



October 22, 2020

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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

Dear Acting Regulatory Unit Chief Hageman:

The Association of American Universities (AAU) responds with significant concern and strong opposition to the Department of Homeland Security's (DHS) proposed rule (herein after referred to as "the NPRM") on "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" released on September 25, 2020. AAU recommends the NPRM be withdrawn as it would create significant procedural uncertainty for international students and universities and introduce an unnecessary, costly, and burdensome extension of stay process to the detriment of our nation's ability to attract and retain talent. At a time when our global competitors are actively expanding incentives for international students to study and work in their country, now is not the time for the United States to introduce burdensome policies which threaten our resounding competitive advantage.

While the NPRM suggests "a significantly smaller percentage of students are engaged in programs which may last longer than four years," AAU represents America's leading research universities that collectively provide the education and training for nearly 50 percent of the country's Ph.Ds. 68 percent of all postdocs, 21 percent of all graduate students, and 36 percent of all international students.¹ As America's leading research-intensive universities, AAU universities have been the destination of choice for international students interested in receiving undergraduate and graduate degrees in every academic discipline. For the last ten years, the Institute of International Education's annual Open Doors report has reported that 22 out of the 25 top U.S. institutions hosting international students are AAU universities.²

Despite the fact that our nation's research universities have long been the top destination for international talent, DHS has proposed a new paradigm it knows will threaten higher education as a critical research engine for our nation's economy. The NPRM even states, "if these students and exchange visitors choose another country over the United States because of this proposed rule, then the reduced demand could result in a decrease in enrollment, therefore, impacting school programs in terms of forgone tuition and other fees, jobs in communities surrounding schools, and the U.S. economy." DHS actively acknowledges the proposed rule would have a harmful impact on the U.S. economy and U.S. higher education yet suggests "many factors" make the United States attractive to

¹ [AAU By the Numbers](#), Association of American Universities, August 2020

² ["Open Doors Data on Leading Institutions,"](#) Institute of International Education, November 2019

students and scholars. Unfortunately, it is policies like those suggested in this proposed rule that would limit the prevalence of other factors like opportunities to complete a degree, for post-completion employment, and would threaten the reputation and prestige of America's leading research universities.

AAU will provide comments specific to the impact on graduate education and the student to research workforce pipeline. As the NPRM states, the number of international students and scholars pursuing education in the United States is "a testament to the United States' exceptional academic institutions, cutting-edge technology, and environment that promotes the exchange of ideas, research, and mutual enrichment." Unfortunately, the changes proposed in the NPRM would implement an overly burdensome and complex process and create an uncertain, if not a hostile, environment for international students and scholars to continue or initiate the pursuit of education and training in the United States.

AAU along with the American Council on Education (ACE) and eight other higher education organizations have also [requested](#) an extension to the 30-day comment period to a period of at least 60 days in order to provide careful analysis for a lengthy and complicated NPRM. The NPRM has far reaching economic and competitive impacts not only for current and prospective international students, but for university departments, the greater U.S. higher education system, as well as the broader fields of science, humanities, and medicine. In the absence of an extended comment period, we are providing these comments dated October 22, 2020. Should an extension be granted, we may expand upon our comments.

AAU also supports those comments provided by ACE, the Association of American Medical Colleges (AAMC), and the American Association for the Advancement of Science (AAAS).

Undergraduate to Ph.D. Pipeline

The NPRM would impose a fixed period of admission for student visas of either two or four years to complete their degree. These arbitrary time allocations would be problematic for the majority of international students and institutions of higher education, and result in unnecessary increased burden on students, institutions, and USCIS. 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). NCES data also shows that 56 percent of international students obtain a bachelor's degree within four years, compared to only 44 percent of domestic students. However, a significant population of international undergraduate students would not be able to complete their degrees within a 4-year time period and would need to complete an extension of stay request. Further, nearly all students pursuing optional practical training (OPT) would find it necessary to complete an extension of stay request in addition to work authorization paperwork.

