

Immigration Law Compliance Update Memorandum

September 5, 2002



# COMMONWEALTH of VIRGINIA

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**TO:** Presidents, Chancellor, Rectors, Registrars, Admissions Directors, Domicile Officers, and Foreign Student Advisors (INS Designated School Officials), and the Executive Director of the State Council for Higher Education in Virginia

**FROM:** Alison P. Landry, Assistant Attorney General *(PAL)*

**DATE:** September 5, 2002

**SUBJECT:** Immigration Law Compliance Update

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## Executive Summary

- Illegal or undocumented aliens should not be enrolled in Virginia public institutions of higher education.
- Illegal or undocumented aliens are ineligible for in-state tuition status in Virginia.
- Public employees in higher education are encouraged to voluntarily disclose to the Immigration and Naturalization Service and to the Office of the Attorney General in Virginia factual information indicating that a student on campus is unlawfully present in the United States, or enrolled without proper authorization.
- The student visa system in the United States is under more exacting scrutiny by the INS and the public. Beginning in 1996 and accelerated after the events of September 11, 2001, there have been significant changes in state and federal laws affecting foreign students in higher education. A university's duty to monitor and abide by laws governing student visa-holders will require broad institutional cooperation between foreign student advisors, information technology, admissions registrars, financial aid staff, domicile officers and the executive staff leadership.
- Visa-holders whose current status under federal law forecloses them from forming domiciliary intent under Virginia law are also ineligible for in-state tuition status. None of the time spent in an ineligible visa status can be counted (retroactively or otherwise) when

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considering whether a visa-holder can meet Virginia's exacting evidentiary standard, or the Virginia tuition statute's pre-application one year residency requirement.

- For purposes of determining whether an eligible visa-holder can establish the requisite domiciliary intent under Virginia law, state law doctrines of dependency are generally inapplicable. Federal law and the express terms of each individual alien's visa status alone (adult or child) govern the status of a visa-holder's family or relatives.
- Even if a visa-holder is capable of forming domiciliary intent under federal law, that visa-holder must still prove domiciliary intent by *clear and convincing evidence* and be subject to the same statutory presumptions as any student seeking in-state tuition status.
- Under federal law, it is illegal for a non-citizen to make a false claim to U. S. citizenship for purposes of obtaining for himself or others any state or federal benefit or service. It is also illegal for any person to prepare, assist or file on behalf of another an application for benefits with knowledge or in reckless disregard of fact that such application or document was falsely made. Suspected incidents of document fraud should be promptly reported in writing to the INS.
- As of April 12, 2002, no B-1 or B-2 visa-holder may be enrolled **full time** at any institution of higher education. For B-1s and B-2s, educational coursework that is merely incidental to visa-holder's purpose upon entry, is permitted.
- Virginia law requires most post-secondary educational institutions to inform the Immigration and Naturalization Service and the Office of the Attorney General in Virginia when certain student visa-holders fail to enroll, withdraw, drop out, or otherwise violate the terms of their student visa.

### Immigration Law Compliance Update

As our national response to the attacks of September 11 continues, it has become increasingly clear that the Immigration and Naturalization Service (INS) and the higher education community must pay closer attention to the presence of foreign students and exchange visitors on their campuses. This vigilance is necessary to safeguard the campus, to facilitate the state and the federal governments' common interest in national security, while also ensuring that the educational diversity offered by international education programs continues to flourish. The student visa system and its potential for abuse has brought increased public scrutiny to the field of international education.<sup>1</sup> In response to recent criticisms, the INS has proposed new regulations to close some of the loopholes in the student and exchange visitor programs. This memorandum clarifies those changes, explains new and related developments in Virginia law and addresses the more fundamental issue concerning the presence of illegal aliens at our institutions of higher education.

Specifically, this memorandum addresses these major questions:

- (a) Are there any types of foreign visitors lawfully present in the United States, but whose visa limits their ability to enroll as a student?
- (b) May public colleges and universities categorically exclude from admission those persons who are not citizens of the United States and whose presence in the United States is unlawful? Are they required to do so?
- (c) If public colleges and universities admit students whose presence in the United States is unlawful or undocumented – but who otherwise appear to reside in Virginia – may such students be given the benefit of in-state tuition?
- (d) May foreign students who are lawfully present in the United States under various types of visas qualify for in-state tuition?

