Alaska, Hawaii, Puerto Rico, Guam, the Virgin Islands of the United States, and the Commonwealth of the Northern Mariana Islands.

(39) The term "unmarried", when used in reference to any individual as of any time, means an individual who at such time is not married, whether or not previously married.

(40) The term "world communism" means a revolutionary movement, the purpose of which is to establish eventually a Communist totalitarian dictatorship in any or all the countries of the world through the medium of an internationally coordinated Communist political movement.

(41) The term "graduates of a medical school" means aliens who have graduated from a medical school or who have qualified to practice medicine in a foreign state, other than such aliens who are of national or international renown in the field of medicine.

(42) The term "refugee" means (A) any person who is outside any country of such person's nationality or, in the case of a person having no nationality, is outside any country in which such person last habitually resided, and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion, or (B) in such special circumstances as the President after appropriate consultation (as defined in section 1157(e) of this title) may specify, any person who is within the country of such person's nationality or, in the case of a person having no nationality, within the country in which such person is habitually residing, and who is persecuted or who has a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion. The term "refugee" does not include any person who ordered, incited, assisted, or otherwise participated in the persecution of any person on account of race, religion, nationality, membership in a particular social group, or political opinion. For purposes of determinations under this chapter, a person who has been forced to abort a pregnancy or to undergo involuntary sterilization, or who has been persecuted for failure or refusal to undergo such a procedure or for other resistance to a coercive population control program, shall be deemed to have been persecuted on account of political opinion, and a person who has a well founded fear that he or she will be forced to undergo such a procedure or subject to persecution for such failure, refusal, or resistance shall be deemed to have a well founded fear of persecution on account of political opinion.

(43) The term "aggravated felony" means--

(A) murder, rape, or sexual abuse of a minor;

(B) illicit trafficking in a controlled substance (as defined in section 802 of Title 21), including a drug trafficking crime (as defined in section 924(c) of Title 18);

(C) illicit trafficking in firearms or destructive devices (as defined in section 921 of Title 18) or in explosive materials (as defined in section 841(c) of that title);

(D) an offense described in section 1956 of Title 18 (relating to laundering of monetary instruments) or section 1957 of that title (relating to engaging in monetary transactions in property derived from specific unlawful activity) if the amount of the funds exceeded $10,000;

(E) an offense described in--

(i) section 842(h) or (i) of Title 18, or section 844(d), (e), (f), (g), (h), or (i) of that title (relating to explosive materials offenses);

(ii) section 922(g)(1), (2), (3), (4), or (5), (j), (n), (o), (p), or (r) or 924(b) or (h) of Title 18 (relating to firearms offenses); or

(iii) section 5861 of Title 26 (relating to firearms offenses);

(F) a crime of violence (as defined in section 16 of Title 18, but not including a purely political offense) for which the term of imprisonment at[3] least one year;

(G) a theft offense (including receipt of stolen property) or burglary offense for which the term of imprisonment at[3] least one year;

(H) an offense described in section 875, 876, 877, or 1202 of Title 18 (relating to the demand for or receipt of ransom);

(I) an offense described in section 2251, 2251A, or 2252 of Title 18 (relating to child pornography);

(J) an offense described in section 1962 of Title 18 (relating to racketeer influenced corrupt organizations), or an offense described in section 1084 (if it is a second or subsequent offense) or 1955 of that title (relating to gambling offenses), for which a sentence of one year imprisonment or more may be imposed;

(K) an offense that--

(i) relates to the owning, controlling, managing, or supervising of a prostitution business;

(ii) is described in section 2421, 2422, or 2423 of Title 18 (relating to transportation for the purpose of prostitution) if committed for commercial advantage; or

(iii) is described in any of sections 1581-1585 or 1588-1591 of Title 18 (relating to peonage, slavery, involuntary servitude, and trafficking in persons);

(L) an offense described in--

(i) section 793 (relating to gathering or transmitting national defense information), 798 (relating to disclosure of classified information), 2153 (relating to sabotage) or 2381 or 2382 (relating to treason) of Title 18;

(ii) section 3121 of Title 50 (relating to protecting the identity of undercover intelligence agents); or

(iii) section 3121 of Title 50 (relating to protecting the identity of undercover agents);

(M) an offense that--

(i) involves fraud or deceit in which the loss to the victim or victims exceeds $10,000; or

(ii) is described in section 7201 of Title 26 (relating to tax evasion) in which the revenue loss to the Government exceeds $10,000;

(N) an offense described in paragraph (1)(A) or (2) of section 1324(a) of this title (relating to alien smuggling), except in the case of a first offense for which the alien has affirmatively shown that the alien committed the offense for the purpose of assisting, abetting, or aiding only the alien's spouse, child, or parent (and no other individual) to violate a provision of this chapter [4]

(O) an offense described in section 1325(a) or 1326 of this title committed by an alien who was previously deported on the basis of a conviction for an offense described in another subparagraph of this paragraph;

(P) an offense (i) which either is falsely making, forging, counterfeiting, mutilating, or altering a passport or instrument in violation of section 1543 of Title 18 or is described in section 1546(a) of such title (relating to document fraud) and (ii) for which the term of imprisonment is at least 12 months, except in the case of a first offense for which the alien has affirmatively shown that the alien committed the offense for the purpose of assisting, abetting, or aiding only the alien's spouse, child, or parent (and no other individual) to violate a provision of this chapter;

(Q) an offense relating to a failure to appear by a defendant for service of sentence if the underlying offense is punishable by imprisonment for a term of 5 years or more;

(R) an offense relating to commercial bribery, counterfeiting, forgery, or trafficking in vehicles the identification numbers of which have been altered for which the term of imprisonment is at least one year;

(S) an offense relating to obstruction of justice, perjury or subornation of perjury, or bribery of a witness, for which the term of imprisonment is at least one year;

(T) an offense relating to a failure to appear before a court pursuant to a court order to answer to or dispose of a charge of a felony for which a sentence of 2 years' imprisonment or more may be imposed; and

(U) an attempt or conspiracy to commit an offense described in this paragraph.