AAU is particularly concerned for students who enter the U.S. for doctoral studies or those who enter for a master's degree and wish to continue their studies at the doctoral level. These students are vital contributors to the U.S. economy. By advancing and completing their education and training in the U.S., they help alleviate workforce challenges, particularly in Science, Technology, Engineering, and Mathematics (STEM) fields. These students would be burdened to file multiple extension of stay requests that could lead to delays in their degree progression or potentially an abrupt end to their education and training. For STEM fields, as Figure 1 supports, this could be particularly burdensome and would disincentivize the very students we need to educate and train to fill gaps in the U.S. workforce. In

2018, temporary visa holders earned the majority of doctorates awarded in engineering (57%) and in mathematics and computer sciences (55%).³

Figure 1 – Time to degree in STEM fields⁴

	Graduate School start	Doctoral start
Life Sciences	6.8 years	5.5 years
Physical Sciences and Earth Sciences	6.3 years	5.7 years
Mathematics and Computer Sciences	6.8 years	5.7 years
Psychology and Social Sciences	7.8 years	6.0 years
Engineering	6.7 years	5.3 years

Ph.D. Education

Graduate education programs in the United States are respected and emulated worldwide and are an international magnet for talented students. While AAU institutions make up only 2 percent of all 4-year universities in the U.S., our universities award 50 percent of all doctoral degrees in STEM and the social sciences and 53 percent of all doctoral degrees in arts, humanities, and music.⁵ Collectively, 40 percent (roughly 61,000 international students) of all doctoral enrollments at AAU institutions are international students who, regardless of their country of origin, will become the next generation’s scientists, teachers, and leaders in government, business, and industry. These programs are unique to the U.S. higher education enterprise and can help to identify talent and expertise that many U.S. industries rely upon. If prospective students decline to enter the U.S. and become part of the larger high-skilled employee pool, then U.S. companies will suffer from a reduction in available talent. At a time when American leadership and prosperity depend increasingly on the creation and use of knowledge, graduate education provides our country with an important competitive advantage and our immigration policies should support maintaining this advantage.

While the NPRM would provide a 4-year maximum stay for all international students, the 2018 Survey of Earned Doctorates⁶ reports the median time to degree for doctoral students across all fields is 5.8 years. In effect, the NPRM would require nearly **all** international doctoral students to complete an extension of stay (EOS) request to remain in their degree programs, coming at a financial cost to the student and an added burden to university DSOs. Additionally, this new process creates unnecessary uncertainty for doctoral students as well as those students who have advanced from one degree level to the next and could jeopardize their ability to complete a doctoral degree in the United States. After applying and being approved for a student visa and maintaining full-time status, the proposed rule puts into question whether **all** international doctoral students can maintain reasonable expectation to complete their

³ [“2018 Survey of Earned Doctorates,” National Science Foundation, 2018](#)

⁴ Id.

⁵ [AAU By the Numbers, Association of American Universities, August 2020](#)

⁶ [“2018 Survey of Earned Doctorates,” National Science Foundation, 2018](#)

degree. If an international student is unable to maintain realistic expectations of a completed degree, they will be incentivized to go elsewhere.

If the U.S. changes to a fixed admission period, students will also have to weigh the uncertainty of pursuing graduate education in the U.S. against the benefit of attending a highly regarded academic program. Earning a Ph.D. requires a tremendous investment of time and energy for more than four years in most fields. Many prospective international students will choose to attend universities in Canada, Australia, the United Kingdom, and elsewhere as those countries provide a clear pathway for students to study and work upon degree completion.

Postdoctoral Education, Teaching, and Research

Our nation's unique system of combining graduate education with cutting-edge research is a core strength of the American innovation system and continued U.S. economic competitiveness. Postdoctoral education plays an important role in the research enterprise of the United States and helps provide recent Ph.D. recipients with an opportunity to develop further the research skills acquired in their doctoral programs or to learn new research techniques. In the process of developing their own research skills, postdoctoral appointees perform a significant portion of the nation's research and augment the role of graduate faculty in providing research instruction to graduate students. Postdoctoral education has been a part of American higher education for over 100 years.

Postdoctoral appointees are defined as persons who earn Ph.Ds. or equivalent doctoral degrees and who subsequently perform research full-time under a senior scientist or scholar for two to three years before taking a permanent research position in academe, industry, or government. Just as the medical residency has replaced the M.D. degree as the terminal credential in the preparation of physicians, so has the postdoctoral appointment effectively replaced the Ph.D. degree as the terminal academic credential in such fields as physics and the life sciences.⁷ International postdoctoral appointees are typically sponsored on J-1 visas or H-1B visas. But many often begin positions in F-1 status to complete OPT or STEM Extension work authorization after their Ph.D. program has concluded. We are concerned about the impact the NPRM will have on this population and their ability to complete critical training after completing their graduate degree. For example, a gravitational physics mentor at a large midwestern public university who has mentored nearly 30 doctoral students and over 70 postdoctoral students comments, "because of the level of expertise needed to successfully complete federally funded multi-year research projects, we often need to hire post-docs who already have two years of post-Ph.D. experience. This ability and ultimately our country's leadership will certainly be seriously hampered with the limitation on the duration of visas."