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<sup>1</sup> United States Department of Justice, The Immigration and Naturalization Service's Contact With Two September 11 Terrorists 1 (2002), *available* at [http://www.usdoj.gov/oig/special/2002\\_05/fullreport.pdf](http://www.usdoj.gov/oig/special/2002_05/fullreport.pdf) (quote) (hereinafter "DOJ Report"). "[T]he INS's foreign student program historically has been dysfunctional, and the INS . . . does not know how many foreign students are in the United States. In addition, the INS lacks accurate data about the schools that are authorized to issue I-20s, the students who obtain student visas and student status, the current status of those students, and whether fraud is being perpetuated in the foreign student program." See George J. Borgas, "Rethinking Foreign Students," *National Review*, June 17, 2002 (describing America's foreign student program as "so large, so riddled with corruption, and so ineptly run that the INS simply does not know how many foreign students are in the country or where they are enrolled").

- (e) What should school officials do if they suspect that a nonimmigrant alien or their representative presents false documents or makes material misrepresentations of fact?
  - (f) What other reporting obligations and/or restraints must public colleges and universities follow in dealing with students whose presence in the United States is unlawful?
- A. Are there any types of foreign visitors lawfully present in the United States, but whose visa limits their ability to enroll as a student?**

State institutions of higher education need to be aware of the new B-1/B-2 non-immigrant enrollment restrictions. Under previous INS regulations, a tourist visitor to the United States could enroll in a full-time course of study for up to six months without violating the terms of his or her visa. B class entrants were also permitted to enroll while awaiting a change of status to F-1 or M-1 class student visa. Because of this "loophole," Mohammed Atta, one of the 9/11 hijackers, was able to finish flight school a year before the INS ever knew he intended to enroll. Because of the processing backlogs at the INS Service Center, Huffman Aviation in Florida, Atta's Florida flight school, received Atta's I-20s from the INS six months after Atta and his accomplices had already destroyed the World Trade Center, prompting President Bush to demand an investigation. *See DOJ Report, n.1.* In order to repair this security flaw, effective April 12, 2002, non-immigrants entering on B-1/B-2 visas violate the terms of their entry into the United States if they enroll in a course of study.<sup>2</sup> Under the current interim regulation, *B class non-immigrants must first obtain a change to F-1 or M-1 status in order to enroll full time.* The interim regulations still permit B class non-immigrants to take courses *incidental to the purpose of their visit to the United States.* However, *B class non-immigrants are clearly prohibited from engaging in full time study.* The Office of the Attorney General, therefore, advises that institutions should deny full time enrollment to any B class nonimmigrant visa-holder until he or she has secured a change in status to an F or M student visa.<sup>3</sup>

- B. May public colleges and universities categorically exclude from admission those persons who are not citizens of the United States and whose presence in the United States is unlawful? Are they required to do so?**

The threshold question is the most obvious one. If a person is an illegal alien, why would he not be deported instead of being allowed to attend college here? The answer to the question resides in part with the difficulties, priorities and abilities of the Immigration and Naturalization

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<sup>2</sup>See 67 Fed. Reg. 18061 (Apr. 12, 2002) (interim final rule).

<sup>3</sup>This enrollment ban does not preclude any other class of non-immigrant visa-holder from enrolling in a full time course of study and affects only B-1/B-2 tourist and business visitors.

Service (INS) in enforcing this nation's immigration laws. The answer also resides in part with the fact that our colleges and universities often do not know the citizenship and immigration status of their students or applicants. Even so, there will be cases when the college or university is aware that an applicant is not lawfully present in the United States, and the institution must determine how that fact will affect its treatment of his application.

There is no federal or state statute that precludes an institution from admitting an applicant known to be an illegal alien. Moreover, unlike the area of employment law, there is no statute that requires proof of United States citizenship or proof of immigration status in order to apply to a college or university. Thus, as strictly a legal matter, institutions have broad discretion to decide what documentation they will request of applicants, and how they will treat applicants who are not lawfully present in the United States. As a matter of policy, however, the Attorney General is strongly of the view that illegal and undocumented aliens should not be admitted into our public colleges and universities at all, especially when doing so would displace a competing applicant who is an American citizen or otherwise lawfully present here.<sup>4</sup>

**C. If public colleges and universities admit students whose presence in the United States is unlawful or undocumented – but who otherwise appear to reside in Virginia – may such students be given the benefit of in-state tuition?**

Some institutions, exercising the discretion that current law allows them, do not preclude illegal and undocumented aliens from being admitted and have asked whether they can also provide such students with the benefits of in-state tuition. This is an issue that the law *does* address. Under Virginia and federal law, undocumented aliens cannot qualify for in-state tuition benefits.

