

United States Senate
WASHINGTON, DC 20510

October 26, 2020

The Honorable Chad F. Wolf
Under Secretary
Office of Strategy, Policy, and Plans
U.S. Department of Homeland Security
3801 Nebraska Ave, NW
Washington, DC 20528

RE: Notice of Proposed Rulemaking, *Establishing a Fixed Time Period of Admission and an Extension of Stay Procedure for Nonimmigrant Academic Students, Exchange Visitors, and Representatives of Foreign Information Media*, 85 Fed. Reg. 60,526 (September 25, 2020) (to be codified at 8 C.F.R. 214 and 274a), RIN 1653-AA78, (DHS Docket No. ICEB-2019-0006)

Dear Under Secretary Wolf:

We write to request that the U.S. Department of Homeland Security's ("the Department") recent proposed rule entitled, *Establishing a Fixed Time Period of Admission and an Extension of Stay Procedure for Nonimmigrant Academic Students, Exchange Visitors, and Representatives of Foreign Information Media* ("the rule"), be withdrawn in its entirety, and that the admission for duration of status for those impacted by this rule remain in effect. This rule, if implemented, would have deeply harmful effects not only on students and institutions of higher education, but would threaten health care across the nation at a time when we are facing an unprecedented strain on resources in light of the 2019 novel coronavirus (COVID-19) pandemic.

The proposed rule would apply burdensome and arbitrary admission period limitations on all F, I, and J visa holders in a purported effort to address a small number of "overstays." In doing so, the Department would reverse the long-standing "duration of status" policy that allows international students to stay in the United States until they have completed their course of study. The proposed rule would replace the current, commonsense approach that allows students to stay for the duration of their program with a fixed-four year admission period that can be further limited to just two years.

As a preliminary matter, the proposed rule was deemed a "significant regulatory action" as defined under Executive Order 12,866, which requires that the Department "adopt a regulation only upon a reasoned determination that the benefits" of the rule "justify its costs."¹ The "benefits" section as required under EO 12866 consists of two paragraphs that explain the "unquantified" benefits of the rule. According to the Department, the benefit is the possibility that the rule "could" result in reduced fraud, abuse, and national security risks, but "whether the rule will in fact result in a reduction will be borne out when the final rule is implemented." The Department fails to show a reasoned determination of the benefits of the proposed rule.

¹ Exec. Order No. 12866, §§ 3, 6 58 Fed. Reg. 51,735 (1993).

In contrast to the possible “unquantified” benefits of the proposed rule, conversely, the harms are *very* quantifiable for approximately one million international students, colleges and universities, and our health care workforce during a pandemic. The rule is also estimated to cost an additional \$229.9 to \$237.8 million to implement, annually.

There are at least five major concerns with the proposed rule: (1) it would result in massive disruptions for the health care workforce, particularly for J-1 physicians who are actively providing patient care amid the pandemic and could be forced to leave the country, diminishing the already strained capacity of health care facilities around the country; (2) it would devastate institutions of higher education and their ability to serve international and domestic students alike; (3) it would limit the admission period for students from select countries without adequate rationale; (4) it is entirely unnecessary given the current reporting systems, and; (5) it would further strain United States Citizenship and Immigration Services (USCIS) resources.

The rule threatens the nation’s health care workforce amid the COVID-19 pandemic

The proposed rule would have an out-sized impact on institutions of higher education and more than one million international students, and will acutely harm the nation’s health care workforce while they struggle to save lives during the COVID-19 pandemic.

More than 12,000 physicians are in J-1 visa status providing critical patient care across the United States, serving a vital role in our frontline response to the pandemic. These foreign physicians work at nearly 750 teaching hospitals across almost every state. The proposed rule would cause significant disruptions to the patient care they provide by requiring annual renewal applications in the midst of the COVID-19 pandemic. Beyond this, it will put a considerable burden on remaining trainees, including American citizens, who will be left to continue providing patient care in under-resourced settings, which could negatively impact their training.

The U.S. health care system is already facing significant physician shortages, with one estimate suggesting the country could face a total shortage of nearly 139,000 physicians by 2033.² Some states have even recruited retired physicians and those licensed in other jurisdictions, as well as utilized medical students to respond to rising COVID-19 caseloads. States with a particularly high number of J-1 physicians include New York, Michigan, Texas, Pennsylvania, Massachusetts, and Florida.

The proposed rule will devastate institutions of higher education and drive international talent away from the United States

International students play an essential role in research, innovation, and instruction in the United States, particularly in the science, technology, engineering, and mathematics (STEM) fields.³ They are also vital to our economy. In the 2018-2019 school year, international students

² Dall T., Reynolds, R. Chakrabarti, R., Jones K., Iacobuccim, W. (2020). *The Complexities of Physician Supply and Demand: Projections From 2018 to 2033*. Association of American Medical Colleges. <https://www.aamc.org/system/files/2020-06/stratcomm-aamc-physician-workforce-projections-june-2020.pdf>.

