

October 22, 2020



The Honorable Chad F. Wolf
Acting Secretary of Homeland Security
U.S. Department of Homeland Security
3801 Nebraska Ave, NW
Washington, DC 20528

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 Secretary Wolf and Acting Regulatory Unit Chief Hageman,

On behalf of NAFSA: Association of International Educators (NAFSA), 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). I urge you to withdraw this poorly conceived rule from consideration. If the rule does move forward, I reiterate NAFSA's request for at least an additional 30-day comment period given the drastic policy change and refer you to the separate request for this extension submitted by NAFSA on October 6, 2020, along with nine higher education associations.

With nearly 10,000 members at more than 3,500 colleges and universities, NAFSA is the world's largest nonprofit professional association dedicated to international education. The proposed rule will impact all international students and exchange visitors, higher education institutions that admit or sponsor them, and employers who benefit from the international students pursuing optional practical training (OPT). If it were to become final, the damage done by this rule will be felt on our campuses and in our communities and will negatively impact our country's standing in the world.

Our ability to attract and retain international students and exchange visitors is a key element of U.S. public diplomacy, foreign policy, competitiveness, and innovation. We are in a global competition for talent as other countries around the world recognize the outsized benefits of

international students and exchange visitors to their countries and have implemented policies to create a welcoming environment for them to thrive.

This proposed rule is an example of misguided policy that will benefit countries other than our own. If finalized, the rule will foster tremendous uncertainty for many international students and exchange visitors about whether they will be able to maintain their legal status in the United States through the completion of their studies or program.

Under the proposed rule, administering international student and exchange visitor programs will be far more difficult. The rule also sends a message, not only to international students and exchange visitors but to the world in general, that exceptional talent, work ethic, diverse perspectives, and economic contributions from abroad are not welcome in the United States.

This proposed rule would replace a proven, flexible policy that has served the nation, international students, and exchange visitors for decades with a policy that is duplicative, burdensome and creates uncertainty. Less onerous options are available for ICE to meet the stated goals of the proposed rule. More importantly, the ICE Student and Exchange Visitor Program (SEVP) and the Department of State's Bureau of Educational and Cultural Affairs (ECA) already track international students and exchange visitors through the Student and Exchange Visitor Information System (SEVIS) and certify U.S. institutions of higher education and research and other organizations that admit or sponsor them. International students and exchange visitors are the only nonimmigrants tracked the entire time they are in the country. If they overstay, the system already exists to alert ICE to this violation. We urge DHS to examine how the current system can be used to achieve stated goals instead of establishing new policies that will only do harm.

The NPRM does not sufficiently consider the contributions of international students and exchange visitors.

In the rule preamble, ICE states ending duration of status (D/S) “may adversely affect U.S. competitiveness in the international market for nonimmigrant student enrollment and exchange visitor participation.”¹ ICE recognizes other countries may immediately benefit from the decline in U.S. international student enrollment with “corresponding increased enrollments in other English-speaking countries, notably in Canada, Australia, and the United Kingdom.”² These other countries have policies akin to D/S that allow ongoing legal immigration status for the length of students’ enrollment without the uncertainty of a required extension of status (EOS) filing that could derail their studies.

ICE makes an anemic argument that “there are many factors” beyond the period of admission that attract international students to the United States.³ However, ICE cites only one study of business degree students who “rate opportunities for post-graduation employment, availability of financial aid, and reputation of the school as the most important factors in selecting a

¹ 85 Fed. Reg. at 60573.

² Ibid.

³ 85 Fed. Reg. at 60574.

university.”⁴ Even if it were true that the United States offers tremendous opportunities for employment after graduation or generous financial aid (it does not), it is indefensible to expect international students to choose to study here when it is entirely possible that their legal immigration status will not be extended throughout the time they would need to complete their studies or finish their programs. Graduating without a job opportunity is troubling. The prospect of being forced to leave a country before completing a degree or program—or instead becoming an illegal immigrant—is hard to justify.

Economic and job contributions of international students are undeniable.

Also in the preamble, ICE provides a perfunctory nod to the positive economic impact of international students to the United States, citing NAFSA’s International Student Economic Value Tool, the annual state-by-state and congressional district analysis of the economic contributions of international students and their families to the U.S. economy. NAFSA’s latest analysis finds that international students studying at U.S. colleges and universities contributed \$41 billion to the U.S. economy and supported 458,290 jobs during the 2018–19 academic year.⁵ At the community college level alone, international students contributed \$2.6 billion and supported nearly 14,000 jobs during the 2018–19 academic year.

Further analysis shows that for every seven international students in the United States, three U.S. jobs are created or supported by spending in the following sectors: higher education, accommodation, dining, retail, transportation, telecommunications, and health insurance. According to the U.S. Department of Commerce, education currently ranks as the nation’s sixth largest services export.⁶

Prior to the onset of COVID-19, the rate of new international student enrollment in the United States was already in decline, while competitor countries experienced double-digit growth in this area. International student enrollment in Canada grew by 16%, while Australia’s international student population increased by 15%.⁷ NAFSA estimates the continued decline in international student enrollment in the United States since fall 2016 has cost the U.S. economy \$11.8 billion and more than 65,000 jobs.⁸ During this unprecedented COVID-19 period, now is not the time to double down on policies that will push more international students to study in other countries.

