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Proposed Rules
Federal Register

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This section of the FEDERAL REGISTER contains notices to the public of the proposed issuance of rules and regulations. The purpose of these notices is to give interested persons an opportunity to participate in the rule making prior to the adoption of the final rules.

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DEPARTMENT OF JUSTICE

Immigration and Naturalization Service

8 CFR Part 214

[INS No. 2100-00]
RIN 1115-AF97

Academic Honorarium for B Nonimmigrant Aliens

AGENCY: Immigration and Naturalization Service, Justice.

ACTION: Proposed rule.

SUMMARY: The Immigration and Naturalization Service (Service) is proposing to amend its regulation relating to the acceptance of academic honoraria by nonimmigrant aliens admitted to the United States as B visitors. This is necessary to implement changes to section 212 of the Immigration and Nationality Act (Act) made by the American Competitiveness and Workforce Improvement Act of 1998. The amendment outlines the proposed procedures necessary for a nonimmigrant alien visiting the United States in valid B status to accept honoraria in connection with usual academic activities.

DATES: Written comments must be submitted on or before July 29, 2002.

ADDRESSES: Please submit written comments to the Director, Regulations and Forms Services Division, Immigration and Naturalization Service, 425 I Street, NW, Room 4034, Washington, DC, 20536. To ensure proper handling, please reference INS No. 2100-00 on your correspondence. Comments may also be submitted electronically to the Service at insregs@usdoj.gov. When submitting comments electronically, please include INS No. 2100-00 in the subject heading. Comments are available for public inspection at this location by calling (202) 514-3048 to arrange for an appointment.

FOR FURTHER INFORMATION CONTACT: Craig Howie, Business and Trade Services Branch, Adjudications Division, Immigration and Naturalization Service, 425 I Street, NW, Room 3040, Washington, DC 20536, telephone (202) 353-8177.

SUPPLEMENTARY INFORMATION:

Background

What Is a B Nonimmigrant Alien?

A B nonimmigrant is an alien whose admission to the United States is based on a temporary visit for business (B-1) or a temporary visit for pleasure (B-2). Section 101(a)(15)(B) of the Act defines the visitor classification as:

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.

Based on the statutory language, the Service has long held a B-1 nonimmigrant to be one seeking admission for legitimate activities of a commercial or professional nature, and a B-2 nonimmigrant to be one seeking admission for activities relating to pleasure.

Legislative Authority

How Does the American Competitiveness and Workforce Improvement Act (ACWIA) Affect the B Nonimmigrant Classification?

On October 21, 1998, President Clinton approved enactment of the American Competitiveness and Workforce Improvement Act of 1998 (ACWIA), Public Law 105-277, Div. C, Title IV, 112 Stat. 2681-641. Section 431 of the ACWIA amended the Act at section 212 by adding a new subsection 212(q):

(q) Any alien admitted under section 101(a)(15)(B) may accept an honorarium payment and associated incidental expenses for usual academic activity or activities (lasting not longer than 9 days at any single institution) as defined by the Attorney General in consultation with the Secretary of Education, if such payment is offered by an institution or organization described in subsection (p)(1) and is made for services conducted for the benefit of that institution or entity and if the alien has not accepted such payment

or expenses from more than five institutions or organizations in the previous 6-month period.

Section 212(p) (1) of the Act, as amended by ACWIA, defines the relevant institutions and organizations as:

(A) an institution of higher education (as defined in section 101(a) of the Higher Education Act of 1965), or a related or affiliated nonprofit entity; or

(B) a nonprofit research organization or a Government research organization, * * *

Note that the Service and the Department of Labor have previously defined the organizations described in section 212(p) (1) of the Act. See 65 FR 10678 (2/29/00) and 65 FR 80209 (12/20/00), respectively. For consistency, the Service plans to adopt these previously published definitions for this proposed rulemaking.

On November 30, 1999, the Service provided policy guidance to its field offices that noted the amendatory language in the ACWIA. In addition, the guidance noted that no new documentary requirements were to be imposed upon aliens applying for admission and stating the intent to accept an honorarium from an academic organization until the Service published implementing regulations.

