

Congress of the United States
Washington, DC 20515

October 26, 2020

Sharon Hageman, Acting Regulatory Unit Chief
Office of Policy and Planning
U.S. Immigration and Customs Enforcement
Department of Homeland Security
500 12th Street SW
Washington, DC 20536

Re: DHS Docket No. ICEB-2019-0006, RIN: 1653-AA78, 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

Dear Acting Chief Hageman:

We, the undersigned Members of Congress, submit this comment in opposition to the Department of Homeland Security (DHS), Immigration and Customs Enforcement (ICE) proposed rule, “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,” published in the Federal Register on September 25, 2020.¹ Although we share with the Administration a mutual objective of protecting against abuses in our temporary visa programs, we are deeply troubled by the changes proposed in this rulemaking, which will introduce needless administrative paperwork into an already overburdened system without meaningfully improving program integrity.

Since the mid-1980s, the United States has recognized the unique needs of the academic, research, and media industries by adopting a reasonable and workable policy regarding the temporary admission of foreign students (F), exchange visitors (J), and media representatives (I). This policy—known as “duration of status”—allows such individuals to be admitted to the United States for the period of time that they comply with the terms and conditions of their temporary visas, rather than a fixed time period. Over the years, this policy has proven essential to U.S. institutions of higher education, exchange visitor organizations, and other entities that sponsor nonimmigrants, where flexibility is key to the success of these programs and their participants.

Now, nearly 40 years later, DHS proposes to impose a fixed period of admission for F, J, and I nonimmigrants, setting a four year limitation for F and J nonimmigrants and a blanket limit of two years for some based on arbitrary criteria, including national origin. As explained in more detail herein, DHS has failed to provide adequate justification for these changes, which will not only fail to solve the problems they purport to address, but will also impose significant burdens on U.S. Citizenship and Immigration Services (USCIS), an agency already overtaxed with record

¹ 85 Fed. Reg. 60526 (Sept. 25, 2020).

high case backlogs and the ongoing threat of financial insolvency.² We urge DHS to abandon this rulemaking and maintain the duration of status model for F, J, and I nonimmigrants.

I. DHS Fails to Draw a Rational Connection Between the Proposed Rule and its Stated Goal

When engaging in rulemaking, DHS must “examine the relevant data and articulate a satisfactory explanation for [the] action including a ‘rational connection between the facts found and the choice made.’”³ DHS states that the transition from duration of status to a fixed period of admission is necessary to deter fraud and abuse of the nonimmigrant visa system.⁴ While we support DHS’s goal of reducing fraud in the immigration system, the proposed rule does not draw a rational connection between the identified problem and the changes proposed.

In its assessment of “Risks to the F Classification,” DHS outlines instances of sweeping fraud perpetrated by for-profit school owners who were criminally prosecuted for collecting tuition from students under false pretenses and falsely reporting that students were maintaining F-1 status.⁵ To be clear, school owners and others who prey upon non-citizens and perpetrate fraud have no place in our immigration system. The educational community necessarily plays an important role in the administration of the student visa program and must be scrutinized closely and if necessary, subjected to enforcement.

To that end, recommendations for reducing fraud in the student visa program from interested government agencies have appropriately centered on increasing monitoring and reporting requirements for schools and academic institutions.⁶ In 2012, DHS implemented five measures recommended by the Government Accountability Office (GAO), such as monitoring state licensing and accreditation status for institutions of higher education, and developing criteria to refer criminal cases to law enforcement agencies.⁷ In 2019, DHS began implementation of a number of additional GAO-recommended measures to manage fraud risks related to school recertification and program oversight.⁸

In the proposed rule, however, DHS fails to identify widespread problems that can be solved by eliminating the duration of status policy, pointing primarily to evidence of some students who have remained in the United States for extended periods of time in F-1 status by enrolling in consecutive educational programs, transferring to new schools, or repeatedly requesting program extensions.⁹ However, DHS admits that these instances of extended stay do “not always result in technical violations of the law” and fails to provide a reasoned explanation

² See e.g., U.S. Citizenship and Immigration Services, *USCIS Averts Furlough of Nearly 70% of Workforce* (Aug. 25, 2020), <https://www.uscis.gov/news/news-releases/uscis-averts-furlough-of-nearly-70-of-workforce>.