Joint Programs and Master's/Professional Degrees

Many of AAU's member institutions offer joint degree programs which attract the world's best and brightest students and scholars. These programs have unique timelines and would require a student to file multiple extension of stays and adds uncertainty if a student will be able to complete their degree. For example, a joint M.D. / Ph.D. program can take eight years to complete. A joint M.D. / J.D. program can take seven years on average to complete. Many surgical specialties require training beyond a basic

⁷ ["Committee on Postdoctoral Education, Report and Recommendations,"](#) Association of American Universities, March 31, 1998

residency and those surgeons-in-training would be required to submit an extension of stay request under the NPRM. The extension of stay process creates uncertainty and establishes another time-consuming procedural hurdle to attainment of an advanced or joint degree. Certainly, both students and the degree programs they attend will suffer.

Impact of COVID-19

In addition to the concerns the NPRM raises regarding normal degree progression, the NPRM fails to account for the added uncertainty the COVID-19 pandemic has created, especially for current and future enrollment in Ph.D. programs and subsequent postdoctoral appointments. While the NPRM does allow for a national health crisis to be cited as reason to request an extension of stay, data is only now beginning to emerge on the long-term impact of the pandemic on Ph.D. education which is likely to continue well beyond the national health crisis. The National Science Foundation (NSF) recently funded a survey asking more than 4,000 graduate students at 11 institutions about their experiences with the pandemic. One in four graduate students said they thought it would take them longer to complete their degrees, most reporting that they think they would need another six months to a year.⁸ In addition, according to a recent study by the National Opinion Research Center (NORC) at the University of Chicago, “nearly two-thirds of institutions *automatically* extended timelines for degree completion for all doctoral students (65%) and masters students (61%), and numerous additional institutional representatives clarified that their institutions granted such extensions on a case-by-case basis.”⁹ These extensions have often been necessary due to the early closure of research labs, cancellation of research travel, and temporary closure of academic resource centers and libraries. The implementation of a fixed period of admission would complicate realities brought on by the pandemic and/or a future health crisis, surge extension requests, and leave the extension decision to USCIS officials, who are not equipped to evaluate the circumstances surrounding an international student’s academic progress.

Experiential Education and Work Authorization

In 1947, the Department of Justice promulgated a regulation permitting “employment for practical training” for international students, after completion of the student’s regular course of study.¹⁰ For over 70 years, a program allowing such post-completion employment authorization for international students has continued, now through Department of Homeland Security regulations governing F-1 nonimmigrants.

Such post-completion employment experience, now called “optional practical training,” or OPT, under DHS regulations, recognizes that experiential learning is a key component of the post-secondary educational experience. Indeed, OPT, including the STEM OPT extension, does an excellent job of facilitating experiential learning for our international students. Learning through experience is distinct from learning that takes place in the classroom. OPT allows students to take what they have learned in the classroom and apply “real world” experience to enhance learning and creativity while helping fuel

⁸ [“How Has the Pandemic Affected Graduate Students? This Study Has Answers,”](#) *The Chronicle of Higher Education*, September 3, 2020

⁹ [“Graduate Schools Respond to COVID-19: Promising Pathways to Innovation and Sustainability in STEM Education,”](#) *National Opinion Research Center (NORC) at the University of Chicago*, Fall 2020

¹⁰ [12 Fed. Reg. 5355 \(August 7, 1947\)](#)

the innovation that occurs both on and off campus. Experiential learning opportunities have become an integral part of U.S. higher education and pathway to the highly-skilled workforce.

Moreover, at the graduate level experiential learning fosters the capacity for critical thinking and application of knowledge in complex or ambiguous situations. We believe that experiential learning is a necessary component of a 21st century education, and that this is nowhere more evident than at the graduate level.

As the number of U.S. postsecondary STEM degrees attained by F-1 nonimmigrants has steadily grown, the Optional Practical Training (OPT) program, to include the STEM OPT extension, has correspondingly become a significant pipeline for the U.S. STEM workforce, especially at the graduate level. As explained by the Congressional Research Service last year, from school year 88-89 (the earliest year for which annual data are available) to school year 16-17 (the most recent year for which data are available) there has been a 315% increase in STEM degrees awarded in the U.S. to foreign students, most of which is at the graduate level.¹¹ “Graduate degrees, particularly Master’s degrees, account for the largest share of STEM degrees awarded to foreign students and have also experienced the fastest growth in recent years.”¹²

