

FOR: The Honorable Chad Wolf, Acting Secretary of Homeland Security

FROM: 60 student government bodies/student unions representing over 850,000 students at 51 universities across the United States

DATE: October 26, 2020

SUBJECT: Docket No. ICEB-2019-0006, RIN 1653-AA78 - 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 Secretary Wolf,

We are writing on behalf of the student governments at 51 universities representing over 850,000 students across the nation in response to the Department of Homeland Security's (DHS) Notice of Proposed Rulemaking. Through this comment, we would like to express concerns regarding the proposed rules relating to the establishment of a fixed time period of admission for nonimmigrant academic students as published in the Federal Register on September 25th, 2020.

We thank you for the opportunity to comment on the above-referenced 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". Collectively, our student government bodies advocate for and support the diverse needs of all graduate students at our respective universities in their personal, professional, and public lives and have represented the student voice at all levels of government. Our students work to further the education and research mission of universities and our nation as a whole, regardless of which country they were born in. International students bring unique and valuable perspectives and diversity to our campuses that enrich the experience for all students and tackle problems that impact all Americans. This proposed ruling replacing the established Duration of Status with a fixed time period of admission impacts all of our constituents, both domestic and international, and disregards the value that international students bring to our campuses and country.

The proposed rule will deter international students from pursuing education in the United States resulting in significant harm to our education, scientific, economic, and defense capabilities. Without convincing evidence of a national security concern, the proposed rule places a 4-year maximum duration on student visas, while most doctoral degrees take over 6 years to complete and the average undergraduate enrollment time is 5.1 years¹. This forces international students to apply for extending their stay multiple times throughout their studies

¹<https://nscresearchcenter.org/wp-content/uploads/SignatureReport11.pdf>

and requires DHS to determine if a student is making satisfactory academic progress as opposed to the university. Further, this proposed ruling also discriminates against students from a specific subset of countries which send few students to the U.S. by giving them a 2-year maximum, resulting in a much less diverse educational environment. The harm the proposed rule will have on U.S. educational, scientific, economic, and defense interests is not justified with any substantive evidence of a current national security threat, and we urge you to rescind this rule.

The Proposed Rule Harms U.S. National Interest

This proposed rule change would be particularly detrimental for international students pursuing degrees with expected completion dates greater than the proposed time limits of 2 or 4 years, including almost all doctoral students. According to NSF, the median time to complete a doctoral degree is 6+ years, indicating that virtually all international doctoral students would have to apply for an extension of stay (EOS) at least once.² Temporary visa holders earned 57% of all doctoral degrees in 2017, a pattern that has remained steady for many years,³ and remain a critical part of higher education in the U.S. Through research assistantships (RA) and teaching assistantships (TA), international students contribute significantly to our research output and our ability to educate undergraduate and early graduate students.

The proposed rule increases visa restrictions for international students and suggests decreasing the number of international student visas granted. Both of these restrictions directly contradict U.S. national interest, as mentioned by the Future of Defense Task Force, the American Association for the Advancement of Science (AAAS), the Cato Institute, and many others. Recommendation X.b in the Future of Defense Task Force 2020 Report⁴ is to “attract and retain foreign STEM talent to study and work in the United States through specialized visas and scholarships” as a means of ensuring the United States maintains its position as a leader in defense. The AAAS has made several public comments on the importance of recruiting an international student body and relates such a student body to improved national security and technical innovation. One such report from the AAAS⁵ outlines recommendations for enhancing the U.S. visa system to advance our country’s scientific and economic competitiveness. As a specific example, Cato Institute recently highlighted⁶ the role international students have played in allowing the United States to be a leader in the highly-competitive semiconductor industry. Even recently, the House Armed Services Committee’s Future of Defense Task Force,⁷ the

²<https://nces.nsf.gov/pubs/nsf20301/report/path-to-the-doctorate#time-to-degree>

³<https://nces.nsf.gov/pubs/nsb20197/international-s-e-higher-education>

⁴https://armedservices.house.gov/_cache/files/2/6/26129500-d208-47ba-a9f7-25a8f82828b0/6D5C75605DE8DDF0013712923B4388D7_future-of-defense-task-force-report.pdf

⁵<https://www.aaas.org/sites/default/files/s3fs-public/0518visa.pdf>

⁶<https://www.cato.org/blog/how-can-us-government-really-help-us-semiconductor-industry>

⁷ See supra 4.

