CHAMBER OF COMMERCE
OF THE
UNITED STATES OF AMERICA

JONATHAN BASELICE
EXECUTIVE DIRECTOR, IMMIGRATION POLICY
EMPLOYMENT POLICY DIVISION

1615 H STREET, N.W.
WASHINGTON, D.C. 20062
202/463-5448 · 202/463-3194 FAX

October 26, 2020

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

Via electronic submission: www.regulations.gov

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
85 Fed. Reg. 60526 (September 25, 2020)
RIN 1653-AA78

Dear Acting Chief Hageman:

The U.S. Chamber of Commerce submits the following comments regarding the proposed rule referenced above. The Chamber greatly appreciates that the Department of Homeland Security ("DHS" or "the Department") and U.S. Immigration and Customs Enforcement ("ICE") are concerned about the integrity of the nation's legal immigration system. Combatting immigration fraud and national security risks are legitimate government interests. However, this proposal is a vastly suboptimal means with which to meet those goals. Furthermore, the business community is very concerned about the broad changes implications of the provisions contained within the proposal, as many companies fear the program changes could seriously inhibit their ability to attract the top talent to help them compete in the global economy.

Specifically, our members have expressed concerns about the changes to the F Student and J Exchange Visitor programs that would make it much more difficult for them to utilize these programs to meet their future workforce needs. The creation of arbitrary time limits for duration of stay for international students and exchange program participants, along with a very complicated process for individuals to extend their status once they're in the U.S., will make it very difficult for companies across a host of industries to meet their workforce needs through these programs moving forward. Moreover, the perception created by these proposed changes among future international students and exchange visitors is that coming to the U.S. (and staying here) is going to become much more difficult than it used to be. If these types of individuals become much less inclined to come and pursue opportunities in the U.S., many companies will

see the talent pipeline for their critical workers constrict, which will inhibit the ability of their businesses to innovate, expand, and create jobs.

Many companies across various industries constantly compete for the best talent in the world to help their businesses grow, and foreign students and exchange visitors are a critical source of talent for their businesses. Given the pressures they face in competing for talent in the global economy, our nation needs to have policies that help attract talent to our nation. Unfortunately, this proposal, in many ways, acts like a talent repellent due to the uncertainty it creates for businesses and workers alike. We strongly implore DHS to withdraw this proposal, as the wholesale elimination of the Duration of Status (hereinafter "D/S") framework for adjudicating these types of nonimmigrant visa petitions. Our comments focus on the changes that have been suggested for the F and J nonimmigrant visa classifications in this proposal.

THE PROPOSAL DOES NOT PROPERLY ACCOUNT FOR THE BUSINESS COMMUNITY'S CONCERNS

DHS seeks to impose a fixed period of admission for individuals entering the U.S with an F student visa or a J exchange visitor visa. The period of admission allowed for these individuals under this new proposal would be either two or four years, dependent upon several factors considered in the proposal.[1] After these initial grants of status, the individual would need to file for an Extension of Stay (EOS) to maintain their ability to stay in the country and either continue in their academic/exchange program or pursue employment with U.S. companies.[2]

Under the DHS proposal, an individual seeking status as a nonimmigrant in the F or J visa classifications is allowed to stay for maximum period of four years, with a significant portion of individuals in the F visa classification only being eligible to receive two years of lawful status in said classification.[3] Notably, DHS admits that this proposal "may adversely affect U.S. competitiveness in the international market for nonimmigrant student enrollment and exchange visitor participation,"[4] as these other programs would be less restrictive than what our programs would become if these new changes were implemented in a final rule. The Chamber strongly urges DHS to withdraw this rule, as it would hinder the ability of many companies to compete for top talent in a host of fields.

Business Concerns with Proposal's Impact on Academic Programs for F-1 Students

Several technology companies and manufacturers are particularly concerned about this proposal's impact on the talent pipeline for their U.S.-based research and development

[1] 85 Fed. Reg. 60526, 60536 (Sept. 25, 2020).
[2] 85 Fed. Red. 60526, 60539 (Sept. 25, 2020).
[3] See Proposed 8 CFR § 214.2(f)(20) and 8 CFR § 214.2(j)(6), 85 Fed. Reg. 60526, 60595, 60597 (Sept. 25, 2020).
[4] See 85 Fed. Reg. 60526, 60573 (Sept. 25, 2020), where DHS admits that this proposal could cause a decrease in the amount on nonimmigrant student enrollment in the U.S. with a corresponding increase in international student enrollment in English-speaking countries like Canada, Australia, and the United Kingdom.

operations. These companies are specifically concerned about the rule's impact on the individuals they employ who possess an F student visa, were educated at a U.S. college or university, and are employed pursuant to the Optional Practical Training (OPT) status they obtained following their graduation.