The value of these STEM Masters and Ph.Ds. having the opportunity to compete OPT should not be questionable any longer. When the Business Roundtable of American CEOs (BRT) partnered with the Interindustry Forecasting Project of the University of Maryland (Inforum) to assess the OPT program the resulting BRT-Inforum modeling showed, among other things, that without the OPT program there would be a loss of 443,000 jobs over a decade, including 225,000 jobs held by native-born workers.¹³ Relatedly, when an economist analyzed unemployment among STEM workers in 102 metro areas, concluded that unemployment rates are lower in areas with larger numbers of F-1 nonimmigrants doing OPT as a share of workers in STEM occupations.¹⁴ When given the opportunity for OPT, those F-1 nonimmigrants that choose to participate end up excelling: data illustrate that 10 additional OPT participants working in a core-based statistical area (CBSAs are aggregated metropolitan areas) leads to 5 additional patents originating in that CBSA¹⁵ and that 22% of America’s billion-dollar start-ups had at least one immigrant founder that first came to the U.S. as an international student.¹⁶

Despite the economic costs of taking steps that might dilute the above-described utility of OPT as a pipeline, the NPRM establishes one of the most uncertain and cumbersome processes that could be devised for F-1 nonimmigrants seeking post-completion employment authorization. DHS fails to explain the *benefits* of the following, and these confusing processes in the aggregate provide another reason for withdrawing the NPRM:

¹¹ [“Foreign STEM Students in the United States”](#), Congressional Research Service, November 1, 2019

¹² Id.

¹³ [The Economic Impact of Curbing the Optional Practical Training Program](#), BRT-Inforum, December 2018

¹⁴ [“International Students, STEM OPT and the U.S. STEM Workforce”](#), Madeline Zavodny, National Foundation for American Policy, March 2019

¹⁵ [“Optional Practical Training and International Students After Graduation: Human Capital, Innovation, and the Labor Market”](#), Jeremy Neufeld, Niskanen Center, March 2019

¹⁶ [Immigrants and Billion-Dollar Companies](#). Stuart Anderson, National Foundation for American Policy, October 2018

- Students will have to complete an Extension of Stay (EOS) when requesting a 12-month, post-completion period of OPT and a separate EOS for a 24-month STEM OPT extension, paying a separate fee each time.
 - Should a final rule be published, DHS should provide for a fee waiver all F-1 nonimmigrants requesting either OPT or an OPT extension, with respect to the filing fee that otherwise attaches to the Form I-539.
- When an EOS is pending the individual's F-1 nonimmigrant status is not extended, even when seeking an EOS from the 12-month OPT to a STEM OPT extension, and instead the individual is merely "considered to be in a period of authorized stay."
 - Should a final rule be published, DHS should provide for a continuation of F-1 nonimmigrant status for timely filed Form I-539s filed on behalf of F-1s seeking OPT or a STEM OPT extension.
- A STEM OPT extension has a Form I-983 Training Plan required to be filed and reviewed by USCIS with the Form I-765 Application for Employment Authorization Document. This affords USCIS sufficient access to information to confirm eligibility for an F-1 nonimmigrant's extension.
 - Should a final rule be published, DHS should explain why a review of the I-983 Training Plan is not sufficient to verify eligibility for those F-1 nonimmigrants seeking a STEM OPT extension, and if such justification cannot be provided then DHS should drop the requirement for the I-539 submission by these filers.
- Extended cap-gap time is helpful, and that change is welcomed, but in extending cap-gap employment authorization and status USCIS admits the agency is unable to keep up with current processing demand and leaves the remainder of F-1 nonimmigrants seeking initial post-completion OPT with no relief and does not provide relief to F-1 nonimmigrants seeking a STEM OPT extension relief should the agency be unable to complete adjudications within 180 days.
 - Should a final rule be published, DHS should commit to timelines for other F-1 nonimmigrant status adjudications or provide automatic extensions of status as with cap-gap.
- Should an I-539 or I-765 filed by an F-1 nonimmigrant seeking OPT or a STEM OPT extension be denied, the student essentially has no right to appeal because the F-1 nonimmigrant will be required to depart the United States. Leaving USCIS with this unreviewable discretion is unfair.
 - Should a final rule be published, DHS should codify a policy in its regulations that allows an F-1 nonimmigrant to appeal and remain in the United States to await a decision, without employment authorization, or a specially-devised process for appeal even though the F-1 nonimmigrant departs the United States, codifying the student's right for a new F-1 nonimmigrant visa issuance should the appeal be granted.

It is hard to imagine a system that presents *more* uncertainty to the individual F-1 nonimmigrant or their employer providing the on-the-job training opportunity. Notwithstanding careful analysis by economists that document decidedly positive outcomes for individual Americans and the national economy as a result of the OPT program, the NPRM proposes a system that injects this unnecessary uncertainty into the OPT program and treats each and every F-1 nonimmigrant as an enforcement problem to be solved. This is yet another fatal flaw of the NPRM.

