

October 24, 2020

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

RE: 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 (DHS Docket No. ICEB-2019-0006)

Submitted online via www.regulations.gov.

Dear Acting Regulatory Unit Chief Hageman:

On behalf of the National Foundation for American Policy, a nonpartisan policy research organization, I submit this comment to the Department of Homeland Security (DHS) Immigration and Customs Enforcement (ICE) in response to the notice of proposed rulemaking (NPRM) published in the Federal Register on September 25, 2020, titled 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 (DHS Docket No. ICEB-2019-0006).

These comments rely primarily on a September 2020 NFAP Policy Brief entitled “International Students and DHS data.” I have included an extended excerpt of the report and also attached it in full as part of the comment, as well as a report by demographer Robert Warren.

SUMMARY

The DHS “overstay” reports upon which the regulation relies are flawed for policymaking purposes and should not be the basis for rulemaking on international students. Problems with DHS systems properly identifying individuals who changed status inside the U.S. or left the country is an issue the DHS regulation fails to acknowledge.

An examination of Department of Homeland Security reports finds the 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.

Under the proposed rule, students born in countries that a recent DHS report finds have an overstay rate of 10% or higher would be limited (along with certain other students) to a fixed term of only two years. Other students would be limited to four years. An approved extension would be required to remain in the country. But the overstay rates contained in the DHS reports are inflated and do not actually measure overstay rates. “The DHS figures represent actual overstays *plus arrivals whose departure could not be verified*,” according to demographer Robert Warren. “That is, they include both actual overstays *and unrecorded departures*.” (Emphasis added. Warren report is included here.)

The Department of Homeland Security is knowingly relying on flawed reports as a pretext for the overall policy in the rule and to limit the admission periods for students from specific countries. With circular logic, the 10% overstay rate threshold contained in the proposed rule comes not from an immigration law but from a [presidential memorandum on overstays](#) issued on April 22, 2019, that uses the same flawed DHS overstay reports. Students from [approximately 60 countries](#), including Vietnam and the Philippines, would be limited to two-year terms (with the possibility of extensions).

Extensions might be difficult to obtain as the focus in the proposed rule has moved away from allowing students to make normal academic progress to an enforcement-default, note attorneys, with the only reasons cited to approve an extension for additional time are for a “compelling academic reason, documented medical illness or medical condition, or circumstance that was beyond the student's control.”

In its FY 2019 report, DHS emphasizes the “suspected in-country overstay” rate, a lower rate for countries than the overall overstay rate. DHS understands the “suspected in-country overstay” rate is also overstated and largely an issue of an ability (or inability) to match records, since the report shows the FY 2018 overstay rate dropped by half when examined 12 months later after allowing more time to verify records for departures and change of status.

- The DHS analysis of FY 2018 data (contained in the FY 2019 report) shows the overstay problem appears to be an issue of matching up student data rather than actual overstays. The “suspected in-country overstay” rate for student and exchange visitors in FY 2018 dropped from 2.11% to 0.84% 12 months later, according to DHS, with the rate declining every three months. This means DHS systems catch up and correctly identify people as lawfully in the country or having already left the United States as time passes. In addition, to the extent the problem of overstays exists it solves itself over time.

Table 1
DHS FY 2018 “Suspected In-Country Overstay” Trend for F-1 Students and Exchange Visitors

Admission Type	Expected Departures	FY 2018 Report	3 Months Later (as of 12/31/18)	6 Months Later (as of 3/31/19)	9 Months Later (as of 6/30/19)	12 Months (as of 9/30/19)
Student and Exchange Visitors	1,840,482	38,881 (2.11%)	29,980 (1.63%)	24,869 (1.35%)	18,505 (1.01%)	15,525 (0.84%)

Source: Department of Homeland Security, National Foundation for American Policy.

- DHS data fail to show a need to initiate a costly and disruptive regulatory change. In FY 2019, the “suspected in-country overstay” rate for F-1 students was only 1.42%. The rate declined from 2.99% to 1.42% between FY 2016 and FY 2019, a drop of 53%, indicating to the extent a problem or situation existed it has improved. Most likely, the decline in the “suspected in-country overstay” rate reflects DHS correcting some of its inability to identify students who were not “overstays” but simply changed status inside the U.S. or left the country without being properly recorded in U.S. government systems.

Table 2
DHS “Suspected In-Country Overstay” Rate for F-1 Students

Year	“Suspected In-Country Overstay Rate” F-1 Students
FY 2016	2.99%
FY 2017	2.25%
FY 2018	1.99%
FY 2019	1.42%

Source: Department of Homeland Security, National Foundation for American Policy.