³ *Motor Vehicle Mfrs. Assn. v. State Farm Ins.*, 463 U.S. 29, 43 (1983) (quoting *Burlington Truck Lines v. United States*, 371 U.S. 156, 168 (1962)).

⁴ 85 Fed. Reg. at 60528.

⁵ 85 Fed. Reg. at 60533.

⁶ See U.S. Gov’t Accountability Off., GAO-12-572, *Student and Exchange Visitor Program: DHS Needs to Assess Risks and Strengthen Oversight Functions* (2012), <https://www.gao.gov/assets/600/591668.pdf>.

⁷ *Id.*

⁸ See U.S. Gov’t Accountability Off., GAO-19-297, *Student and Exchange Visitor Program: DHS Can Take Additional Steps to Manage Fraud Risks Related to School Recertification and Program Oversight* (2019), <https://www.gao.gov/assets/700/697630.pdf>.

⁹ 85 Fed. Reg. at 60533-34.

as to why changing programs and pursuing consecutive degrees is impermissible or undesirable.¹⁰

DHS further states that the changes in the proposed rule “would ensure that the Department has an effective mechanism to periodically and directly assess whether these nonimmigrants are complying with the conditions of their classifications and U.S. immigration laws, and to obtain timely and accurate information about the activities they have engaged in and plan to engage in during their temporary stay in the United States.”¹¹ Yet, with respect to F and J nonimmigrants, DHS currently has this capability—the Student and Exchange Visitor Information System (SEVIS), administered by Immigration and Customs Enforcement (ICE). Through SEVIS, Designated School Officials are obligated by law to routinely and timely report to ICE on the activities and status of students including address changes, academic progress and program completion, disciplinary action, failure to maintain a full course of study, and employment status for students engaged in practical training.

If such records are not timely updated, SEVIS flags such records with automatic updates and in certain circumstances, automatically terminates the student’s record.¹² SEVIS provides DHS with more than adequate information to take action against students who are believed to have violated their status, as was demonstrated just days ago when ICE arrested 15 students who allegedly claimed to be working on OPT for companies that do not exist, and sent termination notices to approximately 3,300 students who were in active OPT status but had not reported employer information in SEVIS.¹³ As such, it is unclear how these sweeping changes, which will impose significant additional paperwork burdens and costs on individual students and USCIS, will lead to the identification of program abuses that cannot be currently identified by ICE through SEVIS.

II. DHS Fails to Adequately Consider the Economic and Operational Impact of the Proposed Changes on USCIS

DHS recognizes that the proposed rule would place a significant burden on USCIS operations and costs, but fails to provide an adequate analysis of either.¹⁴ USCIS currently has a backlog of 2.5 million cases¹⁵—the largest net backlog since 2003, when adjudication processing

¹⁰ *Id.* As part of its flawed analysis, DHS claims that frequent changes within an educational level or changes to a lower level are “not consistent with attainment of a ‘specific educational or professional objective,’” as required by the definition of “full-course of study.” However, the regulation simply states that such objective be attained upon “successful completion” of the full course of study and in no way limits a student’s ability to explore other career paths or change objectives.

¹¹ 85 Fed. Reg. at 60528.

¹² See generally Immigration and Customs Enforcement, *SEVIS Reporting Requirements for Designated School Officials*, <https://www.ice.gov/sevis/dso-requirements#:~:text=Federal%20laws%20and%20regulations%20require,automatically%20updates%20the%20student%20records>.

¹³ Immigration and Customs Enforcement, *ICE Arrests 15 Nonimmigrant Students for OPT-Related Fraud* (Oct. 21, 2020), <https://www.ice.gov/news/releases/ice-arrests-15-nonimmigrant-students-opt-related-fraud>.

¹⁴ 85 Fed. Reg. at 60568, Table 6.