Should the Department nevertheless finalize its proposal to Establish a Fixed Time Period of Admission and an Extension of Stay Procedure, we ask that DHS strike altogether the requirement that an F-1

nonimmigrant seeking 12-month OPT or a 24-month STEM OPT extension also file for and secure an Extension of Stay. We ask that the end date on the Employment Authorization Document serve as the end date for the F-1 nonimmigrant's period of stay.

Delivery of Medical Care and Value of International Research

Delivery of Medical Care

AAU aligns our comments with those of the AAMC and American Medical Association (AMA) on the deleterious impact the NPRM would have on medical training, research, and care.

The NPRM would significantly and negatively impact patient care at hundreds of teaching hospitals across the United States. Currently, nearly 12,000 foreign national physicians participate in the Department of State's Exchange Visitor Program on J-1 visas. "The patient care provided by resident trainees, under supervision, is essential to a teaching hospital's ability to provide continuity of care. As a result, a change to the duration of status model has the potential to significantly disrupt the delivery of health care across the country. The patients most impacted will be those in underserved and rural areas and those living in critical access points in large cities. Additionally, other residents in those programs would have their education and training negatively impacted as more of the clinical responsibilities would shift to them as a result of the loss of the J-1 trainees.

DHS has failed to show adequate deficiencies on the current process for J-1 residency tracking and renewal.¹⁷ The Educational Commission for Foreign Medical Graduates (ECFMG) is the sole Department of State-designated sponsor for foreign national physicians participating in U.S. residencies and fellowships on J-1 visas. The 12,000 physicians currently participating in ECFMG-sponsored training are located at more than 700 U.S. teaching hospitals accredited by the Accreditation Council for Graduate Medical Education (ACGME). ECFMG-sponsored training can last from one to seven years, depending on the medical specialty and/or subspecialty being pursued. As J-1 physicians progress through training, they are required to apply annually to ECFMG to extend their sponsorship. The annual application process ensures proper monitoring and assurances that each J-1 physician is progressing in training and meeting required milestones."

USCIS process times for J-1 visas range from four to six months. This would be in addition to the to extend ECFMG sponsorship is six weeks. Should J-1 physicians be required to annually extend their visas status by filing through USCIS in addition to the Department of State, current processing times indicate that thousands of thousands of J-1 physicians would very likely be unable to begin or continue their training programs on time. A constraint on the number of J-1 physicians and residents would harm the delivery of health care in the United States by exacerbating our nation's physician shortage.

Damage to U.S. Competitiveness

America's leadership in science, technology, and scholarship depends on our ability not only to cultivate domestic talent, but also to attract and retain the best and brightest from around the world. For decades, the discoveries and contributions of international students, scholars, and researchers have

¹⁷ Under the current duration of status model, a J-1 physician's visa status is automatically extended with issuance of a new Form DS-2019, generated by ECFMG through the government's Student and Exchange Visitor Information System (SEVIS). Through the required annual review process and SEVIS reporting, ECFMG is able to assure both oversight and monitoring of all J-1 physicians in the United States.

made our country stronger, wealthier, and more successful. The NPRM explicitly states the proposed rule “may adversely affect U.S. competitiveness in the international market for nonimmigrant student enrollment and exchange visitor participation. Specifically, the proposed changes could decrease nonimmigrant student enrollments in the United States with corresponding increased enrollments in other English-speaking countries, notably Canada, Australia, and the United Kingdom.” It is this very reasoning for why the proposed rule would have a deleterious impact on U.S. higher education and our ability to attract and retain the best and brightest. Federal policies and rhetoric that acknowledge and actively discourage international students and researchers from coming to, and staying in, the United States hurt our nation’s ability to develop the cures, innovations, and technologies that drive our economy. Instead, we need clear information, less burdensome policies, and a welcoming message from the federal government or our competitive advantage as the nation that attracts and retains top talent will be forever lost and aid other countries in their rise to preeminence.

The economic impact of international students in 2019 is estimated at \$41 billion and supports over 458,000 jobs across U.S. economic sectors (accommodation, dining, retail, transportation, telecommunications, health insurance, etc.), not just institutions of higher education.¹⁸ Significant damage to these jobs seems likely should the NPRM go into effect, just at the time that we need jobs to return as we recover from the COVID-19 pandemic. One reason we expect a weakening of these positive economic tentacles in our higher-ed communities should the proposed rule be finalized, is that international students increasingly have alternative options with respect to securing student status in other English-speaking countries.