- The “suspected in-country overstay” rate is low for student and exchange visitors from China and India, the largest sending countries. In FY 2019, the rate for China was 0.65% and for India it was 1.92%. Even this number likely overstates the actual percentage of student overstays from these countries.
- The DHS reports fail to identify significant problems that need to be addressed through an expensive and burdensome rule that will discourage international students from coming to the United States, particularly at a time when international student enrollment has already been falling.
- Analysts believe the purpose of the rule is to discourage international students from coming to America, a longstanding ideological goal of Trump administration policy, and to make life easier for immigration enforcement personnel. USCIS lost the [Guilford College](#) case after a judge ruled USCIS could not change its rules on when “unlawful presence” begins to accrue by issuing a memo.

Under the proposed rule, “All those who overstay would begin to accrue unlawful presence, generally the day after their period of stay expires, when admitted for a fixed period of admission.”

- DHS cannot explain why its reports contain so many people who are not overstays. Evaluating the FY 2016 DHS overstay report, Robert Warren wrote, “Slightly more than *half* of the 628,799 reported to be overstays by DHS actually left the country but their departures were not recorded. After adjusting the DHS estimates to take account of unrecorded departures, as well as departures in 2016 of overstays that lived here in 2015, overstay population growth was near zero in 2016.”
- It goes against good government practices for DHS to justify immigration policy changes and limit terms of admission to study in the United States, including for students from approximately 60 countries, when DHS difficulties in confirming departures or changes of status call into question the use of the report for any purpose other than for internal evaluations of government systems. The DHS overstay reports display a false precision that does not exist, including the use of decimal points to the second place in the reports.

Under the proposed regulation, U.S. Citizenship and Immigration Services, which already is unable to process applications in a timely manner, would be expected to process an additional 300,000 to 364,000 applications a year under a process that will make it much less attractive for international students to attend U.S. universities. DHS estimates students typically would need to spend more than \$1,000 to obtain extensions.

The rule will not prevent individuals who intend to overstay their time in the United States from doing so. However, it will burden international students who wish to comply with the rule and continue studying in the United States. To the extent individuals are innocently falling out of status, adding to the alerts in the SEVIS system, such as through additional text or email reminders for students and working with universities, would be less burdensome and more effective than the proposed rule’s solution of compelling hundreds of thousands of international students each year to file extensions.

DHS “OVERSTAY” REPORTS

Beginning in 2016, the Department of Homeland Security began issuing annual reports that purported to identify the number of individuals who overstayed their period of authorized stay, labeling the results, with some caveats, as an overstay rate. The first report issued during the final year of the Obama administration did not include international students and exchange visitors, only tourist and business travelers.

The term “suspected in-country overstay” rate in the DHS explanation of its definitions indicates the lack of certainty of the report’s findings. “An overstay is a nonimmigrant lawfully admitted to the United States for

an authorized period, but remained in the United States beyond his or her authorized period of admission,” according to the DHS *Entry/Exit Overstay Report Fiscal Year 2019* published in March 2020. “The authorized admission period can be a fixed period; or for the duration of a certain activity, such as the period during which a foreign student is pursuing a full course of study or any authorized technical/practical training. U.S. Customs and Border Protection (CBP) identifies two types of overstays: 1) individuals for whom no departure was recorded (Suspected In-Country Overstays), and 2) individuals whose departure was recorded after their authorized period of admission expired (Out-of-Country Overstays).”¹

The “suspected in-country overstay” rate for F-1 international students, which as noted is not an actual overstay rate, has declined each year DHS has attempted to measure it. From 2.99% in FY 2016, to 2.25% in FY 2017 and 1.99% in FY 2018, to 1.42% in FY 2019. That means the “suspected in-country overstay” rate for F-1 international students has dropped by more than half, according to DHS. Due to problems with DHS methodologies, there is no way to know whether this means fewer international students have overstayed their time in the United States or DHS is simply correcting for errors in previous reports, or a combination of the two.

A revealing table in the FY 2019 report looks back at FY 2018 data and illustrates the overstay problem may be largely an issue of matching up student data rather than actual overstays. According to DHS, the “suspected in-country overstay” rate for student and exchange visitors in FY 2018 dropped from 2.11% to 0.84% 12 months later. The data showed a decline in the “suspected in-country overstay” rate every three months. This indicates the problem of overstays solves itself over time or that as time passes DHS systems catch up and correctly identify people as lawfully in the country or having already left the United States.

Another issue that indicates a limited problem: The “suspected in-country overstay” rate is low for student and exchange visitors from China and India. In FY 2019, the rate for China was 0.65% and for India it was 1.92%. Even this number likely overstates the actual percentage of student overstays from these countries.