Contributions extend to academia, workforce development, global understanding, and diplomatic ties.

Beyond the economic contributions illustrated above, international students and exchange visitors provide immense contributions to our campuses and communities in the areas of academia, workforce development, global understanding, and diplomatic ties. International student enrollment helps to maintain the viability of courses and majors when domestic

⁴ Ibid.

⁵ NAFSA, *International Student Economic Value Tool*, www.nafsa.org/economicvalue.

⁶ Department of Commerce International Trade Commission, “U.S. Education Service Exports,” <https://www.trade.gov/education-service-exports> (Accessed October 20, 2020).

⁷ NAFSA, *Losing Talent 2020*, March 2020, www.nafsa.org/losingtalent.

⁸ Ibid.

enrollment lags, specifically in some STEM fields. To be sure, the United States must do more to ensure more American students are prepared and eager to study in STEM fields. According to the U.S. State Department's 2019 *Open Doors* report, nearly 52% of international students in the United States pursue STEM fields. Without these students in the classroom, there would be fewer course options for American students. Since 2000, immigrants have represented nearly 40 percent of all American Nobel Prize recipients in chemistry, medicine, and physics. Meanwhile, in 2016, all six American Nobel Prize winners in economics and scientific fields were immigrants.

International students and scholars studying and conducting research alongside American students and scholars also helps foster a mutual understanding of each other's cultures. Their perspective, experiences, and competencies provide a window to the world that U.S. students and researchers need to be successful in developing products for the global marketplace. No matter the political winds, growth in the U.S. job market is inextricably tied to the world outside our borders. The ability to conceive of, develop, and market goods and services to non-U.S. markets is essential to future business success and innovation.

When international students and exchange visitors return home, they bring with them the knowledge and understanding of our country and become America's greatest foreign policy assets. They help by strengthening links in trade, research cooperation, and diplomacy. Since World War II, U.S. institutions of higher education have welcomed and educated millions of students from all over the world, with many going on to become world leaders and some of our closest friends and allies. U.S. foreign policy leaders across the political spectrum, from Colin Powell to Madeleine Albright to Robert Gates, all agree that our openness to international students and exchange visitors helps to strengthen ties with countries across the globe.

Lack of legal immigration status is not an indication of threat to national security.

In the proposed rule, ICE argues that ending D/S will advance national security. However, it is difficult to understand how the damage done to the many interests served by admitting international students and exchange visitors to the United States will be balanced out by the "benefit" of requiring an exact status expiration date. The ICE NPRM shifts the narrative on international students and exchange visitors from welcome contributors to our campuses and communities to those to be treated with continuous suspicion.

Being born outside the United States is not a precondition of threat to national security. According to the Cato Institute, from 2008 through 2015 the chance of being murdered by a native-born terrorist was 1 in 43.8 million per year, more than twice the likelihood of murder by foreign-born terrorists at 1 in 104.2 million per year.⁹ During that same period, Americans were more likely to be killed by an animal (1 in 1.6 million per year) than by a terrorist attack on U.S. soil (1 in 30.1 million per year).¹⁰ Further, studies show that U.S. citizens born in the United States are more likely to commit crimes than immigrants. A study published March 25, 2018, in the journal *Criminology*, finds no positive relationship between illegal immigration and crime,

⁹ Alex Nowrasteh, "More Americans Die in Animal Attacks than in Terrorist Attacks," *Cato Institute*, March 8, 2018, <https://www.cato.org/blog/more-americans-die-animal-attacks-terrorist-attacks> (Accessed October 20, 2020).

¹⁰ Ibid.

even after analyzing population-level crime data 57 different ways.¹¹ The authors conclude that illegal immigration does *not* increase crime.¹²

DHS should use SEVIS to achieve its goals.

DHS states in the preamble to the proposed rule that “[r]eplacing admissions for D/S with admissions for a fixed period of authorized stay is consistent with most other nonimmigrant categories,” and “the significant increase in the volume of F academic students [and] J exchange visitors...poses a challenge to the Department’s ability to monitor and oversee these categories of nonimmigrants while they are in the United States.” Additionally, “[a]dmission for D/S, in general, does not afford immigration officers enough predetermined opportunities to directly verify that aliens granted such nonimmigrant statuses are engaging only in those activities their respective classifications authorize while they are in the United States.”

The only justification that DHS makes for abandoning the duration of status system is an unsubstantiated assertion that “DHS believes that this process would help to mitigate risks posed by foreign adversaries who seek to exploit these programs” and anecdotal examples to support an assertion that “DHS believes this greater oversight would deter F, J, or I nonimmigrants from engaging in fraud and abuse and strengthen the integrity of these nonimmigrant classifications.” Greater oversight does not require overturning a longstanding policy that applies to all Fs, Js, and Is, but rather better utilizing the ICE SEVIS system to identify and target bad actors. It is difficult to avoid concluding that threats of terrorism are at least in part a cover for an administration goal of eliminating D/S as a way to apply the negative consequences of unlawful presence to international students and exchange visitors.