The NPRM states the change from a duration of status policy to a fixed period of admission could hurt enrollments and competition for students with UK, Canada, and Australia. Particularly at a time when other countries are expanding incentives for students to study and work, the U.S. should not be implementing policies that restrict our ability to compete globally for talent. Openness is a hallmark of the U.S. academic research system and a key to its success. This openness is not just a matter of principle. Attracting talented people and sharing ideas have created a national competitive advantage. Recent surveys conducted by the American Physical Society (APS) indicate that “...the U.S. is losing its ability to attract the best students in the world.” Specifically, the APS survey found an average 2-year decline of 22% in international applications to Ph.D. physics programs at major research universities which lie outside the top tier of physics research institutions (e.g. Stanford, UC Berkeley, MIT). These institutions, which the APS points out play an essential role in U.S. innovation and training the U.S. STEM workforce, are having to make changes to adapt to these declines, including lowering their standards.¹⁹ Policies that further restrict or make education in the U.S. less attractive, will make it even more difficult to for U.S. universities to educate and retain talent that fills critical gaps in the U.S. workforce.

Artificial intelligence (AI) is often viewed as an emerging frontier for innovation. In a recent report, Georgetown University’s Center for Security and Emerging Technology (CSET) states that there is a significant talent shortage in AI, both domestically and globally. CSET writes, “the United States heavily relies on foreign-born talent. For example, more than 50 percent of computer scientists with graduate degrees employed in the country today were born abroad, as were nearly 70 percent of enrolled

¹⁸ [NAFSA International Student Economic Value Tool](#), NAFSA: Association of International Educators, Updated 2018

¹⁹ [“Attracting the Best Students in the World to U.S. Universities: Challenges and Opportunities,” American Physical Society, October 2019](#)

computer science graduate students. The vast majority of foreign-born talent wants to stay in the United States. Among U.S.-trained Ph.D. graduates in AI-related fields, around 80 percent have remained in the country.”²⁰ The proposed rule would make it more difficult to educate and train the next generation of foreign-born talent in these critical fields and will harm U.S. competitiveness in these emerging fields.

Criteria for Maximum 2-Year Period of Admission Has Severe Limitations

The NPRM proposes to limit the admission period for some categories of international students and scholars to a maximum of two years, asserting these exceptions are to prevent fraud and abuse, national security, and overstay concerns. These proposed changes would create inequalities among students and scholars and penalize certain individuals based on their country of origin and DHS’s reliance on bad data. The proposed criteria are entirely outside of the student’s control and has no relevance to a student’s academic capabilities yet would impact their admission period. This is bad policy and would send an unwelcome message to thousands of students from predominately African and South Asian countries (populations already underrepresented in the U.S.) that the U.S. instead prioritizes the interests of other students. In addition, educational engagement with all nations strengthens U.S. interests abroad and contributes to building friendly, peaceful relations between the people of the United States and the people of other countries. We believe DHS has failed to make a compelling argument for why these new limitations are necessary.

Overstays

According to the NPRM, DHS would seek to limit the admission period to a maximum of 2 years for students and scholars from countries with historic overstay rates over 10 percent. DHS’s reliance on the data provided in the annual Entry and Exit Overstay Report,²¹ is flawed and inappropriate for use in this context. As examined in a September 2020 National Foundation for American Policy (NFAP) Report on International Students and DHS Data,²² “the overstay rate for F-1 international students is not an actual overstay rate but only an upper-bound estimate of individuals who DHS could not positively identify as leaving the United States.” The reliance by DHS on this flawed measurement leaves unknown the actual overstay rates and would restrict the admission period for students and scholars from nearly 60 countries. For example, at a private university in the Northeast, this would unfairly penalize 393 students, including 181 undergraduates, many of whom have almost no memories of their country of birth.

In addition, the usage of this flawed data would put countries that send a smaller number of students and scholars at a disadvantage as the overstay rates are not normalized. In practice, this unfairly hurts a smaller country who may have 10 to 20 estimated overstays and whose overstay percentage represents a higher proportion of their overall student and scholar population. In contrast, a large country may send thousands of students and scholars to the U.S. every year and may have hundreds of estimated overstays but a low overstay rate calculation. The NPRM also proposes DHS “issue FRNs listing countries with overstay rates triggering the 2-year admission period” and that changes to the list “would be made

²⁰ [“Strengthening the U.S. AI Workforce,”](#) Georgetown University Center for Security and Emerging Technology, September 2019

²¹ [Entry/Exit Overstay Report](#), US Department of Homeland Security, Updated May 13, 2020

²² [“International Students and DHS Data,”](#) National Foundation for American Policy, September 2020

by a new FRN.” This process would create additional inequalities as countries are moved on and off the list and would create high variability for students and scholars from the same country, some of whom would be subject to a 2-year admission period and others who would be subject to a 4-year admission period. The NPRM is also unclear how often the overstay country list would be updated or if it would align with the publication of the DHS’s annual *Entry and Exit Overstay Report*, which could lead to even more confusion for students and scholars seeking admission to the U.S.