The term applies to an offense described in this paragraph whether in violation of Federal or State law and applies to such an offense in violation of the law of a foreign country for which the term of imprisonment was completed within the previous 15 years. Notwithstanding any other provision of law (including any effective date), the term applies regardless of whether the conviction was entered before, on, or after September 30, 1996.

(44)(A) The term "managerial capacity" means an assignment within an organization in which the employee primarily--

(i) manages the organization, or a department, subdivision, function, or component of the organization;

(ii) supervises and controls the work of other supervisory, professional, or managerial employees, or manages an essential function within the organization, or a department or subdivision of the organization;

(iii) if another employee or other employees are directly supervised, has the authority to hire and fire or recommend those as well as other personnel actions (such as promotion and leave authorization) or, if no other employee is directly supervised, functions at a senior level within the organizational hierarchy or with respect to the function managed; and

(iv) exercises discretion over the day-to-day operations of the activity or function for which the employee has authority.

A first-line supervisor is not considered to be acting in a managerial capacity merely by virtue of the supervisor's supervisory duties unless the employees supervised are professional.

(B) The term "executive capacity" means an assignment within an organization in which the employee primarily--

(i) directs the management of the organization or a major component or function of the organization;

(ii) establishes the goals and policies of the organization, component, or function;

(iii) exercises wide latitude in discretionary decision-making; and

(iv) receives only general supervision or direction from higher level executives, the board of directors, or stockholders of the organization.

(C) If staffing levels are used as a factor in determining whether an individual is acting in a managerial or executive capacity, the Attorney General shall take into account the reasonable needs of the organization, component, or function in light of the overall purpose and stage of development of the organization, component, or function. An individual shall not be considered

to be acting in a managerial or executive capacity (as previously defined) merely on the basis of the number of employees that the individual supervises or has supervised or directs or has directed.

(45) The term "substantial" means, for purposes of paragraph (15)(E) with reference to trade or capital, such an amount of trade or capital as is established by the Secretary of State, after consultation with appropriate agencies of Government.

(46) The term "extraordinary ability" means, for purposes of subsection (a)(15)(O)(i), in the case of the arts, distinction.

(47)(A) The term "order of deportation" means the order of the special inquiry officer, or other such administrative officer to whom the Attorney General has delegated the responsibility for determining whether an alien is deportable, concluding that the alien is deportable or ordering deportation.

(B) The order described under subparagraph (A) shall become final upon the earlier of--

(i) a determination by the Board of Immigration Appeals affirming such order; or

(ii) the expiration of the period in which the alien is permitted to seek review of such order by the Board of Immigration Appeals.

(48)(A) The term "conviction" means, with respect to an alien, a formal judgment of guilt of the alien entered by a court or, if adjudication of guilt has been withheld, where--

(i) a judge or jury has found the alien guilty or the alien has entered a plea of guilty or nolo contendere or has admitted sufficient facts to warrant a finding of guilt, and

(ii) the judge has ordered some form of punishment, penalty, or restraint on the alien's liberty to be imposed.

(B) Any reference to a term of imprisonment or a sentence with respect to an offense is deemed to include the period of incarceration or confinement ordered by a court of law regardless of any suspension of the imposition or execution of that imprisonment or sentence in whole or in part.

(49) The term "stowaway" means any alien who obtains transportation without the consent of the owner, charterer, master or person in command of any vessel or aircraft through concealment aboard such vessel or aircraft. A passenger who boards with a valid ticket is not to be considered a stowaway.

(50) The term "intended spouse" means any alien who meets the criteria set forth in section 1154(a)(1)(A)(iii)(II)(aa)(BB), 1154(a)(1)(B)(ii)(II)(aa)(BB), or 1229b(b)(2)(A)(i)(III) of this title.

(51) The term "VAWA self-petitioner" means an alien, or a child of the alien, who qualifies for relief under--

(A) clause (iii), (iv), or (vii) of section 1154(a)(1)(A) of this title;

(B) clause (ii) or (iii) of section 1154(a)(1)(B) of this title;

(C) section 1186a(c)(4)(C) of this title;

(D) the first section of Public Law 89-732 (8 U.S.C. 1255 note) (commonly known as the Cuban Adjustment Act) as a child or spouse who has been battered or subjected to extreme cruelty;

(E) section 902(d)(1)(B) of the Haitian Refugee Immigration Fairness Act of 1998 (8 U.S.C. 1255 note);

(F) section 202(d)(1) of the Nicaraguan Adjustment and Central American Relief Act; or

(G) section 309 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (division C of Public Law 104-208).

(52) The term "accredited language training program" means a language training program that is accredited by an accrediting agency recognized by the Secretary of Education.

(b) As used in subchapters I and II--

(1) The term "child" means an unmarried person under twenty-one years of age who is--

(A) a child born in wedlock;

(B) a stepchild, whether or not born out of wedlock, provided the child had not reached the age of eighteen years at the time the marriage creating the status of stepchild occurred;

(C) a child legitimated under the law of the child's residence or domicile, or under the law of the father's residence or domicile, whether in or outside the United States, if such legitimation takes place before the child reaches the age of eighteen years and the child is in the legal custody of the legitimating parent or parents at the time of such legitimation;

(D) a child born out of wedlock, by, through whom, or on whose behalf a status, privilege, or benefit is sought by virtue of the relationship of the child to its natural mother or to its natural father if the father has or had a bona fide parent-child relationship with the person;

(E)(i) a child adopted while under the age of sixteen years if the child has been in the legal custody of, and has resided with, the adopting parent or parents for at least two years or if the child has been battered or subject to extreme cruelty

by the adopting parent or by a family member of the adopting parent residing in the same household: *Provided*, That no natural parent of any such adopted child shall thereafter, by virtue of such parentage, be accorded any right, privilege, or status under this chapter; or