Why Is the Service Proposing This Regulatory Change?

This regulation will aid the Service in administering section 212(q) of the Act and will provide guidance to the public. Since the new section 212(q) of the Act alters how the Service has historically viewed the B nonimmigrant classification, a proposed rule is first being published. This will offer the public a chance to comment on the Service proposals. See Matter of Hira, 11 I. & N. Dec. 824 (BIA 1965, 1966; A.G. 1966) and Matter of Neill, 15 I. & N. Dec. 331 (BIA 1975) for more information on how Board of Immigration Appeals decisions have affected the Service's interpretations of the B nonimmigrant classification.

Amendment of Existing Regulation

Are both B-1 Visitors for Business and B-2 Visitors for Pleasure Covered by This Proposed Regulation?

Section 212(q) of the Act applies to "[a]ny alien admitted under section 101(a) (15) (B)'" of the Act. Thus, both nonimmigrant visitors for business (B-1 nonimmigrants) and nonimmigrant visitors for pleasure (B-2 nonimmigrants) may accept honoraria as provided in section 212(q) of the Act.

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(Note that aliens exempt from the nonimmigrant visa requirements pursuant to 8 CFR 212.1 or who possess a valid border crossing card are also eligible to engage in honorarium-related events.) This proposed rule, however, makes an important distinction. Participation in academic conferences and other academic activities is more properly a B-1, rather than a B-2, activity. Therefore, if an alien is coming to

the United States to engage in activities for which he or she may accept honoraria under section 212(q) of the Act, the alien must seek admission to the United States as a B-1, rather than as a B-2 nonimmigrant. For those eligible to seek admission under the Visa Waiver Program (VWP), the corresponding WB classification (Visa Waiver/Business) is the proper one.

The B-1 and B-2 classifications are separate nonimmigrant classifications with distinct purposes. A B-1 nonimmigrant is one who is seeking admission for legitimate activities of a commercial or professional nature, such as business meetings or to engage in litigation. A B-2 nonimmigrant is one who is seeking admission for activities relating to pleasure, namely touring, vacations, or family visits. Therefore, the Service believes that the award of an honorarium for services performed on behalf of an organization is not consistent with the interpretation of a visitor for pleasure.

The proposed rule does make it clear that an alien who has already been admitted as a B-2 nonimmigrant (or as a WT (Visa Waiver/Tourist) nonimmigrant under the VWP) does not violate the terms of admission by accepting honoraria in accordance with section 212(q) of the Act. But if the events for which the honoraria are offered are arranged before the alien travels to the United States, the alien must seek admission as a B-1 or WB nonimmigrant.

The Service also notes that nothing in the amendatory language relieves an alien from first meeting all the statutory requirements placed upon those applying for admission to the United States as B visitors. Namely, the alien must maintain an unabandoned foreign domicile and ties to his or her country of citizenship or residence. Only after the alien has satisfied the requirements of section 101(a)(15)(B) of the Act and is deemed admissible may the alien participate in activities where an honorarium may be awarded.

How Does the Service Propose to Define Honorarium?

The Service is proposing the addition of a new 8 CFR 214.8. At [sect] 214.8(a) the Service provides definitions of various terms used throughout 8 CFR 214.8. Honorarium is defined as a gratuitous payment of money or any other thing of value to a person for the person's participation in a usual academic activity for which no fee is legally required and that an honorarium may be of any dollar amount with no minimum or maximum dollar amount required. This definition makes clear that honorarium is altogether different than a salary that an individual receives on a continuing basis.

How is the Term ``Usual Academic Activity'' Defined?

Section 212(q) of the Act directs the Attorney General to consult with the Secretary of Education in order to formulate a definition of ``usual academic activity.'' As directed by section 212(q) of the Act, the Service has consulted with the Education Department in developing a workable definition of the term, ``usual academic activity.''

At 8 CFR 214.8(a), the Service proposes a broad definition of ``usual academic activity'' that includes lecturing, teaching, and sharing knowledge. In addition, the Service includes activities such as meetings of boards or committees that benefit the institution within the text of the definition.