Because an undocumented alien is not lawfully present in the United States, and is therefore subject to deportation, undocumented aliens cannot, as a matter of law, meet Virginia's statutory requirements for establishing domiciliary intent. The Virginia General Assembly's use of the term "student" or even "individual" in § 23-7(4) (in-state tuition law) plainly does not contemplate inclusion of illegal aliens, nor can Virginia's tuition laws be reasonably construed to mandate taxpayer supported educational subsidies to persons illegally present within the Commonwealth. When construing the meaning of the term "domiciliary intent" (traditionally defined as presence combined with "present intent to remain indefinitely"), it is reasonable to

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<sup>4</sup>See 69-70 Va. A.G. 56, an Attorney General opinion to former VCCS Chancellor Dr. Dana B. Hamel, advising that VCCS's admission system, wherein local and Virginia residents were given admission priority over foreign residents, was within the authority conferred on the VCCS Board. *Plyler v. Doe*, 457 U.S. 202 (1982), a case that struck down Texas' attempt to charge illegal students in K-12 out of state tuition fees, is an opinion unique to children . . . its holding has never been expanded to higher education.

construe “presence” to mean *lawful presence* only. Any construction of state laws governing tuition that would impute to Virginia’s General Assembly an intention to include illegal aliens within the Commonwealth’s largesse produces an absurd result. *Moore v. Gillis*, 239 Va. 239 (1990) (courts have duty to construe statutes so as to avoid absurd results and to adopt a reasonable construction within the legislature’s intent and purpose).

This conclusion about the effect of Virginia law mirrors the result in *Regents of the University of California v. Superior Court of Los Angeles County*, 225 Cal. App. 3d 972 (1990) (“*Bradford* decision”), which affirmed a California Attorney General opinion barring illegal aliens from establishing domiciliary intent for purposes of in-state tuition. There the court said, “[W]e do not interpret the federal immigration statutes ... as authorizing ... the establishment of domicile here by those whose very presence here is unlawful. It would be senseless to so interpret [the statute].” *Id.* at 979-81.

In the *Bradford* decision, the California Court of Appeals went on to say:

The state’s legitimate interests in denying resident tuition to undocumented aliens are manifest and important. We will name just a few: the state’s interest in not subsidizing violations of law; in preferring to educate its own lawful residents; in avoiding enhancing the employment prospects of those to whom employment is forbidden by law; in conserving its fiscal resources for the benefit of its lawful residents; in avoiding accusations that it unlawfully harbors illegal aliens in its classrooms and dormitories; in not subsidizing the university education of those who may be deported; in avoiding discrimination against citizens of sister states and aliens lawfully present; in maintaining respect for government by not subsidizing those who break the law; and in not subsidizing the university education of students whose parents, because of the risk of deportation if detected, are less likely to pay taxes.

*Id.* at 982.<sup>5</sup>

It is not just *state law* that precludes illegal aliens from establishing in-state tuition status. In 1996, *Congress* made it abundantly clear that post-secondary institutions should not be granting in-state tuition subsidies to illegal aliens if such taxpayer subsidies are denied to U. S. citizens based on residency. See *Illegal Immigration Reform and Immigrant Responsibility Act of 1996* § 591, 8 U.S.C.S. § 1623(a) (Lexis 2002) (“[A]n alien who is not lawfully present in the United States shall not be eligible ... for any post-secondary education benefit unless a citizen or

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<sup>5</sup>When California State University refused to abide by the *Bradford* decision, the American Association of Women brought a writ of mandamus to compel the University to deny in-state tuition to illegal aliens, which writ was granted. See *American Association of Women v. Bd. of Trustees of the California State University*, 31 Cal. App. 4th 702, 38 Cal. Rptr. 2d 15 (1995).

national of the United States is eligible for such a benefit ... without regard to whether the citizen or national is such a resident”).

In response to this newly enacted federal law, the City University of New York (“CUNY”), on advice of counsel, changed its longstanding policy in 2001 and determined that illegal aliens were no longer eligible for in-state tuition status. The College’s decision was challenged in a New York state court administrative proceeding and upheld. *In re Paula R. v. Goldstein*, N.Y.L.J. at 17 (Feb. 14, 2002). Judge Wetzel decided that CUNY’s tuition decision was not arbitrary or capricious and that the university’s reliance on the plain meaning and presumed constitutionality of 8 U.S.C. § 1623 of the IIRIRA was “eminently rational.” *Id.* While § 1623 has never been directly challenged, and has no accompanying regulations, it is presumed constitutional and its purpose is unambiguous.<sup>6</sup>

Similar federal provisions denying certain aliens various public benefits have likewise been upheld. *Lewis v. City of New York*, 252 F.3d 567 (2nd Cir. 2001) (upholding welfare reform provision denying prenatal care to illegal aliens); *Aleman v. Glickman*, 217 F.3d 1191, 1201-04 (9th Cir. 2000) (denial of food stamps to certain divorced aliens); *City of Chicago v. Shalala*, 189 F.3d 598, 605-09 (7th Cir. 1999) (denial of food stamps, supplemental security income, and other public benefits); *Rodriguez v. United States*, 169 F.3d 1342, 1350-53 (11th Cir. 1999) (denial of food stamps and supplemental security income); *see also Kiev v. Glickman*, 991 F. Supp. 1090 (D. Minn. 1998); *Abreu v. Callahan*, 971 F. Supp. 799 (S.D.N.Y. 1997).