(ii) subject to the same proviso as in clause (i), a child who: (I) is a natural sibling of a child described in clause (i) or subparagraph (F)(i); (II) was adopted by the adoptive parent or parents of the sibling described in such clause or subparagraph; and (III) is otherwise described in clause (i), except that the child was adopted while under the age of 18 years;

(F)(i) a child, under the age of sixteen at the time a petition is filed in his behalf to accord a classification as an immediate relative under section 1151(b) of this title, who is an orphan because of the death or disappearance of, abandonment or desertion by, or separation or loss from, both parents, or for whom the sole or surviving parent is incapable of providing the proper care and has in writing irrevocably released the child for emigration and adoption; who has been adopted abroad by a United States citizen and spouse jointly, or by an unmarried United States citizen who is at least 25 years of age, at least 1 of whom personally saw and observed the child before or during the adoption proceedings; or who is coming to the United States for adoption by a United States citizen and spouse jointly, or by an unmarried United States citizen at least twenty-five years of age, who have or has complied with the preadoption requirements, if any, of the child's proposed residence; *Provided*, That the Attorney General is satisfied that proper care will be furnished the child if admitted to the United States: *Provided further*, That no natural parent or prior adoptive parent of any such child shall thereafter, by virtue of such parentage, be accorded any right, privilege, or status under this chapter; or

(ii) subject to the same provisos as in clause (i), a child who: (I) is a natural sibling of a child described in clause (i) or subparagraph (E)(i); (II) has been adopted abroad, or is coming to the United States for adoption, by the adoptive parent (or prospective adoptive parent) or parents of the sibling described in such clause or subparagraph; and (III) is otherwise described in clause (i), except that the child is under the age of 18 at the time a petition is filed in his or her behalf to accord a classification as an immediate relative under section 1151(b) of this title; or

(G)(i) a child, younger than 16 years of age at the time a petition is filed on the child's behalf to accord a classification as an immediate relative under section 1151(b) of this title, who has been adopted in a foreign state that is a party to the Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption, done at The Hague on May 29, 1993, or who is emigrating from such a foreign state to be adopted in the United States by a United States citizen and spouse jointly or by an unmarried United States citizen who is at least 25 years of age, Provided, That--

(I) the Secretary of Homeland Security is satisfied that proper care will be furnished the child if admitted to the United States;

(II) the child's natural parents (or parent, in the case of a child who has one sole or surviving parent because of the death or disappearance of, abandonment or desertion by, the other parent), or other persons or institutions that retain legal custody of the child, have freely given their written irrevocable consent to the termination of their legal relationship with the child, and to the child's emigration and adoption;

(III) in the case of a child having two living natural parents, the natural parents are incapable of providing proper care for the child;

(IV) the Secretary of Homeland Security is satisfied that the purpose of the adoption is to form a bona fide parent-child relationship, and the parent-child relationship of the child and the natural parents has been terminated (and in carrying out both obligations under this subclause the Secretary of Homeland Security may consider whether there is a petition pending to confer immigrant status on one or both of such natural parents); and

(V) in the case of a child who has not been adopted--

(aa) the competent authority of the foreign state has approved the child's emigration to the United States for the purpose of adoption by the prospective adoptive parent or parents; and

(bb) the prospective adoptive parent or parents has or have complied with any pre-adoption requirements of the child's proposed residence; and

(ii) except that no natural parent or prior adoptive parent of any such child shall thereafter, by virtue of such parentage, be accorded any right, privilege, or status under this chapter; or

(iii) subject to the same provisos as in clauses (i) and (ii), a child who--

(I) is a natural sibling of a child described in clause (i), subparagraph (E)(i), or subparagraph (F)(i);

(II) was adopted abroad, or is coming to the United States for adoption, by the adoptive parent (or prospective adoptive parent) or parents of the sibling described in clause (i), subparagraph (E)(i), or subparagraph (F)(i); and

(III) is otherwise described in clause (i), except that the child is younger than 18 years of age at the time a petition is filed on his or her behalf for classification as an immediate relative under section 1151(b) of this title.

(2) The terms “parent”, “father”, or “mother” mean a parent, father, or mother only where the relationship exists by reason of any of the circumstances set forth in subdivision (1) of this subsection, except that, for purposes of paragraph (1)(F) (other than the second proviso therein) and paragraph (1)(G)(i) in the case of a child born out of wedlock described in paragraph (1)(D) (and not described in paragraph (1)(C)), the term “parent” does not include the natural father of the child if the father has disappeared or abandoned or deserted the child or if the father has in writing irrevocably released the child for emigration and adoption.

(3) The term “person” means an individual or an organization.

(4) The term “immigration judge” means an attorney whom the Attorney General appoints as an administrative judge within the Executive Office for Immigration Review, qualified to conduct specified classes of proceedings, including a hearing under section 1229a of this title. An immigration judge shall be subject to such supervision and shall perform such duties as the Attorney General shall prescribe, but shall not be employed by the Immigration and Naturalization Service.

(5) The term "adjacent islands" includes Saint Pierre, Miquelon, Cuba, the Dominican Republic, Haiti, Bermuda, the Bahamas, Barbados, Jamaica, the Windward and Leeward Islands, Trinidad, Martinique, and other British, French, and Netherlands territory or possessions in or bordering on the Caribbean Sea.

(c) As used in subchapter III--

(1) The term "child" means an unmarried person under twenty-one years of age and includes a child legitimated under the law of the child's residence or domicile, or under the law of the father's residence or domicile, whether in the United States or elsewhere, and, except as otherwise provided in sections 1431 and 1432 of this title, a child adopted in the United States, if such legitimation or adoption takes place before the child reaches the age of 16 years (except to the extent that the child is described in subparagraph (E)(ii) or (F)(ii) of subsection (b)(1)), and the child is in the legal custody of the legitimating or adopting parent or parents at the time of such legitimation or adoption.