DHS' view on the American higher education system, which is inferred by the structure of this proposal, is overly simplified. The changes sought by ICE are based upon the misguided assumption that the allocation of status in two-year or four-year increments will be sufficiently workable for stakeholders since most academic programs offered in the U.S. are two or four-years in duration. Unfortunately, these fixed periods of status do not match the realities of higher education in America.

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).[5] The NCES data on undergraduate education also shows that 56% of international students seeking bachelor's degrees earn their degrees within a four-year period, but the data shows that a significant portion of international undergraduate students would not be able to complete their degrees within a four-year time period and would need to complete the new extension of stay request even if they weren't subject to the two-year limitation. This is also true for many students who are drawn to U.S. institutions of higher education because the college/university offers a multiple degree program (e.g. a B.S./M.B.A program) that provides multiple credentials, but the duration of these programs is a minimum of 5 years in duration. Furthermore, nearly all students pursuing optional practical training (OPT) would be forced to complete an extension of stay request to be able to stay in the U.S. and continue their training in their field of study with a U.S. employer.

The disconnect between this proposal's structure and higher education realities is even more pronounced, and more antithetical to the interests of the business community regarding students pursuing a graduate level degree. Masters and doctoral degree programs can be very lengthy, and individuals who seek these degrees in the U.S. are drawn here because upon graduation, they begin their careers at U.S. companies. These students are highly sought after once they finish their graduate levels studies from U.S. universities, and they help alleviate workforce challenges, particularly in Science, Technology, Engineering, and Mathematics (STEM) fields. Companies in various industries, including chemical manufacturers, technology companies, semiconductor producers, and pharmaceutical companies, among many others, rely heavily upon these individuals with graduate degrees to meet their critical workforce needs.

The anecdotal evidence provided to the Chamber from both a prominent technology company and a chemical manufacturer indicate that the presence of OPT recipients in the U.S. is critical to their companies meeting their workforce, particularly with respect to their R&D operations. Both companies were very clear that most of their respective employees performing

[5] NCES, "DataLab," https://nces.ed.gov/datalab/index.aspx?ps_x=hmcadm9b (Accessed October 24, 2020).

these critical research functions were hired initially as OPT recipients. Many of these individuals have since changed their status to another nonimmigrant classification or now possess a green card that was sponsored for them by their employer, but if not for the OPT program, these companies would not have been able to innovate and grow in the manner in which they did. Academic studies tend to bear out this trend as well, as data from 2018 shows that temporary visa holders earned the majority of doctorates awarded in engineering (57%) and in mathematics and computer sciences (55%).[6] Given the important role that these individuals play for American companies and the American economy as a whole, companies are very concerned that these onerous compliance burdens being foisted upon them will hinder their ability to meet their workforce needs.

Business Concerns with Proposal's Impact on J-1 Exchange Program Participants

Healthcare industry stakeholders are very concerned about the adverse impact these fixed admission periods will have on their ability to continue providing healthcare to patients. According to leading medical associations, 750 teaching hospitals across the United States employ more than 12,000 foreign national physicians participating in the Exchange Visitor Program in J-1 visa status. These J-1 trainees provide essential medical care to many American patients across the country. Forcing this change to the D/S model for J-1 medical trainees has the potential to disrupt the delivery of health care.

Given DHS' proposed framework of only allowing a maximum of two or four years of status for J-1 Exchange Visitors,[7] many J-1 Foreign Medical Graduates will likely have to file for extensions of stay during the pendency of their U.S. training. These residency/specialization programs can last up to seven years; if a medical trainee is subject to the two-year limitation on authorized stay and their specialization training is seven years in duration, they will need to apply for status on four separate occasions, quadrupling the current compliance burden faced by J-1 medical trainees today and providing several opportunities at which these workers could be denied an extension.

The additional applications are not simply a drain on the resources of the J-1 sponsors and the foreign medical graduates. These are potential chokepoints at which a J-1 medical trainee could lose their ability to continue their training in the U.S. This increases the risk that the pursuit of their medical training in the U.S. might not end well for them, but those risks are shared by the health care providers at teaching hospitals across the country that employ these individuals. In the event the medical trainee losses status and must leave the U.S., that causes a serious disruption in the healthcare provider's workforce. To that end, the health care providers who stand to suffer the most if there is a disruption caused by their medical trainees' inability to

[6] "2018 Survey of Earned Doctorates," *National Science Foundation*, 2018. Percentages calculated using the data in Table 18.
[7] See proposed 8 CFR § 214.2(j)(1)(ii) and 8 CFR § 214.2(j)(6), 85 Fed. Reg. 60526, 60596-60597 (Sept. 25, 2020).

extend their stay in the U.S. will be those providers located in medically underserved areas or in critical access points in large cities.