While the Service also includes performances, master classes, and readings within the definition of ``usual academic activity,''

proposed rule does place limitations on the commercial nature of such events. The Service proposes that such events must be open to students and/or the general public free of charge, with no sale of general admission tickets. An alien performing artist wishing to perform before a paying audience and who would otherwise be charging a set fee for the performance must avail him or herself of another type of nonimmigrant visa specifically intended for use by such an artist. For example, the O and P nonimmigrant categories were, in part, created to accommodate performing artists. The Service notes that section 212(q) of the Act does not create a new method for performing artists to circumvent the prescribed nonimmigrant visa petition process.

Is the Service Proposing Limitations on Honorarium Activity and Frequency?

Yes, section 212(q) of the Act provides that during a 6-month period, an alien may accept an honorarium and reimbursement of the associated expenses from no more than five organizations, and that the event may not last more than 9 days at any single institution. While Congress did not offer an explanation about why these limitations are included in the amendatory language, the Service interprets these stated limitations as evidence of congressional concern that organizations may be tempted to circumvent the nonimmigrant petition process in order to augment staff with alien professors or teachers. Without any limitations, any organization included within the statutory language could in effect hire an alien professor to teach a full course-load, but state that the individual is only ``visiting'' and is being awarded an honorarium for his or her contributions to the benefit of the institution.

The Service therefore proposes at 8 CFR 214.8(c) reasonable limitations on honorarium activity and frequency that are consistent with section 212(q) of the Act. The Service notes that while limits are proposed on honorarium-related activity and frequency, nothing within the proposed rule prevents an alien from obtaining employment with an academic organization through the normal petition process, or through programs such as the Short Term Scholar program (a J-visa program administered by the Department of State at 22 CFR 62.21).

The Service also attempts to provide an interpretation of the term ``single institution'' that is specified in section 212(q) of the Act. The Service proposes that the term ``single institution'' may apply to an organization that has more than one branch or campus. For example, if an alien is making the same presentation at three different campuses of a State university during a 9-day period and is being reimbursed with one honorarium payment, the Service will regard this as a single visit. However, if the alien's intention is to address three different topics at a multi-campus organization over the 9-day period and the different campuses are paying the alien separate honorarium payments for the visits, the Service will consider this to be three separate visits. These visits will be charged against the overall five visits allowed during the 6-month period.

Will the Service Require Documentation From Arriving Aliens Stating the Intent to Participate in Honorarium-related Activities?

Yes, the Service proposes, at 8 CFR 214.8(d), that aliens presenting themselves for admission to the United States as B-1 or WB visitor for business, and who state the intent to participate in

honorarium-related activities, be in possession of the letter of invitation that has been issued by the institution

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sponsoring the activity. It is reasonable to expect that any organization sponsoring an honorarium-related event to have issued a letter of invitation to the alien. Invitation letters should clearly specify the honorarium-related event or activity as well as the date and location of the activity. In addition, the letter may assist the inspecting Service officer in verifying that the activity the alien plans to participate in qualifies pursuant to section 212(q) of the Act and the regulations at 8 CFR 214.8. The Service sees no particular hardship by proposing this reasonable documentary requirement.

Does the Service Consider Organizations Sponsoring Honorarium-Related Events to be Employers Subject to the Provisions of Section 274A of the Act?

No, the Service intends that organizations sponsoring honorarium-related events will not be considered to be employers subject to the provisions of section 274A of the Act as long as their actions are consistent with this rule.

Section 274A of the Act and implementing regulations at 8 CFR part 274a relate to the control of the employment of aliens in the United States. These provisions require persons or entities who hire individuals for employment in the United States to verify such individuals' employment eligibility and identity on the Employment Eligibility Verification form (Form I-9). These provisions also prohibit persons or entities from: hiring an alien knowing that he or she is unauthorized to work in the United States; continuing to employ an alien knowing that he or she is or has become unauthorized to work; or using a contract, subcontract, or exchange to obtain the labor or an alien in the United States knowing that he or she is unauthorized with respect to performing such labor. In essence, therefore, the prohibitions and requirements of section 274A of the Act and 8 CFR part 274a only apply in the employment and contract services contexts.