House China Task Force,⁸ and the House Intelligence Committee⁹ have all acknowledged the need to attract and retain students from around the world. The impacts of this rule will be directly contradictory to that while solving no issues whatsoever. About two-thirds of graduate students in electrical engineering and computer science, the top educational fields feeding into the U.S. semiconductor industry, are international students. Across all fields, NAFSA: Association of International Educators estimates using Department of Commerce data that during the 2018-2019 academic year alone, **international students contributed \$41 billion to the U.S. economy and created or supported 458,290 jobs.**¹⁰ This proposed rule substantially harms the national interest and reduces U.S. economic and technological international power.

In addition to impacting our research ecosystem, economy, and defense standing, this rule will significantly impact student body diversity within American educational institutions to the detriment of domestic students by reducing overall international student enrollment and, through the 2-year limit, targeting specifically Middle Eastern and African countries. The Supreme Court has repeatedly reinforced the importance of a diverse student body. This is particularly vital to domestic students because, “enrolling a diverse student body ‘promotes cross-racial understanding, helps to break down racial stereotypes, and enables students to better understand persons of different races.’”¹¹ and “student body diversity promotes learning outcomes, and better prepares students for an increasingly diverse workforce and society.”¹²

Insubstantial Evidence and Inappropriate National Security Justification

The DHS claims that intermittent EOS applications will allow for more oversight of these visa holders and will thus improve national security. However, the DHS provides no evidence-based justification for requiring increased oversight among this visa population. In II.A. Purpose of the Regulatory Action, **the DHS only claims that the D/S system has created incentives for fraud and abuse without offering justification or statistical validation for this concern, despite D/S being the standard for decades.** Implementing such a rule change without evidence of substantial national security concerns threatens the U.S. education system and economy by deterring international students from enrolling at U.S. institutions of higher education.

First, international students are already closely tracked via the Student and Exchange Visitor Information System (SEVIS) from the moment they are admitted to an institution until their degree of research completion. Under existing rules, SEVIS already alerts DHS when international students and exchange visitors overstay or fail to comply with their immigration

⁸ <https://gop-foreignaffairs.house.gov/blog/china-task-force-report/>

⁹ https://intelligence.house.gov/uploadedfiles/final_start_report_v4.pdf

¹⁰ <https://www.nafsa.org/sites/default/files/media/document/isev-2019.pdf>

¹¹ *Fisher v. Univ. of Texas at Austin (Fisher II)*, 136 S. Ct. 2198, 2210 (2016) (quoting 24 *Grutter*, 539 U.S. at 328, 330)

¹² *Fisher II*, 136 S. Ct. at 2210 (internal quotation marks omitted).

status.¹³ Second, DHS has provided no standardized procedure on how it will adjudicate factors that will impact the EOS adjudication, i.e., i) does the student “have the funds to live and study in the United States without engaging in unauthorized work;” ii) is the student “maintaining a residence abroad to which they intend to return;” iii) has the student “pursued” and is “pursuing a full course of study;” iv) is the student “completing their studies within the 4 year generally applicable timeframe relating to their post-secondary education programs in the United States or are able to provide a permissible explanation for taking a longer period of time to complete the program.” Because of this, international students pursuing studies in the United States will face excessive pressure to complete their program in the allotted time period in face of challenging courses, changes in major or thesis work, or unexpected life circumstances that the DHS may not deem appropriate for an EOS, all of which are relatively common student experiences. In addition, regulating how many degrees one can pursue at the same level or whether one can enroll in a second Master’s degree after obtaining a Ph.D. are decisions best taken by admission committees, and a one-size fits all approach putting an upper limit on either would be detrimental to the principles of academic freedom. **In effect, DHS is inappropriately assuming the role of evaluating student performance, a task which clearly belongs to universities.** Many international students will avoid the undue risk of pursuing higher education in the U.S. due to a possible EOS rejection that would derail their educational plans, particularly as the UK,¹⁴ Australia,¹⁵ Canada,¹⁶ and other countries are attracting a higher percentage of international students.