It is for the reasons outlined in this section that we believe DHS has failed to adequately demonstrate the validity and usage of this data as a means to limit the admission period for students and scholars from an estimated 60 countries. While overstay rates should not be applied to restrict student and scholar admission periods, we do recognize there is value in the Department providing greater accuracy in overstay tracking and we encourage the Department to improve reporting through existing mechanisms.

National Security Concerns and Tracking Fraud and Abuse

AAU is concerned that the NPRM overstates concerns with fraud and abuse in U.S. higher education as a means to curtail arbitrarily the period of admission for a broad category of individuals. DHS also cites the need to protect U.S. national interests as further reasoning to restrict admission to a 2-year period for certain students and scholars without providing concrete information on the criteria for those restrictions. The NPRM states, “if the DHS Secretary determines that U.S. national interests warrant limiting admission to a 2-year maximum period in certain circumstances, then it will publish an FRN to give the public advance notice.” An example notes this could apply to students enrolled in specific courses of study, such as nuclear science. We are concerned this provision goes beyond DHS’s statutory authority and also lacks necessary guardrails or guidance on what type of limitations the Secretary could put forth. In practice, this provision could be broadly applied to limit admission periods for large categories of students and could very well raise significant concerns about USCIS’ ability to process requests in the future, depending on how broadly this provision is implemented.

America’s leading research universities take seriously the economic and national security threats posed by foreign adversaries who seek to interfere with our highly successful innovation enterprise. Research universities recognize this threat and are working to effectively safeguard America’s innovation and research enterprise, including efforts to protect information housed at universities (such as intellectual property, proprietary information, trade secrets, and classified or otherwise controlled government information). Our efforts to address this threat include a survey of effective practices²³ on our member campuses that AAU and the Association of Public and Land-grant Universities (APLU) updated in May 2020. While the NPRM provides examples of suspected fraud and abuse related to F-1 students and J-1 scholars, we believe these examples of security concerns are the exception and not the rule. Most students and scholars seeking admission to the United States to pursue education do not have malign intent yet the NPRM would implement a burdensome, disruptive, and costly extension of stay process based on a small number of cases. For example, NIH funds approximately 20,000 investigators per year, the number investigated for security concerns is less than insert percentage (200 cases investigated, 90

²³ [“Actions Taken by Universities to Address Science and Security Concerns,”](#) Association of American Universities and Association of Public and Land-grant Universities, updated May 2020

with findings) so less than one half of one percent.²⁴ We continue to actively work with U.S. federal science agencies, security and intelligence agencies, and Congress to combat these threats and proactively address security concerns in academia.

Most importantly, the government has several existing processes and mechanism to screen out potential threats and act on those suspected of malign intent who are present in the United States. First, the State Department already has screening processes in place to scrutinize students and scholars and tools such as the classified Technology Alert List (TAL) to deny or limit visas. We recognize the visa process overseen by the Department of State is distinct from the determination of admission period authorized by the Department of Homeland Security and discussed in the NPRM, yet the processes are very much complimentary and the NPRM would duplicate many existing screening processes already implemented by the Department of State in visa screening procedures.

Second, the Department of Homeland Security already has the authority to act on cases of fraud and abuse. The Department can leverage existing information in SEVIS, where Designated School Officials (DSO) regularly update progress to degree information. In addition, ICE's Homeland Security Investigations (HSI) has broad legal authority to enforce a diverse array of federal statutes and uses this authority to investigate all types of cross-border criminal activity, including commercial fraud and intellectual property theft and immigration document and benefit fraud, among others.²⁵ HSI works closely with the Student and Exchange Visitor Program (SEVP) to investigate suspected cases of fraud and abuse of students and scholars. The NPRM's assertion that eliminating the duration of status policy is necessary to tackle national security concerns and address fraud and abuse fails to recognize the existing mechanisms DHS must address these challenges. We implore the Department to address efficiencies in existing capacities rather than implementing a complicated, burdensome, and costly new extension of stay process to address a problem they are already capable of handling.