¹⁵ See U.S. Citizenship and Immigration Services, *Annual Report on the Impact of the Homeland Security Act on Immigration Functions Transferred to the Department of Homeland Security* (Apr. 29, 2020), <https://www.uscis.gov/sites/default/files/reports-studies/Annual-Report-on-the-Impact-of-the-Homeland-Security-Act-on-Immigration-Functions-Transferred-to-the-DHS-FY19-Signed-Dated-4.29.20.pdf>.

times increased significantly in the wake of the 9/11 terrorist attacks.¹⁶ Between fiscal years 2014 and 2019, USCIS’s average processing times have increased by 101%.¹⁷ International students, universities, and businesses consistently struggle to manage the effects of lengthy processing times, particularly when it comes to applications for employment authorization for students to engage in practical training, which currently range between 105 to 165 days.¹⁸ Because international students can only file an application 90 days before they complete their academic program,¹⁹ processing delays have resulted in significant financial hardships and the loss of valuable job opportunities for such students.²⁰

The agency estimates that the rule would result in the filing of 203,103 extension applications for F, J, and I nonimmigrants in fiscal years 2020 and 2021, with such applications increasing in fiscal years 2022 and 2023 and peaking at 364,060 applications in 2024.²¹ The proposed rule also states that in-person interviews may be required in connection with extension applications.²² As history has indicated, additional interview and vetting requirements will undoubtedly lead to further delays.²³ Given this history and the agency’s current financial difficulties, DHS cannot afford to let USCIS fly blindly into this costly experiment. DHS must step back and provide a complete analysis of the financial and operational impact—and how such impacts will be mitigated—before proceeding. If USCIS is not fully prepared to handle the massive influx of extension requests that will result from this proposed rule, tens of thousands of students will fall out of legal status.

Further, it should not be forgotten that prior to the creation of DHS, the agency’s predecessor, the Legacy Immigration and Naturalization Service (INS), transitioned to a fixed period of admission for F nonimmigrant students on two occasions—in 1973²⁴ and 1981.²⁵ In both instances, Legacy INS reversed course, primarily citing the administrative burdens associated with processing requests for student extensions of status.²⁶

Until 1973, F-1 students, along with their spouses and minor children, were admitted to the United States for the duration of the student’s academic program.²⁷ In 1973, a rule was promulgated limiting the period of admission for students to one year.²⁸ By 1978, Legacy INS proposed changing the admission period back to duration of status to “eliminate the need for the

¹⁶ U.S. Citizenship and Immigration Services, *Backlog Elimination Plan* (June 16, 2004), <https://www.aila.org/File/DownloadEmbeddedFile/44829>.

¹⁷ American Immigration Lawyers Association (AILA), *Policy Brief: Crisis Level USCIS Processing Delays and Inefficiencies Continue to Grow* (Feb. 26, 2020), <https://www.aila.org/advo-media/aila-policy-briefs/crisis-level-uscis-processing-delays-grow>.

¹⁸ U.S. Citizenship and Immigration Services, *Check Case Processing Times*, <https://egov.uscis.gov/processing-times/> (last visited Oct. 20, 2020).

¹⁹ 8 C.F.R. § 214.2(f)(11)(B).

²⁰ Erica Green, *Visa Delays at Backlogged Immigration Service Strand International Students*, N.Y. TIMES (June 16, 2019), <https://www.nytimes.com/2019/06/16/us/politics/visas-international-students.html>.

²¹ 85 Fed. Reg. at 60568, Table 6.

²² 85 Fed. Reg. at 60572.

²³ 84 Fed. Reg. 62280, 62304-05, nn.48, 106-107 (Nov. 14, 2019) (discussing the impact of new interview procedures on the cost of processing adjustment of status applications).

²⁴ 38 Fed. Reg. 35425 (Dec. 28, 1973).

²⁵ 46 Fed. Reg. 7267 (Jan. 23, 1981).

²⁶ 43 Fed. Reg. 32306 (July 26, 1978); 48 Fed. Reg. 14575 (Apr. 5, 1983).

²⁷ See 85 Fed. Reg. at 60531.