In the context of honorarium-related events, however, the relationship between the organization sponsoring the event and the individual providing the honorarium-related academic activity is neither one of employer/employee nor based upon contract services. The definitions of ``employee,`` ``employer,`` and ``employment`` in 8 CFR 274a.1(f), (g) and (h) respectively make clear that, for purposes of section 274A of the Act, ``employment`` has the common meaning of the provision of labor or service for a wage, salary or other remuneration, to which the employee has a legal entitlement, once the employee performs the labor or service. This proposed rule defines an honorarium, by contrast, as ``a gratuitous payment of money or any other thing of value to a person for the person's participation in a usual academic activity, for which no fee is legally required.`` Thus, an activity for which a person may accept an honorarium under this rule is not ``employment`` nor is it contractual, given its gratuitous nature.

However, the fact that an activity for which an entity may offer an honorarium is not ``employment`` or contract services does not mean an entity can abuse the honorarium process to circumvent the prescribed nonimmigrant petition process that all United States employers must

follow, in those cases where it will, in fact, be employing the services of a qualified alien worker. Organizations, in particular colleges, universities, and other institutions of higher education, may not use the honorarium provisions to hire or contract with an alien worker in order to provide salaried or otherwise compensated services. If the individual is to be the entity's employee, both the entity and the alien must comply with section 274A and all other provisions of the Act--such as visa petition, labor certificate, and visa requirements--governing the alien's ability to accept employment in the United States. For example, organizations that connect events together where the 9-day periods run back-to-back or are otherwise structured in such a way as to allow the instructor to continue the program during a regular semester or other established instructional period must be prepared to substantiate why the Service should not consider this arrangement as employment.

If the alien is to provide contract services, he or she will be violating his or her status by providing such services unless the alien is employment-authorized with respect to this activity. While the entity is not required by section 274A of the Act to verify the employment eligibility on Form I-9 of individuals providing contract services, the entity may be violating the prohibition against knowingly hiring an unauthorized alien if the individual is providing the contract services without being employment-authorized, and the entity is aware of this fact.

What Penalties Might an Alien Incur Should he or she be Found to be in Violation of Status?

The Service has every reason to believe that the vast majority of aliens that intend to take advantage of these honorarium-related provisions will maintain and abide by the B-1 or WB status under which the alien was admitted. However, the Service would be remiss not to address the possible consequences an alien may face should he or she violate the provision of the admitted B-1 or WB status. The Service therefore notes at 8 CFR 214.8(e) that an alien who collects honorarium in excess of the limitations stipulated by the Act will be considered to be in violation of his or her B or WB nonimmigrant status and amenable to removal under the provisions of section 237(a)(1)(C)(i) of the Act.

In addition, an alien who is applying for admission to the United States in order to participate in honorarium-related activities, and who is found to have exceeded the limitations on such activities stipulated by the Act, and who knowingly misrepresents himself or herself to the admitting Service inspector about material facts regarding the alien's honorarium-related activities, may be found to be inadmissible pursuant to the misrepresentation provisions found in section 212(a)(6)(C)(i) of the Act.

Regulatory Flexibility Act

The Commissioner of the Immigration and Naturalization Service, in accordance with the Regulatory Flexibility Act (5 U.S.C. 605(b)), has reviewed this regulation and, by approving it, certifies that this rule will not have a significant economic impact on a substantial number of small entities. This rule applies to nonimmigrant aliens visiting the United States in valid B status to accept honoraria in connection with usual academic activities. It does not affect small entities as that

term is defined in 5 U.S.C. 601(6).

Unfunded Mandates Reform Act of 1995

This rule will not result in the expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of \$100 million or more in any one year, and it will not significantly or uniquely affect small governments. Therefore, no actions were deemed necessary under the provisions of the Unfunded Mandates Reform Act of 1995.

Small Business Regulatory Enforcement Fairness Act of 1996

This rule is not a major rule as defined by section 804 of the Small Business Regulatory Enforcement Act of 1996. This rule will not result in an annual effect on the economy of \$100 million or more; a major increase in

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costs or prices; or significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based companies to compete with foreign-based companies in domestic and export markets.