**D. May foreign students who are lawfully present in the United States under various types of visas qualify for in-state tuition?**

In order to qualify for in-state tuition benefits, a nonimmigrant student alien must *show by clear and convincing evidence* that for *at least one year before application*: 1) he was lawfully present in the Commonwealth, either as a legal permanent resident, or as a *qualifying* non-immigrant visa-holder; and 2) that the student intends to remain indefinitely in the Commonwealth and to abandon any previous domicile, if such existed. Va. Code Ann. § 23-7.4(B) (Repl. Vol. 2000) (emphasis added).

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<sup>6</sup>Judge Wetzel noted that 8 U.S.C. § 1623 was “explicitly fueled by a desire to make illegal aliens ineligible for in-state tuition at public institutions of higher education,” citing H.R. Rep. No. 104-828, 104th Cong. 2d Sess. (September 26, 1996) at 240, and presumably to motivate those who could take the appropriate steps to become legal to do so.” *In re Paula R.*, N.Y. L.J. at 17 (Feb. 14, 2002). Referring to recent efforts by various states to avoid the plain import of § 1623, Judge Wetzel rejected arguments that the federal law is unduly vague as evidenced by the fact that “both the Texas and California legislatures understood exactly what they had to do to avoid the clear dictate of the law.” *Id.*

As *Virginia's Domicile Guidelines* make clear, certain kinds of visa-holders, F, M, and J, for example, are foreclosed by law through the very terms of their visa from remaining indefinitely. The Commonwealth's educational institutions are without lawful authority to confer that which Congress has expressly denied. In fact, if an F-1 or M-1 visa-holder applies for in-state tuition, asserting that he intends to remain here indefinitely, that student plainly violates the terms of his current student visa. *Anwo v. INS*, 197 U.S. App. D.C. 121 (1979) (student visa-holder who asserts that he intends to reside permanently in U.S. violates condition of his visa). Although an L class visa permits "dual intent" (i.e., the visa-holder may entertain the intent to remain in the United States), the L class visa does not permit an alien to remain in the United States indefinitely because such visa expires after a maximum period of five years. As a result, an L class entrant is foreclosed from forming the necessary intent for domicile, until an application for adjustment of status to legal permanent resident has been filed as evidenced by the INS' issuance of an I-485. Because Virginia law requires presence and requisite intent for one year prior to application, L visa-holders are not eligible to be considered for in-state tuition benefits until an application for adjustment in status has been pending with the INS for at least 365 days.

Aliens entering the United States in the A, E, G, H-1B (and dependants), I, K, nonmilitary NATO, T, U, and V non-immigrant classes may form the legal capacity under federal law to establish the domiciliary intent as required by Virginia law. These types of visa-holders are not, as a matter of federal law, foreclosed from establishing the requisite intent to remain indefinitely in the United States. These ten classes may attempt to qualify for in-state tuition benefits, but Congress may create other visa categories in the future. If a visa category not listed here is presented to you, consult the Office of the Attorney General or immigration counsel.<sup>7</sup>

Institutions must also keep in mind that merely possessing the *legal capacity* to form domiciliary intent within the meaning of Virginia law is not evidence of its existence. A non-immigrant alien whose visa does not foreclose domiciliary intent must still show by *clear and convincing evidence* that he is not here merely to obtain an education, but actually intends to make Virginia his permanent home and has engaged in purposeful, systematic contact with Virginia beyond those acts normally incidental to being a student in the same manner as any other student must establish such proofs.<sup>8</sup>

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<sup>7</sup>See *Toll v. Moreno*, 458 U.S. 1 (1982) (University's policy of categorically denying domicile status to G-4 visa-holders imposed ancillary burdens not contemplated by Congress and was therefore pre-empted and invalid under Supremacy Clause).

<sup>8</sup>In determining domiciliary intent, all of the following applicable factors shall be considered: continuous residence for at least one year prior to the date of alleged entitlement, state to which income taxes are filed or paid, driver's license, motor vehicle registration, voter registration, employment, property ownership, sources of financial support, military records, a written offer (Footnote continued on next page.)