Ineffective Method and Flawed Data for Addressing Visa Overstays

The DHS’s proposed rule will impose a 2-year time limit on students from countries with an overstay rate of greater than 10% in an attempt to curb visa holders from overstaying and taking advantage of the D/S system. In the proposed rule, the DHS uses the calculation of a country’s overstay risk as justification for limiting visas from that country. **However, this approach will fail because it inadvertently focuses on countries that send few students at all to the U.S. and because it relies on suspected overstays, which greatly overestimate the number of actual overstays.**

DHS is arguing that being born in a particular country directly causes an individual person’s risk of overstaying their U.S. visa to be higher or lower. Merely comparing overstay rates across countries is an invalid approach to estimating a country’s causal impact on an individual’s overstay risk. For example, overstay cases from China (11,030; 2.14%), India (5,304; 4.05%), Mexico (4,791; 3.16%), Brazil (3,177; 5.08%), Saudi Arabia (2,983; 3.39%), and Canada (2,898; 0.71%) alone contribute to approximately 44% of all overstay cases, however these countries

¹³ *Federal Register*, vol. 68, no. 100, May 23, 2003, pp. 28129-28132.

¹⁴ Higher Education Statistics Agency. (2020). [Higher Education Student Statistics: UK 2018/19](#)

¹⁵ Australian Government Department of Education. (2019). [International Education Data Monthly Summary, September 2019](#).

¹⁶ Hoult, J. (2019). [Another Record Year for Canadian International Education](#). Canadian Bureau for International Education.

are not impacted by the rule because the overall rate is less than 10%.¹⁷ Applicants from other countries such as Bhutan (5; 18.52%), Chad (1; 12.50%), and Samoa (3; 11.54%) would be required to adhere to the 2-year visa restriction.⁷ **Ultimately, the approach proposed by the DHS will not effectively deter visa overstay cases because it fundamentally does not address a majority of overstay cases.**

Furthermore, the data used by DHS in compiling its overstay reports is fundamentally flawed because it uses suspected overstays in their total overstay rates and numbers.¹⁸ Suspected overstays do not represent real visa overstays. Issues such as airlines forgetting to collect a student's I-94 Card (if a paper I-94 was issued upon entry) when departing or the student travelling through Canada first before leaving for their home country are just two examples of situations that can lead to suspicion of overstaying. Because of these issues, the reported suspected overstays are an inflation of the true number of visa overstays. In fact, a 2020 National Foundation for American Policy report demonstrates **that the "DHS understands the 'suspected in-country overstay' rate is ... overstated and largely an issue of an ability (or inability) to match records."**¹⁹ Yet, the agency is using a flawed metric on flawed data to present a solution to a problem that doesn't exist.

The Rule is Arbitrary and Capricious

Under the Administrative Procedure Act, a court "shall ... hold unlawful and set aside agency action ... found to be ... arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."²⁰ To satisfy this standard, an agency must "examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made."²¹ When an agency changes its policy, it must "provide a reasoned explanation for the change" that addresses the "facts and circumstances that underlay or were engendered by the prior policy," including "serious reliance interests."²² An agency must also consider the burdens its policy imposes on regulated parties.²³ The Supreme Court recently echoed that **when an agency acts, it must "be cognizant that longstanding policies may have engendered serious reliance interests that must be taken into account. ... It would be arbitrary and capricious to ignore such matters."**²⁴ The proposed rule will undo a policy that has been in place for over 4 decades, impact over 1 million international students currently present in the country and impose financial burdens of over 2 billion dollars, while relying on flawed data and statistics, and without establishing national security concerns or economic

¹⁷https://www.dhs.gov/sites/default/files/publications/20_0513_fy19-entry-and-exit-overstay-report.pdf

¹⁸<https://nfap.com/wp-content/uploads/2020/09/Analysis-of-DHS-Data-on-International-Students.NFAP-Policy-Brief.September-2020-1.pdf>

¹⁹<https://nfap.com/wp-content/uploads/2020/09/Analysis-of-DHS-Data-on-International-Students.NFAP-Policy-Brief.September-2020-1.pdf>

²⁰ 5 U.S.C. § 706(2)(A)

²¹ State Farm, 463 U.S. at 43.