Another problem associated with the administration of foreign medical graduate training programs in the U.S. is that the critical elements of the DHS proposal are in conflict with existing State Department Regulations. These State Department regulations make clear that the State Department facilitates the exchange programs for foreign medical graduates seeking to pursue graduate medical education or training at accredited schools of medicine or scientific institutions.[8] In addition, these regulations establish that the Secretary of State shall determine the duration of the alien physician's participation in the program at the time of his/her entry into the United States, and that said duration may generally be limited to a maximum period of 7 years.[9]

Nothing in these State Department regulations would indicate that DHS would have a role in making these determinations for these programs. This is not surprising, as the statutory text in the Immigration and Nationality Act sets forth that the maximum duration of these medical programs should generally be no greater than seven years and that the State Department is in charge of determining the duration of a given program for foreign medical graduates.[10] The statutory text clarifies Congress' intent to have the State Department manage and regulate the primary components of J-1 programs for foreign medical graduates. Absent Congressional action amending these statutory provisions, the authority of DHS to effectuate its proposed changes remains questionable.

DHS Should Utilize SEVIS to Promote Program Integrity and National Interests

In the proposal's preamble, DHS stated that doing away with the D/S admission regime and replacing it with "a fixed period of authorized stay is consistent with most other nonimmigrant categories."[11] While this would certainly treat F and J visa holders similarly to the beneficiaries of other nonimmigrant visa classifications, it is extremely important to note that the F and J visa classifications are very different from "most other nonimmigrant categories" in one fundamental respect. F and J visa holders are tracked through the Student and Exchange Visitor Information System (SEVIS). SEVIS is operated by the Student and Exchange Visitor Program (SEVP) under ICE. SEVP is responsible for ICE's role in monitoring the activity of international students under the F visa classification, while the Department of State's Bureau of Educational and Cultural Affairs (ECA) has responsibility for tracking exchange visitors in the U.S. Both Departments utilize SEVIS to perform these respective functions.[12]

---

[8] 22 CFR § 62.27(a).
[9] 22 CFR § 62.27(e)(1) and 22 CFR § 62.27(e)(2).
[10] See INA §212(j)(1)(D), 8 USC §1182(j)(1)(D).
[11] 85 Fed. Reg. 60526, 60528 (Sept. 25, 2020).
[12] U.S. Immigration and Customs Enforcement's SEVIS website; http://www.ice.gov/sevis/overview, (accessed Oct. 24, 2020)

International students and exchange visitors are the only nonimmigrants that are continuously tracked and monitored while they are present in the country. Moreover, SEVIS is an existing system that could be built upon by ICE and ECA to address the fraud and national security concerns that DHS states are the driving forces behind this proposal. We urge DHS to examine how they can utilize SEVIS to achieve their stated goals instead of establishing complicated policies and cumbersome procedures for individuals to retain their status in the U.S. that will likely cause disruptions for various companies who will struggle to comply with these news policies.

DHS justifies the expansion of a broad Extension of Stay framework in 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,"[13] 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."[14] However, the fact that DHS has access to those data shows that SEVIS can be an effective tool against fraud. Rather than place all international student and exchange visitor nonimmigrants into a USCIS EOS scheme that would unnecessarily burden universities, exchange programs, businesses, and workers, DHS should consider building upon its analysis of SEVIS data and using its existing authority to further investigate the individuals and institutions it believes are not acting within the bounds of the laws. The business community is not against improved oversight per se, but improved oversight does not need to come at the cost of overturning a longstanding policy that stakeholders had come to rely upon to meet critical workforce needs.

EXTENSION OF STAY PROCESS IS COMPLICATED, CUMBERSOME, AND WILL INCREASE UNCERTAINTY AND DISRUPTION FOR EMPLOYERS

The Extension of Stay (EOS) process that DHS has proposed raises several concerns and potential challenges for F-1 and J-1 visa recipients and their employers. This proposal seeks to curtail the authority of a Designated School Official (DSO) to extend an F-1 student's stay in the U.S., as well as the authority of an exchange program sponsor's Responsible Officer (RO) to extend a J-1 exchange visitor's presence in the country. This is accomplished by DHS separating the process a DSO or an RO engages in to extend the length of a given academic/exchange program from the process of extending the individual's stay in the country. Current policy provides much more flexibility to the university DSO or the exchange program's RO to extend the length of the program and, by extension, the ability for the F/J nonimmigrant to legally stay in the country. Under the new proposal, those responsibilities will be bifurcated and USCIS would be given the responsibility of determining whether the nonimmigrant can continue to remain in the U.S.[15]

[13] 85 Fed. Reg. 60526, 60545 (Sept. 25, 2020)
[14] Id.
[15] 85 Fed. Reg. 60526, 60533 (Sept. 25, 2020).