(2) The terms "parent", "father", and "mother" include in the case of a posthumous child a deceased parent, father, and mother.

(d) Repealed. Pub.L. 100-525, § 9(a)(3), Oct. 24, 1988, 102 Stat. 2619.

(e) For the purposes of this chapter--

(1) The giving, loaning, or promising of support or of money or any other thing of value to be used for advocating any doctrine shall constitute the advocating of such doctrine; but nothing in this paragraph shall be construed as an exclusive definition of advocating.

(2) The giving, loaning, or promising of support or of money or any other thing of value for any purpose to any organization shall be presumed to constitute affiliation therewith; but nothing in this paragraph shall be construed as an exclusive definition of affiliation.

(3) Advocating the economic, international, and governmental doctrines of world communism means advocating the establishment of a totalitarian Communist dictatorship in any or all of the countries of the world through the medium of an internationally coordinated Communist movement.

(f) For the purposes of this chapter--

No person shall be regarded as, or found to be, a person of good moral character who, during the period for which good moral character is required to be established is, or was--

(1) a habitual drunkard;

(2) Repealed. Pub.L. 97-116, § 2(c)(1), Dec. 29, 1981, 95 Stat. 1611.

(3) a member of one or more of the classes of persons, whether inadmissible or not, described in paragraphs (2)(D), (6)(E), and (10)(A) of section 1182(a) of this title; or subparagraphs (A) and (B) of section 1182(a)(2) of this title and subparagraph (C) thereof of such section [5] (except as such paragraph relates to a single offense of simple possession of 30 grams or less of marihuana), if the offense described therein, for which such person was convicted or of which he admits the commission, was committed during such period;

(4) one whose income is derived principally from illegal gambling activities;

(5) one who has been convicted of two or more gambling offenses committed during such period;

(6) one who has given false testimony for the purpose of obtaining any benefits under this chapter;

(7) one who during such period has been confined, as a result of conviction, to a penal institution for an aggregate period of one hundred and eighty days or more, regardless of whether the offense, or offenses, for which he has been confined were committed within or without such period;

(8) one who at any time has been convicted of an aggravated felony (as defined in subsection (a)(43)); or

(9) one who at any time has engaged in conduct described in section 1182(a)(3)(E) of this title (relating to assistance in Nazi persecution, participation in genocide, or commission of acts of torture or extrajudicial killings) or 1182(a)(2)(G) of this title (relating to severe violations of religious freedom).

The fact that any person is not within any of the foregoing classes shall not preclude a finding that for other reasons such person is or was not of good moral character. In the case of an alien who makes a false statement or claim of citizenship, or who registers to vote or votes in a Federal, State, or local election (including an initiative, recall, or referendum) in violation of a lawful restriction of such registration or voting to citizens, if each natural parent of the alien (or, in the case of an adopted alien, each adoptive parent of the alien) is or was a citizen (whether by birth or naturalization), the alien permanently resided in the United States prior to attaining the age of 16, and the alien reasonably believed at the time of such statement, claim, or violation that he or she was a citizen, no finding that the alien is, or was, not of good moral character may be made based on it.

(g) For the purposes of this chapter any alien ordered deported or removed (whether before or after the enactment of this chapter) who has left the United States, shall be considered to have been deported or removed in pursuance of law, irrespective of the source from which the expenses of his transportation were defrayed or of the place to which he departed.

(h) For purposes of section 1182(a)(2)(E) of this title, the term “serious criminal offense” means--

(1) any felony;

(2) any crime of violence, as defined in section 16 of Title 18; or

(3) any crime of reckless driving or of driving while intoxicated or under the influence of alcohol or of prohibited substances if such crime involves personal injury to another.

(i) With respect to each nonimmigrant alien described in subsection (a)(15)(T)(i)--

(1) the Secretary of Homeland Security, the Attorney General, and other Government officials, where appropriate, shall provide the alien with a referral to a nongovernmental organization that would advise the alien regarding the alien's options while in the United States and the resources available to the alien; and

(2) the Secretary of Homeland Security shall, during the period the alien is in lawful temporary resident status under that subsection, grant the alien authorization to engage in employment in the United States and provide the alien with an "employment authorized" endorsement or other appropriate work permit.

CREDIT(S)

