Elise Fialkowski has been providing immigration assistance and solutions to leading universities, research institutions, multinational corporations, startups, entrepreneurs and individuals for over 25 years.

Elise has long been active in the American Immigration Lawyers Association (AILA) and currently serves on AILA’s Annual Conference Committee and on AILA’s Worksite Enforcement Online Course Committee. Elise also serves on the Women Owned Law Steering Committee and is a Board Member of the John F. Peto Studio Museum. She has served on many other committees at the local and national level.

Elise was named 2022 “Lawyer of the Year” by Best Lawyers in America © and has been included annually in Best Lawyers in America ©, the International Who’s Who of Corporate Immigration Lawyers and the International Who’s Who of Business Lawyers.

A Phi Beta Kappa graduate of the University of North Carolina at Chapel Hill, Elise received her law degree from the Villanova University School of Law (J.D., magna cum laude, 1991).
F-1 Visa – Consular Processing

• Visa processing delays and developments
  ▪ Improvement but many US Consulates remain understaffed
  ▪ Directive to prioritize F-1 visa processing
    o Consular discretion
  ▪ Expedite options
  ▪ Interview waivers
  ▪ Domestic Visa renewal- DOS planning (2/9/23)
    o Initial focus H-1B and L-1s
    o Possible later rollout for F-1s
F-1 Visa – Consular Processing

• Administrative Processing
  ▪ Increased over the last year
    o Common in certain fields
    o Countries/consulates
  ▪ Recent efforts to process/resolve more quickly
  ▪ Options to speed processing?

• Students can now apply for visas **1 year** before the program start date (previously only 120 days)
  ▪ Can still only enter 30 days prior to program start
F-1 Visa – Consular Processing

• Visa Denials –
  ▪ Consulate should provide written explanation
  ▪ Options for wrongly denied F-1 visas
    o Contact consulate/section chief
    o Congressional assistance
    o University Liaison
    o LegalNet 9 FAM 103.4 (updated 2/25/22)
    o Reapply

• Importance – prepare for interview
F-1 Visa – Consular Processing and Entry to the US

• SEVIS/Visa - Name must appear exactly as in passport
  ▪ Machine readable strip generally controls
  ▪ If not match, issues with SAVE once in the US
    o SSN issuance
    o Driver’s license issuance

• Must travel with endorsed I-20 from University

• F-1 entry period – “D/S” - duration of status
  ▪ I-94 controls once in the US, not the visa
  ▪ Tied to I-20
F-1 Visa – Customs and Border Protection

- US Customs and Border Protection (CBP)
  - CBP makes determination if admissible to US
    - Will not generally notify/call the school unless it is a SEVIS issue that needs clarification
    - Student gets one call to advise refused admission
  - Can deny F-1 entry even if administrative processing cleared
    - CBP may have access to different information/review differently
    - CBP procedures/information sharing with airlines
CBP may review/confiscate electronic devices – laptops/phones
  - Entry can be barred if information on device indicates bar applies
  - Example – student with a picture of a bong on their phone
    - Marijuana still a federal crime and basis for refusal
Current F-1 Landscape – in the US

• Processing delays in I-539 Change of Status applications
  o Who can begin classes while F-1 COS is pending
  o Potentially, Premium Processing roll-out will alleviate problem

• Importance of maintaining course of study/status
  o SEVIS compliance
  o Key DSO role/IS office
  o Reinstatement in the US takes many months/success rate
  o Employment without authorization is a violation of status
    □ Reinstatement is NOT an option
F-1 Work in the US – hot topics

- Importance of timely filings
  - Initial F-1 OPT
  - STEM extensions
  - No forgiveness for late filings!

- Curricular Practical Training (CPT)
  - Increased use entrepreneurs/incubators
  - USCIS close scrutiny
Current F-1 Trends – CPT

• USCIS review of CPT programs:
  ▪ Triggered by requests for a Change of Status
  ▪ In effect, adjudicates the validity of a CPT program

• Importance of properly structuring CPT programs:
  ▪ Common CPT pitfalls USCIS focuses on
  ▪ Considerations in establishing strong CPT program
    o Experiential learning programs
    o Integral part of an established curriculum
    o Cooperative agreements with participating employers
Impact of the Gig Economy - What is Employment or Work?

- Performing services in exchange for compensation
- Compensation can be monetary, but can be other ways
  - Unpaid employment is still employment!
  - Distinguishing “true volunteering” from unpaid employment
- Self-employment counts
- Location of payment may not matter
- Timing of payment does not matter
- Consequence – violation of F-1 status if no authorization
What About Everything in Between?

- Selling on eBay/Etsy
- Prizes/awards
- Honorariums
- GoFundMe

- Investing
  - Stocks/crypto
  - Real estate/Airbnb
- Entrepreneurship
- Babysitting
Name, Image Likeness

• Current Landscape: NCAA continuously resisted student athletes receiving compensation for name, image, or likeness (“NIL”)
  ▪ June 21, 2021
    o Supreme Court issued decision in National Collegiate Athletic Association v. Alston
  ▪ June 30, 2021
    o NCAA interim policy
  ▪ July 1, 2021
    o State NIL laws went into effect
• DHS: Monitoring issue but no answer on allowable NIL
Types of NIL Arrangements

- Endorsements
- Sponsorships
- Appearances
- Autographs
- Memorabilia
- Podcasts
- Camps
- Clinics
- Private Lessons
- Crowdfunding
- And more!
Guidance from Past Cases?

- **UNAUTHORIZED**
  - F-1 student deemed to have engaged in unauthorized employment through the purchasing of ice cream and ice cream trucks
  - Leased trucks to vendors to sell and assisted in management as needed
  - Active

- **AUTHORIZED**
  - Foreign national received profits through the ownership of a motel
  - Not actively engaging in the business
  - Passive
  - *Bhakta v. Immigration & Naturalization Service*, 667 F.2d 771 (9th Cir. 1981)
NIL Agreements – Foreign Company

- Any work done in the United States, even for a foreign company, and even if paid to a foreign bank still counts as employment.
NIL Agreements – Active or Passive?

- Company agrees to pay student-athlete every time they post on social media promoting their brand
- Small company located in Germany asks student-athlete to make remote/virtual appearances for sports clinic during the summer
- Active

- New restaurant agrees to pay student-athlete in order to use their picture to promote grand opening on social media
- Student-athlete creates product line, hires management team, and receives income from generated sales
- Passive
NIL Future

• Congress plans to continue discussing federal college sports reform
• The Interim NCAA Policy (June 30, 2021) will remain in place
  ▪ Until federal legislation or new NCAA rules
• Guidance from the Department of Homeland Security
  ▪ Student and Exchange Visitor Program (SEVP) continues to monitor, but no clear guidance yet
Solutions

- NIL within US should be passive
- Active NIL (appearances, clinics) ok outside US
- For substantial economic benefits, consider incorporating and switching to business/employment visas (E, L, H, etc.)
- For very high-level athletes, consider switching to O-1 or P temporary visas, or self-sponsoring green card
Questions?
For Further Information

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