³ New American Economy Research Fund. (2020). *Not Coming to America: Falling Behind in the Race to Attract International Students*. https://research.newamericaneconomy.org/wpcontent/uploads/sites/2/2020/07/NAE_NotComingToAmerica_V3.pdf

contributed \$41 billion to the U.S. economy and created or supported 458,290 jobs.⁴ Mandating fixed timelines as an alternative to duration of status would place a number of undue and unnecessary burdens on this group of visa holders. The proposed two and four-year periods of admission fall far short of the minimum time it takes nearly all candidates to complete doctoral programs, and even short of the 5.1 year average for students to complete a bachelor's degree.⁵ Finally, this rule applies to I-visa holders, which many foreign journalists utilize, and which would impact their ability to continue their work throughout the pandemic as well. The insufficiency of the proposed duration would force many international students to juggle the expensive and time-consuming process of filing an expensive and rigorous extension application while continuing their course of study.

Due to several successive efforts by the Department to limit the number of international students including the proposed rule, international students have been discouraged from applying to institutions of higher education in the United States. Latest data show that compared to last fall, undergraduate enrollment of international students is down a shocking 13.6 percent, and graduate enrollment of international students is down 7.6 percent,⁶ which are both greater rates of decline than for domestic students.⁷ The proposed restrictions on duration of status will cause only additional uncertainty for international students studying in the country and will likely lead to further enrollment loss, as institutions will not be able to assure prospective international students that they will be able to complete their educational or postdoctoral program in the United States. The proposed rule will thus harm institutions of higher education when they can least afford it, reducing the technological innovation, economic growth, and other benefits to the United States that they provide. Decreasing enrollments also reduces tuition revenue to colleges and universities that are already facing massive budget cuts during COVID-19. The higher education community has said that colleges and universities face budget shortfalls of up to \$200 billion in the coming months.⁸

The proposed rule relies on flawed data to further limit visa duration for certain international students based on country of origin or nationality

The proposed rule would provide opportunities for the Department to further limit the admission period for international students and exchange visitors based on their country of origin or nationality. The proposed rule would allow DHS to limit the authorized period of stay to a maximum of two years from nationals of countries associated with “high” visa overstay rates using flawed data.

⁴ NAFSA: Association of International Educators. (2019). *NAFSA International Student Economic Value Tool*. <https://www.nafsa.org/policy-and-advocacy/policy-resources/nafsa-international-student-economic-value-tool-v2>.

⁵ Shapiro, D., Dundar, A., Wakhungu, P.K., Yuan, X., Nathan, A., & Hwang, Y. (2016). *Time to Degree: A National View of the Time Enrolled and Elapsed for Associate and Bachelor's Degree Earners (Signature Report No. 11)*. National Student Clearinghouse Research Center.

⁶ National Student Clearinghouse. (2020). *National Student Clearinghouse Research Center's Monthly Update on Higher Education Enrollment*. <https://nscresearchcenter.org/stay-informed/>.

⁷ Redden, E. (2020). *Community College Enrollments Drop This Fall*. Inside Higher Ed. <https://www.insidehighered.com/news/2020/09/24/undergraduate-enrollment-falls-25-percent-community-college-enrollment-75-percent>.

⁸ Letter from the American Council on Education to Speaker of the House Nancy Pelosi, Minority Leader Kevin McCarthy, Majority Leader Mitch McConnell, Minority Leader Chuck Schumer. (October 19, 2020). <https://www.acenet.edu/Documents/Letter-Congress-October-COVID-Supplemental-101920.pdf>

First, according to the Department’s own data, in 2019 foreign students and exchange visitors made up only three percent of visa overstays.⁹ Further, an examination of DHS reports by the National Foundation for American Policy found:

“[T]he overstay rate for F-1 international students is not an actual overstay rate but only an upper-bound estimate of individuals who DHS could not positively identify as leaving the United States. The rule *relies on a flawed measurement* – an overall overstay rate by country that includes individuals who DHS concludes have already left the U.S. and people DHS concedes may have lawfully changed status inside the United States and are not actual overstays.”¹⁰ (emphasis added).

Despite this evidence that international students and exchange visitors do not systematically, or even in any significant numbers, overstay the duration of their visas, the proposed rule would limit student visas to an even stricter two years for students from 59 countries, a majority across the African continent. The rule would further give DHS broad and concerning authority to further limit student entry. For example, the rule allows for DHS to further limit admission to a 2-year periods if it is in the “U.S. national interest”. However, the rule does not define this term, thus creating a large loophole for the administration to further restrict entry. The fact that DHS is giving itself such broad discretion is concerning and could lead to abuses of this authority that hurt students and universities.

Most importantly, beyond the use of this flawed data and concerning broad authority, DHS already has information at its disposal to determine which visa holders may be overstaying their authorized stay, making the proposed rule unnecessary.