Although F and J nonimmigrants are admitted for duration of status, unlike “most other nonimmigrant categories,” none of those “other categories” are connected to a massive electronic database reporting system like SEVIS. Section 641 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), as amended, is the core statutory authority for the electronic collection of information in SEVIS. In passing Section 641, Congress established reporting and document retention obligations for U.S. schools that admit international students in the F-1 and M-1 categories and organizations that sponsor exchange visitors in the J-1 category.

Congress has had opportunities to end duration of status for international students and exchange visitors since 1991 but has not done so. However, when IIRIRA was passed in 1996, Congress opted to require U.S. schools to report to SEVIS “the date of the alien's termination of enrollment and the reason for such termination (including graduation, disciplinary action or other dismissal, and failure to re-enroll).”¹³ SEVIS and other DHS information systems give DHS immediate access to this detailed information about almost every student and exchange visitor event that could impact a student or exchange visitor’s compliance with the regulations, including where students and exchange visitors are; the fields they are studying, researching, or

¹¹ Michael T. Light and Ty Miller, “Does Undocumented Immigration Increase Violent Crime?” *Criminology*, March 25, 2018, <https://onlinelibrary.wiley.com/doi/full/10.1111/1745-9125.12175> (Accessed October 20, 2020).

¹² *Ibid.*

¹³ IIRIRA 641(c)(1)(H)

teaching; when they have been properly authorized for employment; and when their programs have ended.

The ITDashboard.gov SEVIS Business Case (Section C1: Projects Table)¹⁴ shows that \$181.7 million will have been spent on the SEVIS project from its July 1, 2002, start date through a projected project date of August 30, 2021, for technology investment alone. This expensive endeavor now yields data for DHS that would have been unthinkable in prior decades.

For information not directly submitted in SEVIS, DHS also has the authority to request, “on any individual student or class of students upon notice,” all information and documents that schools are obligated to retain throughout the student’s enrollment and for a period of 3 years beyond that.¹⁵ Likewise, the U.S. Department of State (DOS) exchange program regulations already require sponsors to “cooperate with any inquiry or investigation that may be undertaken by the Department of State or the Department of Homeland Security.”¹⁶

Rather than upend the duration of status system that has worked well for nearly 3 decades, DHS should engage in smart and targeted enforcement that is made possible by the SEVIS tracking system.

DHS adjudication of EOS applications for J exchange visitors interferes with public diplomacy.

The J Exchange Visitor category was developed to implement the Mutual Educational and Cultural Exchange Act (Fulbright-Hayes Act) of 1961. The congressional purpose of the act, and the objective of the Exchange Visitor category, is “to enable the Government of the United States to increase mutual understanding between the people of the United States and the people of other countries by means of educational and cultural exchange; to strengthen the ties which unite us with other nations by demonstrating the educational and cultural interests, developments, and achievements of the people of the United States and other nations, and the contributions being made toward a peaceful and more fruitful life for people throughout the world; to promote international cooperation for educational and cultural advancement; and thus to assist in the development of friendly, sympathetic, and peaceful relations between the United States and the other countries of the world.”¹⁷

The inevitable delays and possible denials of EOS applications that this rule would usher in would lead to participant and sending country frustration with the State Department’s Exchange Visitor Program and generate a broader chilling effect. This in turn will tarnish the public diplomacy efforts and impede the goals of the J-1 Exchange Visitor Program.

¹⁴ Karen Evans, *Business Case: Capital Asset Summary*, Department of Homeland Security, August 31, 2020, <https://itdashboard.gov/drupal/summary/024/024-000005363>. (Click “Download Business Case PDF” link.)

¹⁵ 8 CFR 214.3(g)(1)

¹⁶ 22 CFR 62.10(f)

¹⁷ Mutual Educational and Cultural Exchange Act of 1961, as amended, codified at [22 USC Chapter 33](#).

A two- or four-year admission period does not match the reality of study or research.

The proposed rule limits the period of admission to 2 or 4 years for international students in F status and exchange visitors in J status. While U.S. higher education is often viewed through the lens of two- or four-year degree programs, these time periods do not match the reality of study. According to the National Center for Education Statistics (NCES), the average time to complete a bachelor's degree for international students is 56.3 months (or 4.69 years).¹⁸ NCES data also show that just 56% of international students earn their bachelor's within 4 years, compared to only 44% of domestic students. While this illustrates that international students may complete their studies faster than their domestic peers, it also indicates that many international undergraduate students would not complete their degrees within the maximum four-year period. The maximum admission period does not account for normal academic endeavors such as the need to change majors, take courses outside of one's major, or add a minor. Dual-degree programs often require additional years of study. In addition, the majority of doctorate-seeking international students take an average of 5.3 years from entering a program to completion, while those who complete the master's/doctorate sequence take an average of 7.5 years from entering graduate school to completion.¹⁹ Similarly, the rule does not account for J-1 research scholars who are permitted by DOS to remain in the United States for up to 5 years to complete their research program.

Groups should not be subject to a limited two-year admission period.

