

only be required to pay a new SEVIS fee if they are applying for a new nonimmigrant visa to begin a new course of study or new program or for change of status in order to begin a new nonimmigrant status, not if they are merely extending an existing course of study or transferring to a new school or program level. Many commenters to the 1999 proposed rule suggested that the fee should be imposed one time only or should be an annual fee. DHS cannot adopt these suggestions. To collect a fee for each student and exchange visitor on an annual basis would be overly burdensome to the government as well as the affected parties, and would result in more money being collected than is necessary to fund the program. However, to collect the fee only once, for the lifetime of each student or exchange visitor, would be insufficient to cover program costs. With each event that occurs during the course of a student's or exchange visitor's stay in the United States, the data collection system mandated by section 641 of IIRIRA, will require updates by the school official or program officer and/or require adjudication by a government official, all of which require resources to be expended and funded. Where an F or M nonimmigrant is applying for reinstatement of student status because of a violation of status more than 5 months in duration, the nonimmigrant will be required to pay a new fee to DHS prior to the application for reinstatement in order to be granted a return to valid status. Similarly, pursuant to 22 CFR 62.45, where an exchange visitor applies for reinstatement after a substantive violation or after falling out of his or her J program status for longer than 120 days, the exchange visitor will be subject to paying a new fee prior to applying for reinstatement. The new fee amount may be \$35 or \$100, depending on the type of exchange visitor program to which the J-1 nonimmigrant is seeking to be reinstated.

The following chart outlines who is required to pay a fee under the proposed rule and when fee payment is required:

Fee payment *not* required if applicant is:

An F-2, J-2 or M-2 dependent.

A J-1 participant in an exchange program sponsored by the Federal government.

An F-1, F-3, J-1, M-1, or M-3 nonimmigrant transferring between schools, programs or program categories.

An F-1, F-3, J-1, M-1, or M-3 nonimmigrant requesting/applying for an extension of course of study or program.

An alien who paid an initial fee when seeking an F-1, F-3, J-1, M-1, or M-3 visa from a consular official abroad for initial attendance at an approved school or exchange program, who was denied a visa by the consular officer, and is re-applying for the same status within nine months of the denial.

Applying for a change of classification between an F-1 and F-3 nonimmigrant or between M-1 or M-3 nonimmigrant.

Fee payment *is* required if the applicant is:

An alien seeking an F-1, F-3, J-1, M-1, or M-3 visa from a consular officer abroad for initial attendance at a DHS-approved school or initial participation in a Department of State-designated exchange program.

An alien exempt from the visa requirement described in section 212(d)(4) of the Act, applying for admission to the United States to begin initial attendance at a DHS-approved school or initial participation in a Department of State-designated exchange program.

An alien in the United States seeking a change of status to F-1, F-3, J-1, M-1, or M-3 (except in the case of change classification between F-1 and F-3 or between M-1 or M-3).

A J-1 nonimmigrant who is applying for reinstatement after a substantive violation, or who has been out of program status for longer than 120 days but less than 270 days during the course of his or her program.

An F or M nonimmigrant applying for reinstatement of student status because of a violation of status more than 5 months in duration.

Fee payment is *reduced* if applicant is:

A J-1 nonimmigrant participating in a summer work/travel, au pair, or camp counselor program.

V. Applicability of the Fee Requirement

Many commenters to the 1999 proposed rule stated that the fee should not be retroactive to August 1, 1999, and should only be collected once the student and exchange visitor information system is fully operational. Congress mandated in section 641 of the IIRIRA that the student/exchange visitor information collection program be funded by those aliens included in the program. This system is currently operational and DHS is incurring associated costs. As such, while the fee is not being imposed retroactively, this fee must be collected as soon as feasibly possible. This proposed rule therefore anticipates collection of fees upon implementation of a final rule.

Many commenters to the 1999 proposed rule suggested that F-1 nonimmigrant students participating in intensive English programs should be exempt from the fee requirement, that the fee should be waived for all short-term J-1 or F-1 nonimmigrants, or that the fee should be limited to F-1

students who are in a degree-seeking program. The language of section 641 of IIRIRA does not limit the application of the fee requirement to students in this specific category. Rather, the statute (as amended by Public Law 106-396) directs the Secretary of Homeland Security to impose a fee on all F and M students and J exchange visitors, with the sole exception of J-1 exchange visitors who have come to the United States as participants in an exchange program sponsored by the Federal Government.

Many commenters stated that the language of the proposed fee rule published in December 1999 was ambiguous as to whether or not the fee requirement applied to F-1 nonimmigrants attending private high schools. Section 641(e)(1) of IIRIRA as amended by Public Law 107-56, now directs the Secretary of Homeland Security to collect this fee from students enrolled in other approved educational institutions as well. As a result of this statutory change, the proposed rule subjects F-1, F-3, J-1, M-1, and M-3 nonimmigrants enrolled in public and private high schools or private elementary schools to fee payment. Many commenters stated that the language in section 641(e) of IIRIRA, "sponsored by the Federal Government," is ambiguous, and suggested that, because all J-1 nonimmigrants are in some way sponsored by the Federal Government, all J-1 nonimmigrants should be exempt from paying the fee. DHS cannot adopt this suggestion. In determining who should be exempt from the fee, Congress specifically exempted J-1 nonimmigrants who are participating in an exchange program sponsored by the Federal Government. If Congress intended all J-1 nonimmigrants to be exempt from the fee, it would not have provided for this express exemption. In fact, Congress provided for a reduced fee of \$35 for three other specific categories of J-1 programs. Thus, this provision falls under the principle of *expressio unius*: when one or more things of a class are expressly mentioned, others of the same class are necessarily excluded. That is, by expressly noting that those J-1 nonimmigrants sponsored by the Federal Government are exempt from the fee, other J-1 program participants must therefore not be exempted.

VI. Miscellaneous Comments and Concerns

Many commenters stated that the 1999 proposed rule allows the fee money remitted to DHS to be used for purposes outside the scope of section