(June 27, 1952, c. 477, Title I, § 101, 66 Stat. 166; Pub.L. 85-316, §§ 1, 2, Sept. 11, 1957, 71 Stat. 639; Pub.L. 85-508, § 22, July 7, 1958, 72 Stat. 351; Pub.L. 86-3, § 20(a), Mar. 18, 1959, 73 Stat. 13; Pub.L. 87-256, § 109(a), (b), Sept. 21, 1961, 75 Stat. 534; Pub.L. 87-301, §§ 1, 2, 7, Sept. 26, 1961, 75 Stat. 650, 653; Pub.L. 89-236, §§ 8, 24, Oct. 3, 1965, 79 Stat. 916, 922; Pub.L. 89-710, Nov. 2, 1966, 80 Stat. 1104; Pub.L. 91-225, § 1, Apr. 7, 1970, 84 Stat. 116; Pub.L. 94-155, Dec. 16, 1975, 89 Stat. 824; Pub.L. 94-484, Title VI, § 601(b), (e), Oct. 12, 1976, 90 Stat. 2301, 2302; Pub.L. 94-571, § 7(a), Oct. 20, 1976, 90 Stat. 2706; Pub.L. 94-484, Title VI, § 602(c), Oct. 12, 1976, as added Pub.L. 95-83, Title III, § 307(q)(3), Aug. 1, 1977, 91 Stat. 395; Pub.L. 95-105, Title I, § 109(b)(3), Aug. 17, 1977, 91 Stat. 847; Pub.L. 96-70, Title III, § 3201(a), Sept. 27, 1979, 93 Stat. 496; Pub.L. 96-212, Title II, § 201(a), Mar. 17, 1980, 94 Stat. 102; Pub.L. 97-116, §§ 2, 5(d)(1), 18(a), Dec. 29, 1981, 95 Stat. 1611, 1614, 1619; Priv.L. 98-47, § 3, Oct. 30, 1984, 98 Stat. 3435; Pub.L. 99-505, § 1, Oct. 21, 1986, 100 Stat. 1806; Pub.L. 99-603, Title III, §§ 301(a), 312, 315(a), Nov. 6, 1986, 100 Stat. 3411, 3434, 3439; Pub.L. 99-653, §§ 2, 3, Nov. 14, 1986, 100 Stat. 3655; Pub.L. 100-459, Title II, § 210(a), Oct. 1, 1988, 102 Stat. 2203; Pub.L. 100-525, §§ 2(o)(1), 8(b), 9(a), Oct. 24, 1988, 102 Stat. 2613, 2617, 2619; Pub.L. 100-690, Title VII, § 7342, Nov. 18, 1988, 102 Stat. 4469; Pub.L. 101-162, Title VI, § 611(a), Nov. 21, 1989, 103 Stat. 1038; Pub.L. 101-238, § 3(a), Dec. 18, 1989, 103 Stat. 2100; Pub.L. 101-246, Title I, § 131(b), Feb. 16, 1990, 104 Stat. 31; Pub.L. 101-649, Title I, §§ 123, 151(a), 153(a), 162(f)(2)(A), Title II, §§ 203(c), 204(a), (c), 205(c)(1), (d), (e), 206(c), 207(a), 208, 209(a), Title IV, § 407(a)(2), Title V, §§ 501(a), 509(a), Title VI, § 603(a)(1), Nov. 29, 1990, 104 Stat. 4995, 5004, 5005, 5012, 5018 to 5020, 5022, 5023, 5026, 5027, 5040, 5048, 5051, 5082; Pub.L. 102-110, § 2(a), Oct. 1, 1991, 105 Stat. 555; Pub.L. 102-232, Title II, §§ 203(a), 205(a) to (c), 206(b), (c)(1), (d), 207(b), Title III, §§ 302(e)(8)(A), 303(a)(5)(A), (7)(A), (14), 305(m)(1), 306(a)(1), 309(b)(1), (4), Dec. 12, 1991, 105 Stat. 1737, 1740, 1741, 1746 to 1748, 1750, 1751, 1758; Pub.L. 103-236, Title I, § 162(h)(1), Apr. 30, 1994, 108 Stat. 407; Pub.L. 103-322, Title XIII, § 130003(a), Sept. 13, 1994, 108 Stat. 2024; Pub.L. 103-337, Div. C, Title XXXVI, § 3605, Oct. 5, 1994, 108 Stat. 3113; Pub.L. 103-416, Title II, §§ 201, 202, 214, 219(a), 222(a), Oct. 25, 1994, 108 Stat. 4310, 4311, 4314, 4316, 4320; Pub.L. 104-51, § 1, Nov. 15, 1995, 109 Stat. 467; Pub.L. 104-132, Title IV, § 440(b), (e), Apr. 24, 1996, 110 Stat. 1277; Pub.L. 104-208, Div. C, Title I, § 104(a), Title III, §§ 301(a), 308(d)(3)(A), (4)(A), (e)(3), (f)(1)(A), (B), 321(a), (b), 322(a)(1), (2)(A), 361(a), 371(a), Title VI, §§ 601(a)(1), 625(a)(2), 671(a)(3)(B), (b)(5), (e)(2), Sept. 30, 1996, 110 Stat. 3009-555, 3009-575, 3009-617, 3009-620, 3009-621, 3009-627 to 3009-629, 3009-644, 3009-645, 3009-689, 3009-700, 3009-721 to 3009-723; Pub.L. 105-54, § 1(a), Oct. 6, 1997, 111 Stat. 1175; Pub.L. 105-119, Title I, § 113, Nov. 26, 1997, 111 Stat. 2460; Pub.L. 105-277, Div. C, Title IV, § 421, Div. G, Title XXII, § 2222(e), Oct. 21, 1998, 112 Stat. 2681-657, 2681-819; Pub.L. 105-319, § 2(b)(1), (e)(2), formerly (d)(2), Oct. 30, 1998, 112 Stat. 3014, 3015; renumbered § 2(e)(2), Pub.L. 108-449, § 1(a)(3)(A), Dec. 10, 2004, 118 Stat. 3470; amended Pub.L. 106-95, § 2(a), (c), Nov. 12, 1999, 113 Stat. 1312; Pub.L. 106-139, § (1)(a), (b)(1), Dec. 7, 1999, 113 Stat. 1696; Pub.L. 106-279, Title III, § 302(a), (c), Oct. 6, 2000, 114 Stat. 838, 839; Pub.L. 106-386, Div. A, § 107(e)(1), (4), Div. B, Title V, §§ 1503(a), 1513(b), Oct. 28, 2000, 114 Stat. 1477, 1479, 1518, 1534; Pub.L. 106-395, Title II, § 201(a)(1), Oct. 30,