An excellent application of this principle (that an individual's mere eligibility to establish domicile is not evidence of its existence) can be found in the case of *Adoteye v. Adoteye*, 32 Va. App. 221, 527 S.E. 2d 453 (2000). In this case, a woman from Ghana in G-4 status sought a divorce, but failed to establish that she was a bona fide resident in the Commonwealth. When Mrs. Adoteye, a G-4 World Bank employee, filed for divorce, she had been living in Virginia for 14 years, had purchased a home in Fairfax County and had three children born in Virginia, all of whom spoke English only. Consistent with her G-4 status, she refrained from paying state or federal taxes. During her stay in the United States, she had never returned to Ghana for more than six weeks at a time. She had automobiles registered in Virginia and bank accounts in the Commonwealth. She had previously submitted to the jurisdiction of the Fairfax County Juvenile and Domestic Relations Court, which Court had entered orders governing custody, visitation and spousal support. Mrs. Adoteye owned no property in Ghana and paid no taxes to that country. While the Virginia Court of Appeals conceded that these facts "together create a persuasive package," it nevertheless held that Mrs. Adoteye failed to establish bona fide residency because her package of circumstances were also "consistent with a transitory sojourn in Virginia." *Id.* In denying her petition for a Virginia divorce, the Court emphasized that Mrs. Adoteye's G-4 visa status permitted her to stay only as long as she continued employment with the World Bank; yet *she had never taken any steps to secure citizenship or an immigration visa*. Indeed, the opinion states that "*continuation* under a G-4 visa is inconsistent with an intent to become a permanent, bona fide resident and domiciliary of Virginia." *Id.* at 227 (emphasis added). The lesson of this case is significant for all domicile officers; while *Toll v. Moreno*, 458 U.S. 1 (1982), says that universities cannot categorically foreclose G-4 visa-holders from attempting to prove domiciliary intent, Virginia courts have construed a decision to continue in G-4 (with all its fiscal benefits and without efforts to secure citizenship or immigration status) as conduct (i.e. evidence) that cuts against, and is inconsistent with, establishing domiciliary intent.

On the other hand, when applying the multi-factored analysis required by § 23-7.4(B), institutions should not penalize student visa-holders for having failed to engage in activities that the student may not engage in as a matter of law. For instance, aliens generally cannot vote. Lack of voter registration, for aliens, therefore, would not be probative evidence of domiciliary intent or its absence. If a student is lawfully precluded or exempt from engaging in some activity

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and acceptance of employment following graduation, and any other social or economic relationships with the Commonwealth and other jurisdictions.

Domiciliary status shall not ordinarily be conferred by the performance of acts, which are auxiliary to the fulfilling educational objectives or are required or routinely performed by temporary residents of the Commonwealth. Mere physical presence or residence primarily for educational purposes shall not confer domiciliary status. A matriculating student who has entered an institution and is classified as an out-of-state student *shall be required to rebut by clear and convincing evidence the presumption that he is in the Commonwealth for the purpose of attending school and not as a bona fide domiciliary*. Va. Code Ann. § 23-7.4(B) (emphasis added).

normally considered among domiciliary factors (such as paying state and federal income taxes), the university should focus instead on those activities and contacts that the student *may do* in order to determine whether the requisite intent has been clearly established.<sup>9</sup> *But see Adoteye*, at 227.<sup>10</sup>

Also, when assessing the domiciliary intent of nonimmigrant aliens, such individuals, whose terms of entry are dictated solely and wholly by federal law, must stand on the express terms of their visa and their I-94; they may not avail themselves of parental or family dependency as an alternative means to establish domiciliary intent. Dependencies (or being able for some purpose to “stand in the shoes” of one’s parents) are constructs grounded in state law and are effectively overridden by more specific federal rules and definitions pertaining directly to nonimmigrant status. In other words, when assessing whether a qualified nonimmigrant alien visa-holder can establish domiciliary intent, references in Virginia law or the *Domicile Guidelines* to parental dependency are irrelevant and inapplicable.<sup>11</sup>

**E. What should school officials do if they suspect that a nonimmigrant alien or his representative presents false documents or makes material misrepresentations of fact?**

All institutional officials should be aware that it is unlawful under federal law for a non-citizen to make a false claim to U.S. citizenship or nationality for the purpose of obtaining for oneself, or for any other person, a state or federal benefit or service. *See* § 215 of IIRIRA. It is also unlawful under federal law for any person to prepare, assist or file on behalf of another

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<sup>9</sup>Factors in this kind of balancing analysis may be evaluated as positive, negative or neutral. A factor weighed as neutral by the decisionmaker will have no bearing on the decision. In the case of evaluating proof of domiciliary intent for nonimmigrant aliens, activities from which they are excluded (voting) or exempt (some aliens are not required by their visa status to pay taxes) should be assigned a neutral weight.

<sup>10</sup>Judge Willis, writing for a majority of the Virginia Court of Appeals, stated that he respected Mrs. Adoteye’s right to continue in G-4 status and to refrain from paying taxes as permitted under her visa, but construed these choices as cutting against domiciliary intent. Contrast this outcome to *Hanano v. Alassar*, 19 Cir. 169004 (Fairfax County) (2001), in which an L visa-holder had similar contacts with Virginia as Mrs. Adoteye (five year residence, substantial home improvements, child in private school, Virginia drivers license and automobile registration), *but had also submitted a Labor Application preliminary to filing for H-1B visa and an application for green card*. Under these circumstances, the Fairfax County Circuit Court held that Ms. Hanano’s actions were consistent with both her L visa status, and an intent to remain indefinitely under Virginia law.