The Student and Exchange Visitor Information System (SEVIS) is already sufficient to accomplish the Department’s stated goals

The Student and Exchange Visitor Information System (SEVIS), a joint database of the Department of Homeland Security and Department of State, already tracks a vast amount of relevant data that makes the proposed rule unnecessary. SEVIS gives DHS immediate access to detailed information related to almost every student and exchange visitor event, including student addresses, course and program participation, and employment that could impact compliance with regulations.

Beyond this, pursuant to 8 CFR § 214.3, DHS also has independent authority to request “on any individual student or class of students upon notice” all information and documents that schools are obligated to retain throughout enrollment, providing DHS with ample access to broad statistics and maintaining its ability to conduct compliance investigations. Further, dates of entry, periods of authorized training program participation, and definitive end dates are expressly included for J-visa holders for foreign physicians. J-1 physicians are monitored throughout the

⁹ Department of Homeland Security. (2020). *Fiscal Year 2019 Entry/Exit Overstay Report*.

https://www.dhs.gov/sites/default/files/publications/20_0513_fy19-entry-and-exit-overstay-report.pdf.

¹⁰ National Foundation for American Policy. (2020). *NFAP Policy Brief: International Students and DHS Data*. <https://nfap.com/wp-content/uploads/2020/09/Analysis-of-DHS-Data-on-International-Students.NFAP-Policy-Brief.September-2020-1.pdf>.

year by their sponsor, meaning that the proposed rule will not yield any new or better information about this cohort.

Taken together, the level of detailed information that is already readily available within SEVIS combined with the Department's existing regulatory authority to request additional information make this rule duplicative and unnecessary.

The proposed rule would overburden USCIS

The proposed rule requires visa holders to apply for additional extensions through USCIS, an agency that recently faced a severe budget shortfall and increasing backlogs. In recent months, USCIS notified Congress that it had a budget shortfall so severe it would require massive furloughs, totaling approximately 13,000 employees, or nearly 70 percent of its workforce.¹¹ The agency stated that the budget shortfall will increase backlogs and wait times for services. Considering that USCIS wait times have already increased significantly during the Trump Administration, any further delay in the absence of clear need or benefit is unacceptable.

The proposed rule would force USCIS to process 364,060 new extension requests annually by 2024 and 300,954 in 2025 and later years. We question the need to implement a costly and disruptive regulatory change that duplicates the SEVIS system and that further challenges an agency struggling to meet its current responsibilities.

Given the existing backlog and the projected influx of extension of stay applications, USCIS may face an increased burden in implementing this rule. Current published processing times for visa extensions for J visas, for example, range from five to 19 months. If this rule were implemented, these already lengthy processing times could potentially increase. If the backlog becomes lengthier, J-1 physicians could be forced to annually to apply for their extension through a U.S. consulate abroad if they are not able to obtain an extension through USCIS in a timely manner. This would disrupt patient care amid an ongoing pandemic.

The proposed rule must be withdrawn in its entirety

The proposed rule will harm our nation's ability to fight the ongoing pandemic, impacting the international students, journalists, and physicians who make meaningful contributions to our country on a daily basis, as well as the individuals for whom they provide care. In short, the rule's rationale is wholly unsubstantiated, and it would have a significant and negative impact upon the constituents and communities that we represent. We therefore request that you immediately rescind this rule. If you have any questions please contact Flannery Fox at Flannery_fox@murray.senate.gov, or Emily Smith at Emily_smith@murphy.senate.gov.

Sincerely,

/s/ Patty Murray

Patty Murray
United States Senator

/s/ Christopher S. Murphy

Christopher S. Murphy
United States Senator

¹¹ U.S. Citizenship and Immigration Services. (August 25, 2020). *USCIS Averts Furlough of Nearly 70% of Workforce* [Press release].
<https://www.uscis.gov/news/news-releases/uscis-averts-furlough-of-nearly-70-of-workforce>.

/s/ Dianne Feinstein
Dianne Feinstein
United States Senator

/s/ Tammy Baldwin
Tammy Baldwin
United States Senator

/s/ Chris Van Hollen
Chris Van Hollen
United States Senator

/s/ Ron Wyden
Ron Wyden
United States Senator

/s/ Robert P. Casey, Jr.
Robert P. Casey, Jr.
United States Senator

/s/ Cory A. Booker
Cory A. Booker
United States Senator

/s/ Mazie K. Hirono
Mazie K. Hirono
United States Senator

/s/ Patrick Leahy
Patrick Leahy
United States Senator

/s/ Sheldon Whitehouse
Sheldon Whitehouse
United States Senator

/s/ Jack Reed
Jack Reed
United States Senator

/s/ Tim Kaine
Tim Kaine
United States Senator

/s/ Christopher A. Coons
Christopher A. Coons
United States Senator

/s/ Jeanne Shaheen
Jeanne Shaheen
United States Senator

/s/ Elizabeth Warren
Elizabeth Warren
United States Senator

/s/ Richard Blumenthal
Richard Blumenthal
United States Senator

/s/ Tom Udall
Tom Udall
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Michael F. Bennet
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United States Senator

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/s/ Jeffrey A. Merkley
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Jacky Rosen
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