2000, 114 Stat. 1633; Pub.L. 106-409, § 2(a), Nov. 1, 2000, 114 Stat. 1787; Pub.L. 106-536, § 1(a), Nov. 22, 2000, 114 Stat. 2560; Pub.L. 106-553, § 1(a)(2) [Title XI, § 1102(a), 1103(a)], Dec. 21, 2000, 114 Stat. 2762, 2762A-142, 2762A-143; Pub.L. 107-125, § 2(b), Jan. 16, 2002, 115 Stat. 2403; Pub.L. 107-274, § 2(a), (b), Nov. 2, 2002, 116 Stat. 1923; Pub.L. 108-77, Title IV, § 402(a)(1), Sept. 3, 2003, 117 Stat. 939; Pub.L. 108-99, § 1, Oct. 15, 2003, 117 Stat. 1176; Pub.L. 108-193, §§ 4(b)(1), (5), 8(a)(1), Dec. 19, 2003, 117 Stat. 2878, 2879, 2886; Pub.L. 108-449, § 1(a)(2)(B), (b)(1), Dec. 10, 2004, 118 Stat. 3469, 3470; Pub.L. 108-458, Title V, § 5504, Dec. 17, 2004, 118 Stat. 3741; Pub.L. 109-13, Div. B, Title V, § 501(a), May 11, 2005, 119 Stat. 321; Pub.L. 109-90, Title V, § 536, Oct. 18, 2005, 119 Stat. 2087; Pub.L. 109-162, Title VIII, §§ 801, 805(d), 811, 822(c)(1), Jan. 5, 2006, 119 Stat. 3053, 3056, 3057, 3063; Pub.L. 109-248, Title IV, § 402(b), July 27, 2006, 120 Stat. 623; Pub.L. 110-229, Title VII, § 702(j)(1) to (3), May 8, 2008, 122 Stat. 866; Pub.L. 110-391, § 2(a), Oct. 10, 2008, 122 Stat. 4193; Pub.L. 110-457, Title II, §§ 201(a), 235(d)(1), Dec. 23, 2008, 122 Stat. 5052, 5079; Pub.L. 111-9, § 1, Mar. 20, 2009, 123 Stat. 989; Pub.L. 111-83, Title V, § 568(a)(1), Oct. 28, 2009, 123 Stat. 2186; Pub.L. 111-287, § 3, Nov. 30, 2010, 124 Stat. 3058; Pub.L. 111-306, § 1(a), Dec. 14, 2010, 124 Stat. 3280; Pub.L. 112-176, § 3, Sept. 28, 2012, 126 Stat. 1325; Pub.L. 113-4, Title VIII, § 801, Title XII, §§ 1221, 1222, Mar. 7, 2013, 127 Stat. 110, 144; Pub.L. 113-76, Div. K, Title VII, § 7083, Jan. 17, 2014, 128 Stat. 567; Pub.L. 117-31, Title IV, § 403(a), July 30, 2021, 135 Stat. 318.)

Footnotes

1 So in original. The words “the alien” probably should not appear.

2 So in original. Probably should be followed by “; or”.

3 So in original. Probably should be preceded by “is”.

4 So in original. Probably should be followed by a semicolon.

5 So in original. The phrase “of such section” probably should not appear.

8 U.S.C.A. § 1101, 8 USCA § 1101
Current through P.L. 117-154. Some statute sections may be more current, see credits for details

Code of Federal Regulations
Title 22. Foreign Relations
Chapter I. Department of State
Subchapter G. Public Diplomacy and Exchanges (Refs & Annos)
Part 62. Exchange Visitor Program (Refs & Annos)
Subpart A. General Provisions

22 C.F.R. § 62.4

§ 62.4 Categories of participant eligibility.

Effective: January 5, 2015
Currentness

Sponsors select foreign nationals to participate in exchange visitor program(s) in the United States. Participation is limited to foreign nationals who meet the following criteria for each of the following categories:

(a) Student. A foreign national who is:

(1) Studying in the United States and:

(i) Pursuing a full course of study at a secondary accredited academic institution;

(ii) Pursuing a full course of study leading to or culminating in the award of a U.S. degree from a post-secondary accredited academic institution; or

(iii) Engaged full-time in a prescribed course of study of up to 24 months (non-degree) duration conducted by:

(A) A post-secondary accredited academic institution; or

(B) An institute approved by or acceptable to the post-secondary accredited academic institution, where the student is to be enrolled upon completion of the non-degree program;

(2) Engaged in academic training as permitted in § 62.23(f);

(3) Engaged in English language training at:

(i) A post-secondary accredited academic institution, or

(ii) An institute approved by or acceptable to the post-secondary accredited academic institution where the college or university student is to be enrolled upon completion of the language training; or

(4) Engaged full-time in a student internship program conducted by a post-secondary accredited academic institution.

(b) Short-term scholar. A foreign national who is a professor, research scholar, or person with similar education or accomplishments who enters the United States for a short-term visit for the purpose of lecturing, observing, consulting, training, or demonstrating special skills at research institutions, museums, libraries, post-secondary accredited academic institutions, or similar types of institutions.

(c) Trainee. A foreign national participating in a structured and guided work-based training program in his or her specific occupational field (in an occupational category for which a sponsor has obtained designation) who has either:

(1) A degree or professional certificate from a foreign ministerially-recognized post-secondary academic institution and at least one year of prior related work experience in his or her occupational field acquired outside the United States; or

(2) Five years of work experience in his or her occupational field acquired outside the United States.

(d) Teacher. A foreign national with the equivalent of a U.S. Bachelor's degree in either education or the subject matter (or related subjects) he or she intends to teach and a minimum of the equivalent of two years of post-degree full-time teaching experience, who is employed as a teacher at the time of application for the program, for the purpose of teaching full-time in a primary or secondary accredited academic institution.

(e) Professor. A foreign national whose primary purpose is teaching, lecturing, observing, or consulting at post-secondary accredited academic institutions, museums, libraries, or similar types of institutions. A professor also may conduct research where authorized by the sponsor.

(f) Research scholar. A foreign national whose primary purpose is conducting research, observing, or consulting in connection with a research project at research institutions, corporate research facilities, museums, libraries, post-secondary accredited academic institutions, or similar types of institutions. A research scholar also may teach or lecture where authorized by the sponsor.

(g) Specialist. A foreign national who is an expert in a field of specialized knowledge or skills who enters the United States for the purpose of observing, consulting, or demonstrating special knowledge or skills.

(h) Other person of similar description. A foreign national of description similar to those set forth in paragraphs (a) through (g) of this section coming to the United States as a participant in an exchange visitor program designated by the Department of State under this category, for the purpose of teaching, instructing or lecturing, studying, observing, conducting research, consulting, demonstrating special skills, or receiving training. The programs designated by the Department of State in this category consist of:

(1) Alien physician. A foreign national who is a graduate of a school of medicine who comes to the United States under a program in which he or she will receive graduate medical education or training conducted by accredited U.S. schools of medicine or scientific institutions.