It seems DHS is using the D/S proposed rule as a vehicle to push forward other priorities independent of those specific to SEVP. The preamble to the proposed rule states, "DHS believes a shorter admission period, up to 2 years, would be appropriate for a subset of the F and J population due to heightened concerns related to fraud, abuse, and national security."²⁰ However, this two-year limit is arbitrary and must be rethought.

State Sponsors of Terrorism. DHS proposes limiting the period of admission of international students and exchange visitors "who were born in or are citizens of countries listed in the State Sponsor of Terrorism List." This overbroad proposal would include individuals who were born in one of those countries but not owe allegiance to the country. For example, a child who happens to be born in Syria to a UK citizen business executive stationed in Syria would be restricted to a two-year period of admission under this proposal. Further, the United States has greatly benefited from the contributions and dedication of people from those very countries.

Countries with greater than 10% overstay rate. DHS also proposes to limit the period of admission for citizens of countries with a student and exchange visitor total overstay rate of greater than 10%, according to the most recent *DHS Entry/Exit Overstay* report.²¹ This policy

¹⁸ NCES, "DataLab," https://nces.ed.gov/datalab/index.aspx?ps_x=hmcadm9b (Accessed October 20, 2020).

¹⁹ NSF, "Survey of Earned Doctorates," December 2019, <https://www.nsf.gov/statistics/srvydoctorates/#tabs-2> (Accessed October 20, 2020).

²⁰ 8 CFR 214.2(f)(20) and 8 CFR214.2(j)(6)

²¹ Department of Homeland Security, "Fiscal Year 2019 Entry/Exit Overstay Report," March 30, 2020, https://www.dhs.gov/sites/default/files/publications/20_0513_fy19-entry-and-exit-overstay-report.pdf.

unfairly targets international students from the continent of Africa because 61% of the 59 countries that currently meet this threshold are in Africa. This calculation also unfairly targets countries that send a small number of international students to the United States as only a few real or perceived overstays will push the percentage of overstays higher than those from countries that send more students in the United States. At the moment, the list of countries whose nationals would be limited to two-years of admission appear to be Afghanistan, Benin, Bhutan, Burkina Faso, Burma, Burundi, Cameroon, Cape Verde, Central African Republic, Chad, Congo-Brazzaville, Congo-Kinshasa, Côte d'Ivoire, Djibouti, Equatorial Guinea, Eritrea, Ethiopia, Gabon, The Gambia, Ghana, Guinea, Guinea-Bissau, Guyana, Haiti, Iraq, Kenya, Kosovo, Kyrgyzstan, Liberia, Libya, Malawi, Mali, Mauritania, Moldova, Mongolia, Nepal, Niger, Nigeria, Papua New Guinea, the Philippines, Rwanda, Samoa, Senegal, Sierra Leone, Somalia, South Sudan, Sudan, Syria, Tajikistan, Tanzania, Togo, Tonga, Turkmenistan, Tuvalu, Uganda, Uzbekistan, Vietnam, Yemen, and Zambia. Furthermore, as discussed below, the overstay statistics cited by DHS are incorrect.

E-Verify participation. In the preamble, DHS also rationalizes that U.S. schools and exchange visitor programs “that are willing to go above and beyond to ensure compliance with immigration law in one respect (verifying identity and employment eligibility as required under section 274A of the Immigration and Nationality Act (INA) and taking the additional step to confirm Form I-9 information using E-Verify) are more likely to comply with immigration law in other respects” and that it has “less confidence” in schools and exchange programs “that are unwilling to do all they can to ensure they have a legal workforce.” However, DHS offers no support for this assertion. Furthermore, E-Verify was expressly created and continued as a *voluntary* program by Congress. IIRIRA 402(a) states that except as specifically provided in that statute, the DHS secretary “may not require any person or other entity to participate” in E-Verify. This proposal is tantamount to a requirement that a school or exchange program enroll in the full E-Verify program, as entities who do not enroll will be at a severe competitive disadvantage with entities that do. Therefore, participation in E-Verify, a program completely unrelated to international student and exchange visitor programs, should not be a precondition for allowing admission for more than 2 years. International students and exchange visitors should not be punished for decisions made by higher education institutions that are entirely unrelated to their studies or program.

Requiring an EOS process is duplicative and wasteful.

Limiting the admission period will mean all international students and exchange visitors who are not able to complete their degrees or programs within the initial time period must file an EOS with United States Citizenship and Immigration Services (USCIS). This is an unnecessary, expensive, and time-consuming process. In the course of an EOS application, students would have to submit information to USCIS that schools already have provided directly through SEVIS or are required to provide upon agency request when warranted.

Making international students and exchange visitors pay and wait for USCIS to make the same decision that is already made by the higher education institution and recorded in SEVIS is duplicative and wasteful. DHS can effectively enforce current immigration laws by wisely using

its resources to engage in data-driven initiatives that focus on risk factors rather than subject entire nonimmigrant categories to an expensive, cumbersome, and time-consuming process that largely duplicates the efforts of schools and exchange visitor programs that already comply with heavy SEVIS reporting and information retention obligations.