²⁸ 38 Fed. Reg. 35425 (Dec. 28, 1973).

Service to adjudicate the large number of applications” required under the 1973 regulations and “permit more efficient use of Service manpower and resources.”²⁹ In 1981, Legacy INS again imposed a fixed period of admission for students, with extension applications accepted and reviewed on a case-by-case basis.³⁰ However, the change once again proved to be too burdensome for the agency, and in two years, with other program fixes to address the issues that precipitated the change, duration of status for students was reinstated.³¹

These past aborted attempts to eliminate duration of status make it clear that DHS’s current proposal would place overwhelming administrative burdens on USCIS that would exacerbate existing backlogs and further increase already record-high processing times. Notably, these burdens were deemed excessive in 1978, when there were roughly 280,000 nonimmigrant students in the United States. Today, more than 1 million foreign students pursue educational degrees in this country, making up over 5.5% of total enrollment in U.S. colleges and universities.³² If the administrative burdens were deemed excessive in 1978, there can be little doubt that they will be exponentially higher today. Without concrete proof that these changes will lead to significant improvements in program integrity, they cannot be justified.

III. The Limitations on Periods of Admission are Arbitrary and Based on Flawed Analyses and Assumptions

A. The Proposed Four-Year Limitation for Students and Exchange Visitors is Arbitrary and Based on Outdated Assumptions

DHS proposes to arbitrarily impose a four-year period of admission for most students with the justification that “the fixed date of admission best aligns with the normal progress these nonimmigrants should be making.”³³ This justification, however, relies on the outdated assumption that four-year (or two year) programs are “the general structure of post-secondary education in the United States.”³⁴ The vast majority of full-time college students in the United States do not graduate within the two-year or four-year timeframe for their respective associate’s or bachelor’s degree.

As of 2017, only 5% of full-time students at public two-year institutions graduated on time, while only 20% of full-time students at non-flagship public four-year institutions and 38% of full-time students at flagship institutions graduated on time.³⁵ Students in Ph.D. and medical programs will be especially disadvantaged, as the median amount of time to complete a doctorate degree in 2017 was 5.8 years; 7.1 years for those in humanities and arts programs.³⁶ Between classes, residencies, fellowships, and training, medical school students are often enrolled for 10

²⁹ 43 Fed. Reg. 32306, 32307 (July 26, 1978).

³⁰ 46 Fed. Reg. 7267 (Jan. 23, 1981).

³¹ 48 Fed. Reg. 14575 (Apr. 5, 1983).

³² Institute of International Education, *International Student Enrollment Trends, 1948/49-2016/17, Open Doors: Report on International Educational Exchange* (2019), <https://opendoorsdata.org/data/international-students/enrollment-trends/>.

³³ 85 Fed. Reg. at 60538.

³⁴ *Id.*

³⁵ Complete College America, *Data Dashboard*, <https://completecollege.org/data-dashboard/> (last visited Oct. 20, 2020) (“Flagship” is defined as universities generally ranked in the top 20).

³⁶ Ilana Kowarski, *How Long Does It Take to Get a Ph.D. Degree?*, US NEWS (Aug. 12, 2019), <https://www.usnews.com/education/best-graduate-schools/articles/2019-08-12/how-long-does-it-take-to-get-a-phd-degree-and-should-you-get-one>.

years or longer.³⁷ As with the rest of DHS’s proposal, this one-size-fits-all approach does not match with the reality of post-secondary education today.

B. *The Two-Year Limitation for Students from Countries with High Overstay Rates is Based on a Flawed Analysis*

DHS proposes to limit the period of admission for certain F-1 students and J-1 exchange visitors to two years, including those who “are citizens of countries with a student and exchange visitor total overstay rate greater than 10 percent according to the most recent DHS Entry/Exit Overstay report.”³⁸ However, this disproportionately impacts smaller countries and yields absurd results. For example, in 2019, of the six students and exchange visitors from Tuvalu who were expected to depart the United States, all such individuals departed, with only one departing late. As a result, the overstay rate for Tuvalu for 2019 is 17%.³⁹ The two-year rule also disproportionately impacts countries in Africa—many of which send only a fraction of America’s foreign students. Under the proposed rule, students and exchange visitors from 36 African countries will be limited to a two-year period of admission. Anything short of an individualized assessment of the overstay rate of each country, taking into account factors such as the total number of students and exchange visitors and in-country versus out-of-country overstays is unacceptable.