DHS also lists an out-of-country overstay rate for international students but it’s difficult to know what policy issue that raises, since the individuals have departed and, it is presumed, any concerns are focused on people who remain in the country. However, in its proposed rule DHS uses an overall overstay rate for the 10% threshold for overstays to single out specific countries. The overall overstay rate is a combination of the out-of-country overstay rate and the “suspected in-country overstay” rate. The DHS reports indicate the “suspected in-country overstay” rate is generally lower and more likely to be closer to the accurate overstay rate.

¹ *Entry/Exit Overstay Report Fiscal Year 2019*, Department of Homeland Security, March 30, 2020.

International students are generally admitted for “duration of status,” which means those in violation don’t technically overstay a “visa” but fail to depart when their studies are completed and have not transferred to another lawful status, such as H-1B or Optional Practical Training. DHS difficulties in confirming departures or changes of status call into question using the DHS reports to justify immigration policy changes.

CRITICISM OF DHS METHODOLOGY AND CONCLUSIONS

In January 2018, Robert Warren, a noted demographer who developed some of the nation’s first estimates of the unauthorized immigrant population at the Immigration and Naturalization Service, published a [study](#) for the Center for Migration Studies, where he is a senior visiting fellow.² Warren analyzed the [Fiscal Year 2016 Entry/Exit Overstay Report](#) released by the Department of Homeland Security during the Trump administration on May 22, 2017. Unlike the first report, which focused on tourists and business travelers, the FY 2016 report expanded to include international students and exchange visitors.

Below are Warren’s main criticisms of the DHS report for FY 2016. Since DHS did not change its methodology, all of the criticisms are also valid for the later reports:

- The key issue is that the Department of Homeland Security’s reports include as “overstays” people who did not necessarily overstay their visa, but individuals who DHS simply have been unable to confirm departed the United States at the time it analyzed the data. “The DHS figures represent actual overstays *plus arrivals whose departure could not be verified*,” writes Warren. “That is, they include both actual overstays *and unrecorded departures*.”³ (Emphasis added.)
- Warren found several estimates in the DHS report to be implausible. “It is clear that the DHS estimates of overstays from Canada and from VWP [Visa Waiver Program] countries that have very small undocumented populations, as well as the *total* number, erroneously include very large numbers of nonimmigrants [individuals with temporary status] that departed but their departure could not be verified,” he writes. “Slightly more than *half* of the 628,799 reported to be overstays by DHS actually left the country but their departures were not recorded. After adjusting the DHS estimates to take account of unrecorded departures, as well as departures in 2016 of overstays that lived here in 2015, overstay population growth was near zero in 2016.”⁴

² Parts of this section are adapted from Stuart Anderson, “USCIS Uses Questionable ‘Overstay’ Report to Justify Policies,” *Forbes*, June 6, 2018.

³ Robert Warren, “DHS Overestimates Visa Overstays for 2016; Overstay Population Growth Near Zero During the Year,” *Journal on Migration and Human Security*, JMHS Volume 5, Number 4 (2017): 768-779.

⁴ *Ibid.*

- “Overstay population growth *was near zero in 2016*,” according to Warren. The DHS report does not explain this reality, which would conflict with the tenor of the DHS report.⁵
- “This paper finds that DHS has greatly overstated the number of noncitizens from roughly 30 countries who have overstayed their nonimmigrant (temporary) visas,” according to Warren. “In particular, the DHS estimates for 2016 include significant numbers of nonimmigrants that left the undocumented population, but whose departure could not be verified. Thus, the actual number of overstays in 2016 was about half of the number estimated by DHS.”⁶
- Warren’s Center for Migration Studies report reached two conclusions: “First, the remarkably high, and erroneous, number of overstays reported by DHS for many Visa Waiver Program countries could lead to mistaken efforts to remove specific countries or to eliminate the program entirely. Second, the unsubstantiated report that more than 600,000 nonimmigrants overstayed in 2016 could revive fears that undocumented population growth has resumed or could lead to enforcement tactics or funding levels unjustified by the size of the overstay challenge.”⁷

DHS UNABLE TO VERIFY DEPARTURES, NOT NECESSARILY AN OVERSTAY

Other experts agree the DHS “overstay” rate is driven by an inability of DHS to verify departures or change of status inside the United States rather than a widespread overstay problem, particularly among international students.

Reasonable explanations underscore why the Department of Homeland Security might be unable to verify a foreign national’s departure in its system. “The DHS report on overstays is dependent on the accuracy of information in SEVIS (Student and Exchange Visitor Information System) and the agency’s ability to match entry and exit information, especially for students who, for example, may have departed through a land port of entry or have had a change of status that was not updated in SEVIS,” according to attorney Paul Virtue, a former top official at the Immigration and Naturalization Service.⁸

“The system for matching data on change of status from the CLAIMS system administered by USCIS is not foolproof,” said Virtue. “While CBP’s [Customs and Border Protection] effort in this regard holds promise, it

⁵ Ibid.