(2) International visitor. A foreign national who is a recognized or potential leader, selected by the Department of State for the purpose of consulting, observing, conducting research, training, or demonstrating special skills in the United States.

(3) Government visitor. A foreign national who is an influential or distinguished person, selected by a U.S. federal, state, or local government agency for the purpose of consulting, observing, training, or demonstrating special skills in the United States.

(4) Camp counselor. A foreign national selected to be a counselor in a summer camp in the United States (e.g., during the U.S. summer months).

(5) Au pair. A foreign national who comes to the United States for the purpose of residing with an American host family and participating directly in their home life, while providing limited childcare services, and fulfilling an educational requirement.

(6) Summer Work and Travel. A foreign national who is a bona fide foreign post-secondary student, who at the time of application is enrolled in and actively pursuing a degree or a full-time course of study at a foreign ministerially-recognized post-secondary academic institution and whose purpose is work and travel in the United States for up to four months during his or her break between academic years.

(7) Intern. A foreign national participating in a structured and guided work-based internship program in his or her specific academic field and who either:

(i) Is currently enrolled full-time in and actively pursuing studies at a foreign ministerially-recognized degree- or certificate-granting post-secondary academic institution outside the United States, or

(ii) Graduated from such an institution no more than 12 months prior to the exchange visitor program begin date reflected on Form DS–2019.

Credits

[67 FR 17612, April 11, 2002; 79 FR 60307, 60310, Oct. 6, 2014]

SOURCE: 58 FR 15196, March 19, 1993; 64 FR 54539, 54540, Oct. 7, 1999; 64 FR 54539, Oct. 7, 1999; 65 FR 20083, April 14, 2000; 72 FR 33673, June 19, 2007; 72 FR 61801, Nov. 1, 2007; 72 FR 62114, Nov. 2, 2007; 72 FR 67576, Nov. 29, 2007; 72 FR 72247, Dec. 20, 2007; 73 FR 34862, June 19, 2008; 73 FR 35068, June 20, 2008; 73 FR 36789, June 30, 2008; 74 FR 15845, April 8, 2009; 75 FR 48559, Aug. 11, 2010; 75 FR 65981, Oct. 27, 2010; 76 FR 10500, Feb. 25, 2011; 79 FR 60307, Oct. 6, 2014; 81 FR 4955, Jan. 29, 2016; 86 FR 20287, April 19, 2021, unless otherwise noted.

AUTHORITY: 8 U.S.C. 1101(a)(15)(J), 1182, 1184, 1258; 22 U.S.C. 1431 et seq.; 22 U.S.C. 2451 et seq.; 22 U.S.C. 2651a; 22 U.S.C. 6531–6553; Reorganization Plan No. 2 of 1977, 42 FR 62461, 3 CFR, 1977 Comp. p. 200; E.O. 12048, 43 FR 13361, 3 CFR, 1978 Comp., p. 168; 8 U.S.C. 1372; section 416 of Pub.L. 107–56, 115 Stat. 354 (8 U.S.C. 1372 note); and 8 U.S.C. 1761–1762.

Current through June 28, 2022, 87 FR 38295, except for 40 CFR § 52.220, which is current through May 6, 2022. Some sections may be more current. See credits for details.

End of Document

Code of Federal Regulations
Title 22. Foreign Relations
Chapter I. Department of State
Subchapter G. Public Diplomacy and Exchanges (Refs & Annos)
Part 62. Exchange Visitor Program (Refs & Annos)
Subpart B. Specific Program Provisions

22 C.F.R. § 62.20

§ 62.20 Professors and research scholars.

Effective: November 18, 2006
Currentness

(a) Introduction. These regulations govern Exchange Visitor Program participants in the categories of professor and research scholar, except:

(1) Alien physicians in graduate medical education or training, who are governed by regulations set forth at § 62.27; and

(2) Short-term scholars, who are governed by regulations set forth at § 62.21.

(b) Purpose. The purpose of the Exchange Visitor Program, in part, is to foster the exchange of ideas between Americans and foreign nationals and to stimulate international collaborative teaching, lecturing and research efforts. The exchange of professors and research scholars promotes the exchange of ideas, research, mutual enrichment, and linkages between research and educational institutions in the United States and foreign countries. It does so by providing foreign professors and research scholars the opportunity to engage in research, teaching and lecturing with their American colleagues, to participate actively in cross-cultural activities with Americans, and ultimately to share with their countrymen their experiences and increased knowledge of the United States and their substantive fields.

(c) Designation. The Department of State may, in its sole discretion, designate bona fide exchange visitor programs, which offer foreign nationals the opportunity to engage in research, teaching, lecturing, observing, or consulting at research institutions, corporate research facilities, museums, libraries, post-secondary accredited educational institutions, or similar types of institutions in the United States.

(d) Visitor eligibility. An individual may be selected for participation in the Exchange Visitor Program as a professor or research scholar subject to the following conditions:

(1) The participant must not be a candidate for a tenure track position;

(2) The participant has not been physically present in the United States as a nonimmigrant pursuant to the provisions of 8 U.S.C. 1101(a)(15)(J) for all or part of the twelve-month period immediately proceeding the date of program commencement set forth on his or her Form DS–2019, unless:

(i) The participant is transferring to the sponsor's program pursuant to provisions set forth in § 62.42;

(ii) The participant's presence in the United States was of less than six months duration; or

(iii) The participant's presence in the United States was pursuant to a short-term scholar exchange activity as authorized by § 62.21; and

(3) The participant is not subject to the prohibition against repeat participation set forth at § 62.20(i)(2).

(e) Issuance of Form DS–2019. The Form DS–2019 must be issued only after the professor or research scholar has been accepted by the institution where he or she will participate in an exchange visitor program.