C. *The Two-Year Limitation on Citizens and Individuals Born in Certain Countries is Overbroad and Based on Discriminatory Assumptions*

We are also troubled by DHS’s proposal to limit some nonimmigrants to a two-year period of admission based on national origin. Specifically, DHS proposes to limit those students and exchange visitors who “were born in or are citizens of countries on the State Sponsor of Terrorism List,”⁴⁰—North Korea, Syria, Iran, and Sudan—to a two-year period of admission to allow the agency to “apply additional scrutiny” to those who may “pose risks to the national security of the United States.”⁴¹ As proposed, this additional scrutiny would apply equally to a citizen of Iran or North Korea studying in a field of concern as it would to a naturalized Canadian citizen who left Iran as a child or a Syrian refugee who is now an Australian citizen.

Rather than working with national security agencies and universities on a solution to reduce security concerns in the student visa program—as recommended by experts in the field—DHS proposes to single out *all* nonimmigrant students originating from certain countries for shorter periods of admission and additional scrutiny.⁴² This approach is overbroad, unfairly

³⁷ Ilana Kowarski, *How Long Is Medical School and What Is It Like?*, US NEWS (Dec. 13, 2018), <https://www.usnews.com/education/best-graduate-schools/top-medical-schools/articles/2018-12-13/how-long-is-medical-school-and-what-is-it-like>.

³⁸ 85 Fed. Reg. at 60543, 60558.

³⁹ U.S. Dep’t of Homeland Sec., *Fiscal Year 2019 Entry/Exit Overstay Report* (Mar. 30, 2020), https://www.dhs.gov/sites/default/files/publications/20_0513_fy19-entry-and-exit-overstay-report.pdf at 24.

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Student Visa Integrity: Protecting Educational Opportunity and National Security Before the S. Comm. on the Judiciary, Subcomm. on Border Sec. and Imm.*, 115th Cong. (June 6, 2018) (Joint Statement of the American Council on Education, Association of American Universities, Association of Public and Land-grant Universities, and the Council on Governmental Relations), <https://www.acenet.edu/Documents/Joint-Statement-AAU-APLU-ACE-COGR-Senate-Judiciary.pdf>.

stigmatizes individuals based solely on their country of birth, and raises constitutional issues.⁴³ While the importance of national security cannot be overstated, DHS should place greater scrutiny on individual students who present an articulable fraud or national security risk instead of adopting this blanket approach.

IV. DHS Downplays the Potential Economic Impact of the Rule on Institutions of Higher Education

DHS also fails to adequately consider the economic impact on institutions of higher education.⁴⁴ In its cost-benefit analysis, DHS concedes that “the proposed rule may adversely affect U.S. competitiveness in the international market for nonimmigrant student enrollment and exchange visitor participation.” DHS notes that in the 2018 academic year, international students had an economic impact of \$44.7 billion from tuition, fees, and other spending during their time in the United States as students.⁴⁵ Further, during the 2018 academic year alone, such students supported 458,290 U.S. jobs.⁴⁶

In considering the proposed economic impact of this rule, however, DHS dismisses concerns with reduced enrollment by citing a 2010 study as evidence that other factors such as post-graduation employment, financial aid, and school reputation outweigh issues such as immigration policy.⁴⁷ Studies such as this, however, were conducted with the implicit assumption that the system for nonimmigrant students that has existed for the past three-and-a-half decades—a fundamental piece of which is duration of status—would not change.⁴⁸

Current studies demonstrate that recent policies that have made the visa and immigration processes more difficult have in fact impacted foreign student enrollment. Between 2015 and 2019 international student enrollment in the United States decreased by more than ten percent, while such enrollment in Australia and Canada skyrocketed.⁴⁹ In 2018, 83% of schools with declining enrollment of F-1 nonimmigrant students cited the visa application process or visa delays as a basis for decreasing international enrollment, a considerable increase from only 34% of such schools in 2016.⁵⁰

⁴³ See *Jean v. Nelson*, 472 U.S. 846 (1985) (holding that discrimination based on race or national origin would violate a facially neutral parole policy).