International students and exchange visitors are already the most tracked of all nonimmigrant categories in the United States. Rather than doing away with the duration of status system that has successfully operated for 30 years, DHS should instead use the information sources and ICE human resources it already has at its disposal to spot trends and bad actors and focus its enforcement efforts on those few individuals or organizations.

Change in policy will unnecessarily burden an already overloaded USCIS.

The problems facing USCIS are well known and dire, as it is unable to handle even its current caseload of applications. This summer, USCIS threatened to furlough thousands of employees due to shortfalls in expected fee funding. However, as ongoing USCIS processing delays illustrate, the agency currently does not have the staff necessary to deal with these requests. As of October 20, 2020, the USCIS website reports processing times²² for Form I-539, Application To Extend/Change Nonimmigrant Status, within the following ranges at the Service Centers: California, between 3.5 and 19.5 months; Nebraska, between 4.5 and 6.5 months; Potomac, between 2 and 4.5 months; Texas, between 6 and 8 months; and Vermont, between 4.5 and 12 months. The National Benefits Center processing time is between 2.5 and 4.5 months. Ending D/S would exacerbate an existing problem by adding an enormous number of new EOS filings to the current backlog. With SEVIS tracking in place, this is only creating extra, unnecessary work for USCIS.

It is a poor use of resources to direct USCIS to adjudicate EOS requests. No matter the fees generated by the requirement, there is no reason to believe that USCIS would be able to improve its timely adjudication of cases if this proposed rule were implemented. The amount of time required to train adjudicators on a new, duplicative requirement could be better spent focused on the present caseload that is already overwhelming the agency.

Lack of certainty for international students and exchange visitors will be detrimental.

It is clear that the proposed rule will increase uncertainty for international students and exchange visitors. There is a ready-made example of the potential detrimental impact of the EOS requirement: the withdrawal of the deference policy for nonimmigrants applying for extension of H-1B status.²³ When USCIS no longer gave deference to the prior approval of H-1B petitions even when there was no material change to the filing, there was a sharp increase in denial of these extensions and onerous requests for further evidence that delayed decisions and upended plans. Under the proposed rule, students and exchange visitors would face the prospect of USCIS adjudicators delaying or denying extension requests. As ICE points out in this proposed rule

²²USCIS, "Check Processing Times," <https://egov.uscis.gov/processing-times/> (Accessed October 20, 2020).

²³ USCIS Policy Memorandum PM-602-0151 (October 23, 2017), <https://www.uscis.gov/sites/default/files/document/memos/2017-10-23-Rescission-of-Deference-PM602-0151.pdf>.

employment opportunities are a factor when choosing a place to study, and they are intimately aware of the increase of H-1B EOS denials.

To participate in post-completion OPT experiential learning, the two- or four-year admission period will require international students to file EOS requests. As noted earlier, USCIS is already overburdened by its current workload, so there is justified concern for the ability of USCIS to complete timely adjudications. If there is not a guaranteed period of experiential learning after degree completion, there will be a chilling effect on attracting international students to the United States. International students are already required to apply to USCIS for work authorization; adding an EOS request creates another level of uncertainty. A U.S. degree is devalued when international students are not given the opportunity to participate in experiential learning that is available to their U.S. peers.

Students and their families cannot make plans based on an unknowable, future USCIS decision or USCIS backlogs. It becomes increasingly difficult to justify studying in the United States when the ability to retain legal student status throughout the period of study is uncertain. The benefits of studying in the United States are great; however, it becomes far more risky when success is tied not to students' abilities or school, but to unknown USCIS representatives who adjudicate the EOS requests and their academic futures.

DHS's concern with fraud is legitimate, but the solution is misplaced.

DHS's concern with fraud is legitimate, but the proposed solution is misplaced. SEVP has the resources necessary to enforce actions to mitigate fraud. DHS cites a few press releases from 2008 to 2015 (and one from 2018) detailing actions taken against certain schools. DHS also points to an anomalous instance of "a nonimmigrant who has been an F-1 student at a dance school since 1991 and who has been issued 16 program extensions since 2003" and several other English as a Second Language (ESL) and associate degree students who were enrolled beyond the normal period of time needed to complete their courses of study. DHS also states that it identified "nearly 29,000 F-1 students who, since SEVIS was implemented in 2003, have spent more than 10 years in student status," including students "who enrolled in programs at the same educational level as many as 12 times, as well as students who have completed graduate programs followed by enrolling in undergraduate programs, including associate's degrees."

The fact that DHS has access to those data already shows the effectiveness of SEVIS. Rather than place all international student and exchange visitor nonimmigrants into a USCIS EOS scheme that would unnecessarily burden schools, programs, students and exchange visitors, and USCIS, DHS should continue its work by analyzing SEVIS data and using its pre-existing authority to further investigate the individuals and institutions it believes are not acting within the bounds of the laws. For example, schools and exchange programs are statutorily required to recertify or redesignate with DHS or DOS every 2 years, which provides the agencies with regular opportunities to determine the bona fides of the institution.