<sup>11</sup>*See* proposed changes to *Guidelines for Determining Domicile and Eligibility for In-State Tuition Rates*, 8 VAC-120-100 (J)(3)(c), deleting reference to minor aliens’ dependency as possible eligibility factor.

person an application for benefits with knowledge or in reckless disregard of the fact that such application or document was falsely made. *See* § 212 of IIRIRA. If school officials believe that any person has engaged in document fraud, they should save or copy the documents in question and immediately contact the INS.

**F. What other reporting obligations and/or restraints must public colleges and universities follow in dealing with students whose presence in the United States is unlawful?**

**1. Federal Law**

The Attorney General strongly encourages school officials and all public employees in higher education to report facts and circumstances that may indicate that a student on campus is not lawfully present in the United States. *See OAG Form B* (attached). While there is no law expressly directing that information regarding illegal aliens be disclosed, federal law clearly *forbids states from preventing public employees from making voluntary disclosures about illegal aliens*. Section 434 of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996, entitled "Communication between State and Local Government Agencies and the Immigration and Naturalization Service" provides:

No state or local government entity may be prohibited, or in any way restricted, from sending to or receiving from the Immigration and Naturalization Service information regarding the immigration status, lawful or unlawful, of any alien in the United States.

Section 642 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, entitled "Communications between Government Agencies and the Immigration and Naturalization Service" expands on § 434 by prohibiting any government entity or official from restricting any other government entity or official from exchanging information with the INS about the immigration or citizenship status of any individual. It further provides that no governmental agency – federal, state, or local – may be prohibited from maintaining or exchanging such information with any other federal, state or local government entity.<sup>12</sup> Reading these two statutes in tandem, it is obvious that Congress wanted public employees to be free to voluntarily disclose information about alien status to the INS and to other governmental agencies, and for government agencies other than the INS to maintain and exchange such information.

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<sup>12</sup>The Report of the Senate Judiciary Committee accompanying the Senate Bill explained that the "*acquisition, maintenance, and exchange of immigration-related information by state and local agencies is consistent with, and potentially of considerable assistance to, the Federal regulation of immigration and the achieving of the purposes and objectives of the Immigration and Nationality Act.*" S. Rep. No. 104-249, at 19-20 (1996) (emphasis added).

Both of these federal law provisions were subject to constitutional challenge and both were upheld. *City of New York v. United States of America*, 179 F.3d 29 (2nd Cir. 1999). Some factual background on this case sheds considerable light on how Congress and the federal courts view the relationship between state government and the INS.

By virtue of an executive order issued by Mayor Koch in 1989, the City of New York forbid its employees from voluntarily providing the INS with information regarding the immigration status of any alien. Shortly after these federal reporting laws became effective, New York City sued the federal government, claiming that the new federal laws unduly interfered with its constitutionally protected interests in controlling its own workforce and that the City had a Tenth Amendment "right" to forbid its employees from providing this information to the INS. The City essentially argued that it retained a Tenth Amendment "right" to compel its employees to engage in "passive resistance" and to "frustrate federal immigration policy." *Id.* at 35. The Second Circuit rebuffed these arguments. It concluded that permitting public employees to voluntarily furnish information about an alien's status to the INS did not compel city employees to enact or administer a federal regulatory program in violation of the Constitution, but was, in fact, a necessary measure to ensure state-federal cooperation in the area of immigration enforcement. *Id.* at 35.

The City's sovereignty argument asks us to turn the Tenth Amendment's shield against federal government's using state and local governments to enact and administer federal programs into a sword allowing states and localities to engage in passive resistance that frustrates federal programs. If Congress may not forbid states from outlawing even voluntary cooperation with federal programs by state and local officials, states will at times have the power to frustrate effectuation of some programs. Absent any cooperation at all from local officials, some federal programs may fail or fall short of their goals unless federal officials resort to legal processes in every routine or trivial matter, often a practical impossibility.

*Id.* at 35.

Citing the historical example of state resistance to the high court's desegregation ruling in *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954), the Second Circuit observed that:

A system of dual sovereignties cannot work without informed, extensive, and cooperative interaction of a voluntary nature between sovereign systems for the mutual benefit of each system. The operation of dual sovereigns thus involves mutual dependencies as well as differing political and policy goals. Without the Constitution, each sovereign could, to a degree, hold the other hostage by selectively withholding voluntary cooperation as to a particular program(s). The potential for deadlock thus inheres in dual sovereignties, but the Constitution has

resolved that problem in the Supremacy Clause, which bars states from taking actions that frustrate federal laws and regulatory schemes.