(f) Location of the exchange. Professors or research scholars must conduct their exchange activity at the site(s) of activity identified in SEVIS, which may be either the location of the exchange visitor program sponsor or the site of a third party facilitating the exchange with permission of the Responsible Officer. An exchange visitor may also engage in activities at other locations if such activities constitute occasional lectures or consultations permitted by paragraph (g) of this section. All such sites of activity must be entered into SEVIS while the exchange visitor's SEVIS record is in Initial or Active status.

(g) Occasional lectures or consultations. Professors and research scholars may participate in occasional lectures and short-term consultations, if authorized to do so by his or her sponsor. Such lectures and consultations must be incidental to the exchange visitor's primary program activities. If wages or other remuneration are received by the exchange visitor for such activities, the exchange visitor must act as an independent contractor, as such term is defined in 8 CFR 274a.1(j), and the following criteria and procedures must be satisfied:

(1) Criteria. The occasional lectures or short-term consultations must:

(i) Be directly related to the objectives of the exchange visitor's program;

(ii) Be incidental to the exchange visitor's primary program activities;

(iii) Not delay the completion date of the exchange visitor's program; and

(iv) Be documented in SEVIS.

(2) Procedures.

(i) To obtain authorization to engage in occasional lectures or short-term consultations involving wages or other remuneration, the exchange visitor must present to the responsible officer:

(A) A letter from the offeror setting forth the terms and conditions of the offer to lecture or consult, including the duration, number of hours, field or subject, amount of compensation, and description of such activity; and

(B) A letter from the exchange visitor's department head or supervisor recommending such activity and explaining how the activity would enhance the exchange visitor's program.

(ii) The responsible officer must review the letters required in paragraph (g)(2)(i) of this section and make a written determination whether such activity is warranted, will not interrupt the exchange visitor's original objective, and satisfies the criteria set forth in paragraph (g)(1) of this section.

(h) Change of activity. At the discretion and approval of the responsible officer, professors may freely engage in research and research scholars may freely engage in teaching and lecturing. Because these activities are intertwined, such a change of activity is not considered a change of category necessitating formal approval by the Department of State and does not require the issuance of a new Form DS–2019 to reflect a change in category. Such change in activity does not extend the exchange visitor's maximum duration of program participation.

(i) Duration of participation. The permitted duration of program participation for a professor or research scholar is as follows:

(1) General limitation. A professor or research scholar may be authorized to participate in the Exchange Visitor Program for the length of time necessary to complete his or her program, provided such time does not exceed five years. The five-year period of permitted program participation is continuous and begins with the initial program begin date documented in SEVIS or the date such status was acquired via a petition submitted and approved by the Department of Homeland Security (DHS) as documented in SEVIS and ends five years from such date.

(2) Repeat participation. Exchange participants who have entered the United States under the Exchange Visitor Program as a professor or research scholar, or who have acquired such status while in the United States, and who have completed his or her program are not eligible for participation as a professor or research scholar for a period of two years following the end date of such program participation as identified in SEVIS.

(3) Extensions. A responsible officer may not extend the period of program duration beyond the five-year period of maximum program duration authorized for professor and research scholar participants. The Department may, in its sole discretion, authorize an extension beyond the permitted five-year period, as submitted by a "G–7" program sponsor, upon successful demonstration of the following:

(i) The participant for whom an extension is requested is engaged in a research project under the direct sponsorship of a Federally Funded National Research and Development Center ("FFNRDC") or a U.S. Federal Laboratory;

(ii) The FFNRDC or U.S. Federal Laboratory requesting the extension on behalf of the participant has determined, through peer review, that the participant's continued involvement in the project is beneficial to its successful conclusion; and

(iii) The Secretary of the Department of Homeland Security has determined in his/her discretion that the extension may be approved;

(iv) The extension request is for not more than five years.

Credits

[58 FR 48448, Sept. 16, 1993; 61 FR 15373, April 8, 1996; 61 FR 20437, May 7, 1996; 61 FR 29287, June 10, 1996; 67 FR 17612, 17613, April 11, 2002; 70 FR 28817, May 19, 2005; 70 FR 36344, June 23, 2005; 72 FR 1283, Jan. 11, 2007]

SOURCE: 58 FR 15196, March 19, 1993; 64 FR 54539, 54540, Oct. 7, 1999; 64 FR 54539, Oct. 7, 1999; 65 FR 20083, April 14, 2000; 72 FR 33673, June 19, 2007; 72 FR 61801, Nov. 1, 2007; 72 FR 62114, Nov. 2, 2007; 72 FR 67576, Nov. 29, 2007; 72 FR 72247, Dec. 20, 2007; 73 FR 34862, June 19, 2008; 73 FR 35068, June 20, 2008; 73 FR 36789, June 30, 2008; 74 FR 15845, April 8, 2009; 75 FR 48559, Aug. 11, 2010; 75 FR 65981, Oct. 27, 2010; 76 FR 10500, Feb. 25, 2011; 79 FR 60307, Oct. 6, 2014; 81 FR 4955, Jan. 29, 2016; 86 FR 20287, April 19, 2021, unless otherwise noted.

AUTHORITY: 8 U.S.C. 1101(a)(15)(J), 1182, 1184, 1258; 22 U.S.C. 1431 et seq.; 22 U.S.C. 2451 et seq.; 22 U.S.C. 2651a; 22 U.S.C. 6531–6553; Reorganization Plan No. 2 of 1977, 42 FR 62461, 3 CFR, 1977 Comp. p. 200; E.O. 12048, 43 FR 13361, 3 CFR, 1978 Comp., p. 168; 8 U.S.C. 1372; section 416 of Pub.L. 107–56, 115 Stat. 354 (8 U.S.C. 1372 note); and 8 U.S.C. 1761–1762.

Current through June 28, 2022, 87 FR 38295, except for 40 CFR § 52.220, which is current through May 6, 2022. Some sections may be more current. See credits for details.

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