Over the years that SEVIS has been in operation, DHS has cultivated and maintained an excellent working relationship with U.S. schools through their principal designated school officials (PDSOs) and designated school officials (DSOs). DOS has done likewise with exchange visitor programs through their responsible officers (ROs) and alternate responsible officers

(AROs). A 2009 letter from then-SEVP director Lou Farrell to U.S. university presidents lauded DSOs: “I know of no other group like these international school officials who handle so many pressures so successfully....They are unique in America in that they are the only group whose good and diligent work determines the success of the very Federal agency that regulates their activities. And they are doing this while serving five masters-their academic institutions, international students, faculty and researchers, the Federal government and their families....They have provided SEVP with thousands of improvements to SEVIS I (the current system), and they are key players in the proper development of SEVIS II. They provide critical feedback on the policies and regulations SEVP is drafting, and they do so in a most professional manner.”²⁴

In its analysis, DHS also does not account for the nationwide fleet of SEVP field representatives who already contribute to compliance and the integrity of the SEVIS system. According to SEVP,²⁵ the field representatives “serve as direct day-to-day liaisons between SEVP and certified schools. SEVP field representatives are official Federal government employees that are trained and certified by SEVP to: [e]nsure SEVP-certified schools understand applicable rules and regulations, [a]nswer general questions related to the nonimmigrant student process, [p]rovide training and assistance to designated school officials; [m]eet in-person with school officials of each SEVP-certified school with active F or M students in their geographical area at least twice per year, [h]elp school officials with the SEVP recertification processes by conducting scheduled school visits, and [a]ttend conferences and meetings in their areas that pertain to nonimmigrant students.”

Current SEVP and ECA leadership do an excellent job of educating and engaging with schools, sponsors, programs, and participants. SEVP’s relationship with schools and ECA’s relationship with program sponsors have continued to grow, and DHS should continue to trust this group of highly trained professionals to competently and conscientiously perform the statutory duties that provide DHS with all the information it needs to ensure compliance while balancing burdens placed on schools and programs.

DHS should address overstay and unlawful presence through separate means.

First, DHS overstates the number of international students and exchange visitors who illegally remain in the country after completing their studies or programs by reliance on deeply flawed data. According to notable demographer Robert Warren, the overstay statistics cited by DHS are incorrect.²⁶ Warren published a study that identifies serious flaws in the overstay statistics, stating, “The DHS figures represent actual overstays plus arrivals whose departure could not be verified. That is, they include both actual overstays and unrecorded departures.” The report concludes that “[s]lightly more than half of the 628,799 reported to be overstays by DHS actually left the country but their departures were not recorded.” The inability of DHS’s Customs and

²⁴ <https://www.nafsa.org/professional-resources/browse-by-interest/sevp-director-letter-university-presidents>

²⁵ DHS, “Official SEVP Field Representatives,” July 9, 2014, <https://studyinthestates.dhs.gov/2014/07/official-sevp-field-representatives>.

²⁶ Stuart Anderson. “USCIS Uses Questionable ‘Overstay’ Report to Justify Policies.” *Forbes*, June 6, 2018, <https://tinyurl.com/y4y8brxl>

Border Protection to consistently match nonimmigrant entry and exit data creates unreliable data.

The passage of IIRIRA in 1996 created distinct sections of the INA to define “visa overstays,” INA 222(g) [8 USC 1202(g)], and “unlawful presence,” INA 212(a)(9)(B) [8 USC 1282(a)(9)(B)]. This legal distinction was created in the same law that mandated SEVIS (8 USC 1372). While DHS and DOS have promulgated detailed regulations to implement SEVIS, DHS and its predecessor INS never issued regulations for the overstay and unlawful presence provisions. Now, DHS is revising international student and exchange visitor regulations purportedly to address the statutory overstay and unlawful presence provisions that have been left undefined by regulations for almost a quarter century. DHS should address its issues with the overstay and unlawful presence provisions by separate rulemaking rather than obliquely attacking the duration of status policy that has worked so well for almost 30 years.

DHS did not adequately explore alternatives.

In the preamble to the proposed rule, DHS states, “Before arriving at a fixed admission period of up to either 2 or 4-years, DHS considered various options, including no action, a 1- and 3-year fixed admission period alternative, and a standard 1-year fixed admission period for all F and J nonimmigrants.” NAFSA strongly recommends that the “no action” option be selected for the reasons set forth in this comment.

Instead, DHS proposed an arbitrary two- or four-year admission limit that inadequately reflects educational and exchange program participation, teaching and research, the progression of moving to a higher academic level of study, dual-degree programs, and other innovative academic offerings.

Even if DHS decides to take some action, it needs to explore other options that better reflect academic reality. For example, the extension of stay system that was in effect from May 22, 1987, through October 28, 1991, (see 52 FR 13223 [4/22/1987]) allowed individuals to remain in F student status for 8 consecutive academic years before applying (to INS) for an extension of stay. DHS should abandon the proposal to limit admissions by program end date or arbitrary two- or four-year admission periods. If it insists on a duration of time, it should be adequate to cover most doctoral programs, natural educational progressions and variations, the full program eligibility for a J research scholar, and the seven-year training that J physicians receive when sponsored by the Educational Commission For Foreign Medical Graduates (ECFMG).