*Id.* at 35.

In light of these federal laws and the case law upholding them, no public college or university in the Commonwealth may adopt or maintain policies forbidding employees from voluntarily cooperating with federal immigration officials. Voluntary reporting by state employees should be on a purely factual basis and should include all available information that may assist the INS to ultimately determine an alien's status and appropriate disposition. *See OAG Reporting Form B* (attached). At the same time, it must be noted that nothing in state or federal law precludes institutions from assisting students to legalize their status, and the Attorney General also encourages state institutions to lend such assistance where appropriate.<sup>13</sup>

## 2. Virginia Reporting Requirements

In addition to new federal regulations currently subject to public comment,<sup>14</sup> the General Assembly recently enacted a state law reporting requirement. On April 1, 2002, the General Assembly of Virginia adopted House Bill No. 364. This bill amends the Code of Virginia to add the following § 23-2.2:

Each public and private two- and four-year institution of higher education in the Commonwealth and the governing board, president or director of any correspondence school, post-secondary school, or proprietary career school, as defined in § 22.1-319, or flight school in the Commonwealth shall inform the Attorney General of the Commonwealth whenever a student who has been accepted for admission to such an educational institution pursuant to a student visa fails to enroll or who has been attending such an educational institution pursuant to a student visa and withdraws at such institution or violates the terms of his visa. The notification shall contain all available information from the U. S. Immigration and Naturalization Service form I-20 and shall be submitted not later than thirty days after the discovery of the reportable event.

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<sup>13</sup>As long as students are here illegally, they may not lawfully work in this country (regardless of their talent or educational attainments), rendering their prospects for security and success here extremely tenuous. *See* U.S.C.A. § 1182 (a)(4). Under the "public charge" doctrine, an alien who cannot provide for himself and thus relies on public assistance for a substantial part of his livelihood is potentially deportable. *See* James, R. Edward, Jr. "Public Charge Doctrine, A Fundamental Principle of American Immigrant Policy," Backgrounder, May, 2001, Center for Immigration Studies.

<sup>14</sup>For additional guidance on the federal law requirements, *see* 67 Fed. Reg. 34,862 (May 16, 2002) (proposed rule change on F, J, and M reporting requirements).

The Attorney General shall notify the U. S. Immigration and Naturalization Service and other appropriate national, state and local agencies of any such failure to enroll, withdrawal, or student visa violations.

This section shall be effective until superceded by federal action.<sup>15</sup>

House Bill No. 364 requires institutions to report to the Attorney General when a nonimmigrant student on an F-1 or M-1 visa:

- (1) has been accepted at the institution, but fails to enroll;
- (2) withdraws from the institution without completing the course of study or;
- (3) otherwise violates the terms of his visa:
  - (a) drops below full time without authorization,<sup>16</sup>
  - (b) drops out or does not regularly attend class;
  - (c) works without authorization.<sup>17</sup>

The Virginia law requires the Attorney General to serve as a state conduit to refer these reports from the Commonwealth's educational institutions to the INS. Information regarding "out of

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<sup>15</sup>If the Attorney General determines at some point in the future that federal law supercedes § 23-2-2, the Attorney General shall inform Virginia's General Assembly of such conclusion in writing.

<sup>16</sup>In determining whether an alien non-immigrant fails to pursue a full course of study, federal courts have considered "the entirety of a student's academic efforts in a fair and reasonable manner consonant with the intent of Congress and dictates of judicial and administrative case law and sensitive to realities and various handicaps of foreign students." *Mashi v. INS*, 555 F.2d 1309, 1313, 1314 (1978) (alien non-immigrant student, who dropped one course to avoid a failing grade but otherwise made satisfactory academic progress, may not be deported). DSO and foreign student advisors should therefore continue to use good judgment as to what kinds of academic setbacks for foreign students are *de-minimus*, and which signal a serious deviation from the student's duty to maintain academic progress consonant with institutional expectations and the students' visa status.

<sup>17</sup>Because working without authorization is a serious charge that, if established, could have adverse consequences, students should be invited to present proof of work authorization before a report is made on that basis.

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status" students will not be referred to state or local law enforcement agencies unless the circumstances of the report suggest that an independent violation of state law has occurred.

Although Virginia's law took effect on July 1, 2002, the first major reporting deadline will be approximately thirty days following the close of the fall registration period anticipated in mid- to late September, 2002. The Office of the Attorney General anticipates the capability to receive electronic reports in addition to mailed submissions. Reporting forms developed by the Office of the Attorney General are attached to this memorandum, are available on Attorney General Kilgore's web site ([www.oag.state.va.us](http://www.oag.state.va.us)), and may be used by any post-secondary institution subject to the reporting requirement. If the college or university wants to use some other form or means of reporting, they may do so as long as all information from the student's I-20 is included as required by law. This Office wants to make it easy for schools to comply with the Act. We are available to work with any school to facilitate compliance with federal requirements and the similar directives found in § 23.2-2 of the Virginia Code.