Executive Order 12866

This rule is considered by the Department of Justice, Immigration and Naturalization Service, to be a ``significant regulatory action'' under Executive Order 12866, section 3(f), Regulatory Planning and Review. Under Executive Order 12866, section 6(a)(3)(B)-(D), this proposed rule has been submitted to and reviewed by the Office of Management and Budget.

Executive Order 13132

This rule will not have substantial direct effects on the States, on the relationship between the National Government and the States, or on the distribution of power and responsibilities among the various levels of government. Therefore, in accordance with section 6 of Executive Order 13132, it is determined that this rule does not have sufficient Federalism implications to warrant the preparation of a federalism summary impact statement.

Executive Order 12988 Civil Justice Reform

This rule meets the applicable standards set forth in sections 3(a) and 3(b)(2) of Executive Order 12988.

Paperwork Reduction Act

Under the Paperwork Reduction Act of 1995, Public Law 104-13, all Departments are required to submit to the Office of Management and Budget (OMB), for review and approval, any reporting or recordkeeping requirements inherent in a rule. This proposed rule does not impose any new reporting or recordkeeping requirements under the Paperwork Reduction Act.

List of Subjects in 8 CFR Part 214

Administrative practice and procedures, Aliens, Employment.

Accordingly, part 214 of chapter I of title 8 of the Code of Federal Regulations is proposed to be amended as follows:

PART 214--NONIMMIGRANT CLASSES

1. The authority citation for part 214 continues to read as follows:

Authority: 8 U.S.C. 1101, 1103, 1182, 1184, 1186a, 1187, 1221, 1281, 1282; sec. 643, Pub. L. 104-208, 110 Stat. 3009-708; Section 141 of the Compacts of Free Association with the Federated States of Micronesia and the Republic of the Marshall Islands, and with the Government of Palau, 48 U.S.C. 1901, note and 1931 note, respectively; 8 CFR part 2.

2. Section 214.8 is added to read as follows:

[sect] 214.8 Academic honorarium for B visitors.

(a) This section establishes the rules that govern an alien's receipt of honoraria in accordance with section 212(q) of the Act, while the alien is present in the United States after having been admitted as a nonimmigrant visitor for business or pleasure (B nonimmigrant). As used in this section the term:

Associated incidental expenses means reimbursements or payments for travel costs, lodging, meals, uniforms, or supplies.

Government research organization means an organizational unit of the Federal Government whose primary mission is the performance or promotion of basic research and/or applied research. See [sect] 214.2(h)(19)(iii)(C) for a complete definition of this term.

Honorarium means a gratuitous payment of money or any other thing of value to a person for the person's participation in a usual academic activity for which no fee is legally required. The value of an honorarium may be of any dollar amount with no minimum or maximum dollar amount required, as distinguished from set compensation (i.e., salary) for services that are rendered on a continuing basis.

Institution of higher education means an institution meeting the requirements of section 101(a) of the Higher Education Act of 1965.

Nonprofit research organization means an organization defined as tax exempt under the Internal Revenue Code of 1986, section 501(c)(3), (c)(4) or (c)(6), 26 U.S.C. 551(c)(3), (c)(4) or (c)(6) and has been approved as a tax exempt organization for research or educational purposes by the Internal Revenue Service. See [sect] 214.2(h)(19)(iii)(C) and (h)(19)(iv) for a complete definition of this term.

Pre-arranged academic activity means any academic activity for which an alien will accept an honorarium, if the institution invited the alien's participation before the alien's admission to the United States.

Usual academic activity (or activities) means those activities for the benefit of the institution that include, but are not limited to, lecturing, teaching, consulting, conducting research, attending

meetings, symposia or seminars, or otherwise sharing knowledge, experience, or skills in master classes, readings, and performances (when the audience is composed of non-paying students and/or open to the general public and general admission tickets to the public have not been sold), and meetings of boards, committees, or merit review panels.

Visitor for business means a person admitted to the United States as a B-1 nonimmigrant or a Visa Waiver Program visitor for business pursuant to 8 CFR part 217.