An applicant should be considered as maintaining valid nonimmigrant status while an EOS is pending.

DHS states in the preamble, “F nonimmigrants with a timely filed EOS application and whose EOS application is still pending after their admission period indicated on Form I-94 has expired would...[r]eceive an automatic extension of their F nonimmigrant status.” However, proposed 8 CFR 214.2(f)(5)(vii) itself does not extend F-1 status while the EOS application is pending. Rather, it states that a student whose I-94 expires while the EOS is pending “will be considered to be in a period of authorized stay...until USCIS issues a decision on the extension of stay application.” A “period of authorized stay” is very different than F-1 nonimmigrant status. While being considered in a “period of authorized stay” may protect an applicant from being subject to

the INA 222(g) overstay penalty and accruing unlawful presence under INA 212(a)(9)(B), DHS has long distinguished between valid nonimmigrant status and a “period of authorized stay.”

In fact, USCIS’s current policy, as detailed in its Customer Guide for EOS applicants [Form M-579], is that “lawful nonimmigrant status ends and you are out of status when your Form I-94 expires, even if you have timely applied to extend your nonimmigrant status.”²⁷ Given exceedingly long USCIS processing times, this rule would needlessly jeopardize the immigration status of international students and exchange visitors if finalized as proposed.

NAFSA urges DHS to withdraw this proposal in its entirety. However, if DHS continues toward a final rule, at a minimum an F or J nonimmigrant should be considered to be in valid F or J nonimmigrant status, not just “in a period of authorized stay” while an application for extension of stay is pending, and remain eligible for all benefits of such status while the EOS application is pending.

International students should be authorized to continue in valid F nonimmigrant status and continue or begin on-campus employment incident to status for the entire time an EOS application is pending with USCIS.

Proposed 8 CFR 214.2(f)(5)(vii) would provide an automatic extension of on-campus work authorization for up to 180 days, asserting that such a period would “minimize disruptions to on-campus employment by teaching assistants, post-graduates working on research projects, and other positions that are integral to an F-1 student’s educational program.” However, 180 days is far too short given already lengthy EOS processing times that are expected to become even longer due to the volume of filings that this rule would generate. For example, on the day the proposed rule was published in the Federal Register, the “estimated time range” at USCIS’s California Service Center (CSC) for adjudicating a Form I-539, Application To Extend/Change Nonimmigrant Status, was 6 months to 8 months. And that time range is for the relatively low volume of current filers for that benefit (mostly M-1 students), compared to the number of F-1 students, F-2 dependents, J-1 exchange visitors, and J-2 dependents who would need to seek extensions under this rule. The estimated time range for “all other extension applicants” at the CSC was even longer at 12 months to 15 months. Even a 240-day period modeled after the period authorized under 8 CFR 274a.12(b)(20) would likely be insufficient given long and unpredictable processing times.

Since processing times are long and unpredictable (which is why processing times are expressed in ranges), a school could have two similarly situated research or teaching assistants, one whose EOS application is processed quickly and another whose EOS application languishes. The first could continue working, but the second would have to stop. There is also variance of processing times at different USCIS Service Centers, which could lead to students at schools in one part of the country being at an advantage over those in another part.

If DHS is truly interested in minimizing disruptions to on-campus work that is integral to an F-1 student’s educational program and setting fair expectations while at the same time giving USCIS

²⁷ USCIS, *I Am a Nonimmigrant: How Do I Extend My Nonimmigrant Stay in the United States*, May 2016, <https://www.uscis.gov/sites/default/files/document/guides/C1en.pdf> (Accessed October 20, 2020).

the time it needs to adequately adjudicate extension applications, it should abandon time limits and allow students to both continue in valid F nonimmigrant status and continue or even begin on-campus employment incident to that status for the entire time an extension of stay application is pending with USCIS. If DHS insists on a time limit, it should apply a 240-day extension to all F incident-to-status employment (including on-campus employment and curricular practical training) so that it is consistent with the 240 days that J exchange visitors have under the 240-day provision at 8 CFR 274a.12(b)(20).

International students should be authorized to continue in valid F nonimmigrant status and continue or begin a segment of curricular practical training (CPT) during the entire time an extension of stay application is pending with USCIS.

DHS states in the preamble, “continued employment authorization for aliens wishing to...engage in CPT...present[s] materially different circumstances from those pertaining to aliens who are...engaging in on campus employment, and that the same automatic extension policies therefore should not apply to them.” Proposed 8 CFR 274a.12(b)(6)(iii) would therefore provide that “curricular practical training terminates on the earlier of the employment end date indicated on Form I-20, or successor form, or on the alien’s fixed date of admission as noted on his or her Form I-94. If applicable, an alien described in 8 CFR 214.2(f)(5)(vii) must not engage in curricular practical training until USCIS approves an alien's extension of stay request.”