#### **Conclusion**

There have been significant changes in immigration law affecting institutions of higher education throughout Virginia. There may be more changes to come. The new rules and regulations require broad institutional cooperation and some understanding of how to integrate and harmonize federal law governing visa status and state law governing domicile. The Attorney General's Office is available to answer questions public educational institutions may face when attempting to understand and apply both bodies of law.

The Office of the Attorney General recommends:

1. Prohibiting the enrollment of undocumented aliens, illegal aliens and those without proper visas.
2. Voluntary, factually based reporting by college/university employees of illegal aliens who present themselves on campus, or who are enrolled in coursework without authorization. (See OAG Form B.)
3. Strict adherence to Virginia's in-state tuition statute, and *Virginia's Domicile Guidelines*, as amended, and as interpreted by this memorandum (all applicants for in-state tuition status, including qualifying visa-holders, must meet the exacting evidentiary standards necessary to establish domiciliary intent for tuition purposes).
4. Careful scrutiny by educational institutions of students' visa status to prevent full time enrollment of B-1/B-2 students, and to ensure that a student's visa status is legally compatible with any attempt to assert eligibility for in-state tuition status.
5. Strict adherence to state and federal reporting statutes that are designed to adequately inform the INS (and the Commonwealth) of student visa-holders' current status. (See OAG Form A.)

**NOTE: OAG FORMS A & B ARE LOCATED ON THE ATTORNEY GENERAL'S  
WEB SITE: <http://www.vaag.com> under Forms/Student Visa.**

**Office of Attorney General § 23-2.2 Student Visa Report (Form A)**

(This form is to be completed by the designated school official or their authorized designee.)

**Please fill out the information in the gray area of each section.**

**PART I – Institution Information:**

School Name							
Address1							
Address2							
City		State		Zip		-	
INS School Code							
INS School Approval Date				SEVIS Enrolled (Check if yes)	<input type="checkbox"/>		
<b>Contact Info:</b>	First Name		Last Name		Phone	- -	

**PART II – Student Biographical and Visa Information:**

ID (Social Security Number or Student ID Number)						
Family Name				Given Name		
Address1						
Address2						
City		State		Zip		-
Country of Birth (2 character country code)*		Date of Birth				
Level of Study	Secondary	Course of Study (Major)				
Country of Citizenship (country code)*		Admission Number (From I-94)				
Port of Entry				Date of Entry		
Passport #				When was student expected to enroll?		

\*To view country codes, go to section 2 of the instructions page.

**PART III – I-20 Information:**

Reason for Issuance of I-20	Initial attendance				
Total Costs of Program	\$		Student's Means of Support	\$	
Additional Dependents Seeking Entry or Re-Entry?					
Student Employment Authorization(s)					

**OAG (FORM A) (CONT'D) (Pg. 2)**

**PART IV – Reportable Events: (Check all that apply)**

- a. Failure to enroll
- b. Withdrawal without completing the course of study (including unauthorized transfer)
- c. Other deviation from terms of visa:
  - i. Dropped below full time without proper authorization
  - ii. Stopped attending class regularly, or otherwise dropped out
  - iii. Unauthorized employment

**Part V – Narrative section: (Please describe all facts and circumstances that explain your report and describe what measures student and/or institution has taken in response to reportable events.)**

***Date of Report:***

**Office of Attorney General Student Alien Report (Form B)**

This form may be completed by the designated school official, their designee, or any college/university employee.

**Please fill out the information in the gray area of each section.**

**PART I – Institution Information:**

School Name									
Address1									
Address2									
City					State		Zip	-	
INS School Code									
INS School Approval Date					SEVIS Enrolled (Check if yes)	<input type="checkbox"/>			
Contact Info:	First Name				Last Name			Phone	- -

**PART II – Student Biographical and Visa Information:**

ID (Social Security Number or Student ID Number)								
Family Name					Given Name			
Address1								
Address2								
City					State		Zip	-
Country of Birth (2 character country code)*				Date of Birth				
Level of Study	Secondary	Course of Study (Major)						
Country of Citizenship (country code)*			Admission Number (From I-94)					
Port of Entry					Date of Entry			

\*To view country codes, go to section 2 of the instructions page.

Part III – Narrative: School and school officials are encouraged to voluntarily report below all facts and circumstances indicating that a student on campus may be unlawfully present in the United States, or enrolled in a course of study without proper authorization.

***Date of Report:***