⁴⁴ 85 Fed. Reg. at 60568, Table 6.

⁴⁵ *Id.*

⁴⁶ National Association of Foreign Student Advisers, *NAFSA International Student Economic Value Tool*, <https://www.nafsa.org/policy-and-advocacy/policy-resources/nafsa-international-student-economic-value-tool-v2> (last visited Oct. 20, 2020).

⁴⁷ 85 Fed. Reg. at 60573 (citing Cynthia Daily, Stephanie Farewell & Gaurav Kumar, *Factors Influencing the University Selection of International Students*, 14 ACAD. OF EDUC. LEADERSHIP J. 59 (2010)).

⁴⁸ See Jane Hemsley-Brown & Izhar Oplatka, *University Choice: What Do We Know, What Don't We Know and What Do We Still Need to Find Out?*, 29 INT'L J. OF EDUC. MGMT. 254 (Apr. 2015), https://www.researchgate.net/publication/277615655_University_choice_what_do_we_know_what_don't_we_know_and_what_do_we_still_need_to_find_out.

⁴⁹ Stuart Anderson, *New International Student Enrollment in the U.S. Has Fallen 10% Since 2015* (Nov. 22, 2019), <https://www.forbes.com/sites/stuartanderson/2019/11/19/new-international-student-enrollment-in-us-has-fallen-10-since-2015/#1b72a84d1ae9>.

⁵⁰ Catherine Rampell, *Why Foreign Students Are Afraid to Study at U.S. Universities*, CHI. TRIB. (Dec. 14, 2018), <https://www.chicagotribune.com/opinion/commentary/ct-perspec-rampell-universities-export-foreign-students-decline-1216-20181214-story.html>.

By failing to consider the significant impact that the proposed rule is likely to have on international student enrollment, DHS fails to assess the broader economic impact of the proposed rule on universities, students, and the U.S. economy. Before DHS can implement such sweeping changes to the student visa system, it must provide the public with a complete and accurate assessment of the rule's projected economic impact.

V. Conclusion

DHS's proposal to impose a fixed period of admission on students, exchange visitors, and members of the media is the latest in a series of unwarranted policy changes that undermine our country's role as a leader in international education, and harm U.S. universities, businesses, and students that depend on foreign student enrollment to subsidize high tuition costs. Although DHS states that proposed rule is necessary to deter fraud and abuse of the nonimmigrant visa system, DHS has failed to draw a rational connection between the identified problem and the changes proposed.

Moreover, fixed time limits on student visas have twice been implemented and reversed, primarily due to the onslaught of additional paperwork and processing obligations that resulted, without any meaningful program improvements. USCIS is already struggling to effectively manage its current workload and backlog of 2.5 million cases. This rule change, which would exponentially increase filing volume at USCIS and have a significant economic impact on our educational institutions and other U.S. entities, would create a system that is simply untenable. For the reasons discussed herein, we urge DHS to abandon this rulemaking and maintain the duration of status model for F, J, and I nonimmigrant visas.

Sincerely,

Jerrold Nadler
Chairman
House Committee on the Judiciary

Zoe Lofgren
Chair
House Subcommittee on Immigration and
Citizenship

Robert C. "Bobby" Scott
Chairman
House Committee on Education and Labor

Bennie G. Thompson
Chairman
House Committee on Homeland Security

Kathleen M. Rice
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Ami Bera, M.D.
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Gilbert R. Cisneros, Jr.
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Vicente Gonzalez
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Hakeem Jeffries
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Henry C. "Hank" Johnson, Jr.
Member of Congress

Barbara Lee
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Alan Lowenthal
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James P. McGovern
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Juan Vargas
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