Businesses are very concerned that this proposal would needlessly complicate the process of ensuring that students and exchange visitors are abiding by the terms of their status. Similarly, companies worry that this process would create more possibilities for seemingly innocuous errors to occur that would jeopardize the ability of individuals who have much to contribute to American employers and the U.S. economy to continue to live, work, and thrive in the U.S.

One manner in which DHS complicates the process is in its rejection of the notion of an F or J nonimmigrant making "normal progress" towards the conclusion of their program is a principle upon which they want to operate these programs moving forward. DHS views this "normal progress" concept as undefined and inconsistently applied in practice.[16] To that end, DHS utilizes this rationale to justify the creation of the EOS process where USCIS becomes the ultimate arbiter of whether an international student or an exchange visitor participant warrants an extension of their stay in the U.S. In short, the DSOs and ROs appear to now simply play an advisory role in this process whereby they provide USCIS with a recommendation as to whether the individual should be allowed to extend their stay in the U.S. and USCIS would be free to approve or deny the extension petition.

Given USCIS' precarious financial situation and processing backlogs, many companies are worried that this additional step in the extension process, which will require a resource-strapped agency to increase its workload to deal with these new EOS requests. The processing of these EOS requests will likely be very time consuming and could cause many valuable workers to fall out of status if USCIS cannot process all these requests in a timely fashion. The operational disruptions that the untimely processing of these could cause would be best avoided by the agency reverting to its D/S framework and building upon its capabilities in SEVIS to better combat fraud and national security concerns.

Many companies are concerned by DHS' desire for USCIS to have a more active role in determining whether international students and exchange visitors can continue to pursue their course of study or their exchange program in the U.S. DSOs and ROs understand the specific circumstances surrounding these nonimmigrants and the programs in which they are participating. Allowing DHS to subsume this authority in the manner proscribed in this proposal increases the likelihood that these workers could lose their ability to legally remain and work in the U.S. USCIS adjudicators are not experts on academic programs or exchange visitor programs and it will take time for adjudicators to adjust to these new requests and understand the eligibility requirements for various types of application. This lack of certainty regarding the agency's expectations has many stakeholders nervous that the level of EOS denials will be very high. This is yet another reason for DHS to withdraw this rule and revert to the D/S policy in adjudicating petitions for F-1 and J-1 nonimmigrant visas.

[16] 85 Fed. Reg. 60526, 60550 (Sept. 25, 2020).

The EOS Framework Must Include an Appeal Process for Stakeholders

The EOS process currently does not provide a meaningful appeal process for aggrieved stakeholders who have been issued a denial on their extension request.[17] The right to appeal is permitted for several other USCIS benefit requests and it is unclear why DHS has not made that an option for the EOS process. Relatedly, the denials section for both F and J nonimmigrants requires individuals who have been denied and the authorized period of admission has expired, those nonimmigrants and their dependent family members all must leave the U.S. immediately.[18] For companies that are relying upon OPT recipients for their crucial R&D efforts or J-1 foreign medical graduates performing their residency in the U.S., the sudden disruption caused by this could be devastating for a company's operations. While the Chamber would prefer that this rule be withdrawn with no EOS framework for stakeholders to be concerned with, but if DHS insists on moving forward with some of form of extension procedures for these programs, the agency must include some form of appeal process to ensure that companies and their workers don't have the rug pulled out from underneath them.

CONCLUSION

Businesses across multiple sectors of the U.S. economy are concerned about the potential disruption to their operations that this proposal would cause. We urge DHS to withdraw this rule and maintain its Duration of Status framework for adjudicating these types of petitions, as that would provide much needed certainty for companies that utilize these programs to meet their critical workforce needs.

Thank you for considering our views.

Sincerely,

Jonathan Baselice
Executive Director, Immigration Policy
U.S. Chamber of Commerce

[17] See Proposed 8 CFR § 214.2(f)(7(viii) and Proposed 8 CFR § 214.2(j)(1)(iv)(E), 85 Fed. Reg. 60526, 60593, 60596 (Sept. 25, 2020).
[18] Id.