Visitor for pleasure means a person admitted to the United States as a B-2 nonimmigrant or a Visa Waiver Program visitor for pleasure pursuant to 8 CFR part 217.

(b) B nonimmigrants eligible to accept honorarium. Both nonimmigrant visitors for business and nonimmigrant visitors for pleasure may accept honoraria in accordance with section 212(q) of the Act. Aliens who are exempt from the nonimmigrant visa requirements of 8 CFR 212.1 or who possess a valid border crossing card are also eligible to engage in honorarium-related events. If, however, the alien is coming to the United States to participate in pre-arranged academic activities for which the alien will accept honoraria the alien must seek admission as a nonimmigrant visitor for business. An alien may not be admitted as a nonimmigrant visitor for pleasure if the alien's plans include participating in pre-arranged academic activities for which the alien will accept honoraria.

(c) Limitations on honorarium activity and frequency. The acceptance of honoraria under this paragraph is subject to the following limitations.

(1) During a 6-month period, an alien may accept an honorarium and reimbursement of the associated expenses from no more than five organizations that are defined in paragraph (a) of this section. If questioned by the admitting Service Inspector or by any Service officer after admission, the alien shall provide a complete accounting of his or her honorarium-related activities within the applicable 6-month period.

(2) The academic activity or activities that the alien is providing for the institution is limited to no more than 9 days per activity at any single institution (a total of 45 possible days during the 6-month period). The term "single institution" also applies to an organization that has branches or campuses in more than one location. For purposes of applying the 9-day limit, if the alien is providing the identical service at more than one location of the institution during the 9-

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day period and is being reimbursed with one honorarium payment, this shall be considered one activity. However, if the alien is providing different activities at different branches of an organization and the different campuses are paying the alien separate honorarium payments for the visits, each visit to each branch or campus shall be considered a separate visit and be calculated against the maximum of five allowed activities within the 6-month period.

(3) An institution may not use the honorarium provisions of section 212(q) of the Act as a vehicle to circumvent the otherwise prescribed nonimmigrant petition process. Institutions desiring to employ nonimmigrant aliens must comply with section 274A of the Act and all other applicable provisions of the Act and the Service regulations at 8 CFR part 274a that govern an alien's ability to legally accept

employment in the United States.

(d) Documentation. Any alien applying for admission to the United States as a B-1 visitor for business or as a WB visitor, stating the intent to participate in an academic activity for which an honorarium payment will be awarded, will be required to be in possession of the letter of invitation that the institution sponsoring the activity has issued to the alien. At a minimum, an invitation letter should clearly specify the honorarium-related event or activity, as well as the date(s) and location of the event. The letter of invitation must be produced for inspection if requested by an inspecting Service officer at the United States port-of-entry where the alien is applying for admission.

(e) Applicability of employment requirements. A nonimmigrant visitor for business or pleasure who accepts honoraria as provided in this section will not be considered as engaging in employment or providing contract services since doing so impedes the ability of the Service to properly administer section 212(q) of the Act.

(f) Violation(s) of status. (1) A nonimmigrant visitor for business or pleasure who collects honoraria in excess of the limitations noted in paragraph (c) of this section is in violation of his or her nonimmigrant status and amenable to removal under section 237(a) (1) (C) (i) of the Act.

(2) It is not a violation of status for an alien who has been admitted as a nonimmigrant visitor for pleasure to accept honoraria under section 212(q) of the Act for the alien's participation in academic activities, if the institution invited the alien's participation after the alien's admission. It is, however, a misrepresentation of a material fact for an alien who is coming to the United States to participate in pre-arranged academic activities for which the alien will accept honoraria to seek and obtain admission as a nonimmigrant visitor for pleasure, rather than as a nonimmigrant visitor for business.

(3) It is not a violation of status for a B-1 alien to participate in more than one academic activity at more than one organization during a single admission. However, the academic activities must comport with the limitations noted in section 212(q) of the Act.

Dated: May 21, 2002.

James W. Ziglar,
Commissioner, Immigration and Naturalization Service.
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