⁶ Ibid.

⁷ Ibid.

⁸ Stuart Anderson, “USCIS Policy Change Could Bar Many International Students,” *Forbes*, June 1, 2018.

is not a finished product and there is still too much guesswork built into the DHS assumptions concerning the number of overstays among the student and exchange visitor populations.”⁹

As the DHS FY 2019 report makes clear, people who DHS fail to capture in their systems are reported as “overstays”: “This report presents the overstay rates of nonimmigrants who overstay and remain in the United States beyond their authorized period of admission *with no evidence of an extension to their period of admission or adjustment to another immigration status.*”¹⁰

“DHS labeling what it is doing as an overstay rate for international students is misleading,” according Mark Regets, a labor economist and senior fellow at the National Foundation for American Policy. “At best, the DHS reports document an upper-bound estimate of individuals who DHS could not positively identified as leaving the United States or having changed status.”

Regets, who analyzed statistics for two decades at the National Science Foundation, identified problems with the DHS “suspected in-country overstay” rate:

- What DHS calls a “Suspected In-Country Overstay Rate” is a maximum rate based upon those DHS has not positively identified as leaving the United States within a certain period after their reason for being admitted has ended.
- Measurement issues make it very likely that a non-trivial number of people counted as overstays have actually left the United States, or are legal in the United States while in the process of adjusting status to another visa category.
- In each year’s report, DHS discusses continuing efforts to better measure departures from airports and seaports, an acknowledgement that the process continues to be imperfect, though these are likely to be the best recorded departures.
- Departures from U.S, land borders remain a much bigger problem. For this reason, DHS only tries to estimate overstay rates for Mexicans and Canadians who arrived originally via air or sea. This raises questions about missing foreign nationals, including students, who decided to depart the United States via Mexico and Canada. In addition to those traveling by land to a Mexican or Canadian airport, Canada in particular is known for recruiting foreign graduates of U.S. schools for high-skilled jobs,.

⁹ Ibid.

¹⁰ *Entry/Exit Overstay Report Fiscal Year 2019*. Emphasis added.

- Even for those correctly reported as remaining in the United States after their visa expiration, this is measured as approximately 6 months beyond the fiscal year of their expiration, and it is not clear how many become part of the long-term unauthorized population.
- The "total overstay rate" in the DHS reports likely contains more measurement error by DHS and will include many short-term overstays of no real policy concern. For example, in 2019, Vietnam had an estimated "total overstay rate" of 11.2%, enough to trigger a restriction under the proposed rule, but only 3.2% were estimated still to be inside the United States.
- A two-year restriction will primarily affect the F-1 student visa, but DHS is basing its restriction on the overall rate for international students and exchange visitors, even though the F-visa rate is lower than for the categories combined.
- The SEVIS reporting system already gives prompt warning to ICE about students not succeeding academically, not attending classes or committing similar visa-violations.

DHS CAVEATS CONTAINED IN REPORTS

The DHS reports contain important caveats that make using the reports for policy purposes unwise. The FY 2019 report states: "It is important to note that the total number of overstays identified in this report does not equal the total number of overstays who currently remain in the United States during this reporting period. That number is lower because foreign nationals identified as possible overstays can subsequently depart the United States, or apply to change or extend their current lawful status. For purposes of this report, these are still considered overstays."¹¹ This caveat has appeared in all DHS overstay reports published to date. While the caveat appears in a paragraph on temporary visitors for business and pleasure it appears to be relevant to the student and exchange visitor portions of the report as well.

The FY 2015 report contained this caveat: "It is very important to point out that determining lawful status is more complicated than simply matching entry and exit data. For example, a person may receive a six month stay at the time of entry but then apply for and receive an extension of that six months while in the United States – which is relevant in determining if a person is truly an overstay or not."¹² That caveat appeared in the FY 2015 and FY 2016 report but the first sentence that begins "It is very important" was dropped in later reports and replaced with the sentence "Determining lawful status requires more than solely matching entry and exit data."¹³

¹¹ *Entry/Exit Overstay Report Fiscal Year 2019*. Emphasis added.

¹² *Entry/Exit Overstay Report Fiscal Year 2015*, Department of Homeland Security, January 19, 2016.

¹³ *Entry/Exit Overstay Report Fiscal Year 2019*.

In conclusion, the DHS reports do not show that a significant overstay problem among international students exists or that a costly new regulation would address the issue.

Sincerely

[Signature Redacted]

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