This proposal is ill-considered. CPT “is an integral part of an established curriculum,” according to 8 CFR 214.2(f)(10)(i). Engaging in CPT should be viewed the same way as engaging in classroom study and on-campus employment. A CPT participant is engaging in experiential learning within the school’s curriculum and therefore should be subject to the same rules that allow a student to continue studying and engage in on-campus employment while an extension of stay is pending. If DHS insists on moving forward with the proposed rule, it should abandon this proposed restriction on CPT and allow students to both continue in valid F nonimmigrant status and continue or begin a segment of CPT incident to that status for the entire time an extension of stay application is pending with USCIS.

If DHS insists on a time limit, it should be 240 days and include all F-1 incident-to-status employment described at 8 CFR 274a.12(b)(6), which would include on-campus employment and CPT, and allow students to begin a new segment of CPT during that period.

DHS should increase the J-1 and M-1 category grace periods to 60 days, not reduce the F-1 grace period to 30 days.

DHS states in the preamble that it “believes that the F category, albeit distinct from M or J, shares a core similarity in that many aliens in these categories are seeking admission to the United States to study at United States educational institutions. Thus, DHS thinks that these categories should have a standard period of time to prepare for departure, or take other actions to extend, change, or otherwise maintain lawful status.” While we agree that the F, M, and J categories share important aspects, we believe that the parity DHS seeks should be achieved by increasing the J-1 and M-1 grace periods to 60 days, not by reducing the F-1 grace period to 30 days.

DHS should not make academic-related decisions or blanket limitations.

The DHS proposal dips into several areas that should remain within the purview of the academic institution.

DHS should not regulate the maximum amount of time needed for language study. DHS proposes limiting ESL study to a lifetime aggregate of 24 months, including breaks and an annual vacation. NAFSA believes that achieving mastery of a language at a level sufficient for study at the college level should not be determined by an arbitrary limit set by an agency that does not specialize in language learning and pedagogy.

DHS should not limit international students from pursuing new F-1 programs at the same or lower educational level. DHS should not cover academic choice with an arbitrary blanket that limits movement between academic programs or levels. Instead, DHS should continue to focus its ongoing compliance and enforcement efforts based on smart, data-driven analysis, using the tools and regulatory authorities already available to it.

DHS should not evaluate the standards for approving every F-1 extension of stay. DHS proposes to eliminate a reference to “making normal progress” with respect to seeking a program extension. While the “normal progress” standard for status maintenance is not overly specific, it is similar to standards used in the education industry. For example, schools are familiar with applying the concept of “satisfactory academic progress” for U.S. students who are receiving federal financial aid. DHS proposes that it will adjudicate whether a student’s need for an extension to complete a program of study is due to “compelling academic reasons.” In addition, DHS dives deeply into the academic realm by suggesting that “[p]assing a class, or not, is something that is within the student’s control. Therefore, a student who has a pattern of failing grades or has failed to carry a full course of study due to failing grades would not be qualified for an extension of stay.” These are academic decisions that the experts at educational institutions are better equipped to handle.

DHS also asserts in the preamble that it “believes that the determinations of program extension and extension of stay should be separated, with the DSO’s and RO’s recommendation being one factor an immigration officer reviews while adjudicating an application for EOS.” However, the proposed rule at 8 CFR states that the student “must establish to the satisfaction of USCIS that the delays in completing the program...are caused by compelling academic reasons.” The proposal thus calls for USCIS to make this academic determination independently from the DSO’s recommendation.

DHS, however, does not have expertise in making such determinations or creating such restrictions. NAFSA believes that the DSO’s decision to extend the program of a student who is making satisfactory academic progress according to the school’s standards is sufficient. The current regulation already requires DSOs to approve extensions only after determining that the delays in completion “are caused by compelling academic or medical reasons, such as changes of major or research topics, unexpected research problems, or documented illnesses.”

If DHS is interested in enhancing the requirements for DSO determinations of eligibility for a program extension, rather than change a decades-old policy that works well, it could change 8 CFR 214.2(f)(7)(iii) to specify that the DSO must base the academic determination on documentation, such as a letter from the student's academic adviser or dean, and retain that documentation for inspection upon the request of the agency.

We also believe that the current system provides adequate information to DHS, through SEVIS, to spot any trends that merit further inquiry through the procedures that already exist at 8 CFR 214.3.

Conclusion

As stated at the outset, the proposed rule is deeply flawed, and I urge you to withdraw this poorly conceived rule from consideration. This proposed rule would replace a proven, flexible policy that has served the nation for decades with a policy that is duplicative, burdensome, and creates uncertainty.

However, if the rule does move forward, I again reiterate our request for at least an additional 30-day comment period given the significant policy changes the rule entails. If DHS does not withdraw the proposed rule, then the many deficiencies identified in this comment letter must be ameliorated prior to finalization through further study and meaningful outreach with the regulated communities, including academia, exchange visitor sponsors, international education associations, and medical and research institutions.

Sincerely,

[signature redacted]

Esther D. Brimmer, DPhil
Executive Director & CEO

cc: Members of the U.S. Senate Committee on the Judiciary
Members of the U.S. Senate Committee on Health, Education, Labor, and Pensions
Members of the U.S. Senate Committee on Foreign Relations
Members of the U.S. House Committee on the Judiciary
Members of the U.S. House Committee on Education and Labor
Members of the U.S. House Committee on Foreign Affairs