²² Encino Motorcars, LLC v. Navarro, 136 S. Ct. 2117, 2125- 26 (2016).

²³ See Michigan v. EPA, 135 S. Ct. 2699, 2707 (2015) ("[R]easonable regulation ordinarily requires paying attention to the advantages and the disadvantages of agency decisions.").

²⁴ Dep't of Homeland Sec. v. Regents of the Univ. of Cal., 140 S. Ct. 1891, 1913 (2020)

justification for the same. The agency itself acknowledges that the rule may deter international students from attending American universities. So why at a time when international enrollments have been decline for the last four years,²⁵ would the agency want to gut them further — particularly given how international scientists help supercharge U.S. innovation?^{26,27} The serious economic costs for the nation appear to have been given no consideration,²⁸ nor the likely disruption of progress on federally-funded research grants with work being performed by international students. But equally important, is DHS’s disregard of potentially life-altering choices this policy would force on universities and the international student community. For these reasons and the arguments laid in prior sections, the rule is arbitrary and capricious.

Conclusion

By erecting barriers to international student enrollment in American universities, this arbitrary and capricious proposed rule will be detrimental to national interests across the education, scientific, economic, and defense sectors, while not sufficiently addressing the national security concerns it claims to be solving. Much of this has also been recognized by Members of Congress in their recent correspondences with DHS.²⁹ We call on the DHS to rescind this proposed rule and consider the impacts that even suggesting such a rule can have on international scholars’ view of the United States.

If you have any questions, please contact Benjamin Lane (bblane@mit.edu) or Divyansh Kaushik (gsa-vpea@andrew.cmu.edu).

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²⁵ <https://www.nafsa.org/sites/default/files/media/document/nafsa-losing-talent.pdf>

²⁶ <https://www.nber.org/chapters/c14101>

²⁷ <https://www.nber.org/papers/w27075>

²⁸ <https://www.gmac.com/-/media/files/gmac/research/talent-mobility/gmac-white-paper-early-warning-signals.pdf>

²⁹ Letter by Representatives Debbie Dingell, Mark Pocan, and 104 other members of Congress to Acting DHS Secretary Wolf asking to rescind the rule; Letter by Representative Jaime Herrera Beutler and House GOP members of Congress to Acting DHS Secretary Wolf asking to rescind the rule.

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Miami University (OH) Graduate Students Association
Michigan Technological University Graduate Student Government
Missouri University of Science and Technology Council of Graduate Students
Missouri University of Science and Technology Graduate Students Association
Northwestern University Chicago Graduate Student Association
Ohio University Graduate Student Senate
Oklahoma State University Graduate and Professional Student Government Association
Portland State University Graduate Employees Union AFT/AAUP Local 6666
Princeton University Graduate Student Government
Rutgers Graduate Student Association
Stevens Institute of Technology Graduate Student Council
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The Icahn School of Medicine at Mount Sinai Student Council
Tulane Graduate and Professional Student Association
University at Albany, SUNY Graduate Student Association
University of Arizona, Graduate and Professional Student Council
University of Arkansas at Little Rock Graduate Student Council
University of California, Merced, Graduate Student Association Executive Council
University of California, San Diego, Graduate & Professional Student Association
University of Colorado Boulder Graduate and Professional Student Government
University of Delaware Graduate Student Government
University of Denver Graduate Student Government
University of Denver Korbel Graduate Students Association
University of Hawai'i at Mānoa Graduate Student Organization
University of Maryland Baltimore Graduate Student Association
University of Massachusetts Amherst Graduate Employee Organization UAW 2322
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University of Nevada, Las Vegas Graduate and Professional Student Association
Consolidated Students of the University of Nevada, Las Vegas
University of New Mexico Graduate and Professional Student Association

University of North Texas Graduate Student Council
University of North Texas Student Government Association
University of Pennsylvania Graduate and Professional Student Assembly
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