E-Verify

The NPRM would require all universities to fully participate in E-Verify or a student's admission periods would be limited to a two-year length of stay. DHS alleges, with no evidence,²⁶ that using E-Verify somehow confers an extra level of compliance or adherence to identifying anomalies in immigration status. The Department fails to explain how increasing nationwide adoption of the E-Verify system will improve identification of those that have violated their visas status.²⁷ Through the NRPM, is essentially engaging in coercive tactics to "force" the adoption of E-Verify by limiting their newly enrolled international students to a two-year period of stay and an uncertain academic pathway. The uncertainty will assuredly discourage international attendees of those universities.

²⁴ ["ACD Working Group on Foreign Influences on Research Integrity Update"](#), Slide 11, Michael S Lauer, National Institutes of Health, June 12, 2020

²⁵ [Homeland Security Investigations](#), *US Immigration and Customs Enforcement*

²⁶ Pp.71-74 of NPRM

²⁷ "Through erroneous non- confirmations, E- Verify has harmed nearly three quarters of a million legal workers and has not stopped illegal employment." <https://www.cato.org/blog/facts-about-e-verify-use-rates-errors-effects-illegal-employment>

Extension of Stay (EOS) Process Concerns & Challenges

The extension of stay (EOS) process the Department is proposing raises several concerns and potential challenges for university administrators and international students. The NPRM would curtail DSOs existing authority to extend a student's status for valid reasons and instead enables USCIS to set criteria and determine whether or not a student is making sufficient academic progress. This is an inappropriate role for USCIS, and a definitive determination of an international student's academic progress should remain with DSOs who are trained and equipped to evaluate the circumstances surrounding an international student's academic progress. In addition, we are very concerned that the NPRM complicates the calculation of a student's status in regard to accrual of unlawful presence and leaves open the potential for inclusion of erroneous clerical errors or discrepancies in SEVIS.

DSO Discretion & Authority

The NPRM asserts "normal progress" is undefined and inconsistently applied by DSOs to extend a student's current program. This argument is used to support removal of the duration of stay policy and use of a "normal progress" standard and instead move to a fixed period of admission and extension of stay process where USCIS develops the criteria and assumes authority to decide whether or not a student's circumstances warrant extension. This change would ask DSOs to recommend instead of granting a program extension and students and scholars would also need to apply to USCIS for an extension of stay. As previously stated, this is an inappropriate role for the Department to assume. DSOs understand the unique characteristics and circumstances of their student's and removal of their authority to grant an extension neglects the reality that if decisions about extension of status are being made by those without academic subject knowledge, it will perpetuate inconsistent adjudications referenced in the NPRM.

EOS Criteria Limitations

The EOS criteria outlined in the NPRM attempts to simplify the determination to "if the additional time needed, it is due to a compelling academic reason, documented medical illness or medical condition, or circumstance that was beyond the student's control." As DSOs and students are well aware, there are various factors and reasons for why each student's status is extended, often unique to each individual and their academic program. Those reasons do not always neatly fit into the categories mentioned in the proposed rule. For example, a doctoral student in natural science may need additional time due to the trial and/or error of experiments or may need additional time to collect data for a publication. It is unclear how these considerations would be handled by USCIS officials.

In practice, this narrow list of criteria would be subject to interpretation by the USCIS official and does not appear to support exception or appeal of denial. The right to appeal is permitted for several other USCIS benefit requests. It is unclear why DHS has not made that an option for the EOS process. For EOS requests submitted to USCIS and where additional information is requested, we remain concerned that this will increase processing times and add uncertainty to a student's academic progression. In addition, the NPRM is unclear on what uniformity (if any) will be given for approved EOS requests and if it is reasonable to assume that additional admission authorization will be in months or years. The proposed rule expresses no standard for USCIS to apply to extension of stay requests that do not require changes to program end dates. This discretion is concerning, as a USCIS officer could, for example, grant only one year when the student needs two or more. This would pose great uncertainty for students and scholars.

Unlawful Presence

AAU believes that by establishing a fixed period of admission via this NPRM, the Department is attempting to implement the goals of the August 8, 2018 USCIS Policy Memorandum, “Accrual of Unlawful Presence and F, J, and M Nonimmigrants (PM-602-1060.1),” which was permanently enjoined on February 6, 2020 by the U.S. District Court for the Middle District of North Carolina.²⁸ By shortening the amount of time a student may stay in the United States and by creating barriers of additional expense and uncertainty, the government meets its objective of the August 2018 Memorandum, to discourage international students from attending colleges and universities in the United States.

The NPRM raises significant procedural concerns for students or scholars which could lead to accrual of unlawful presence and threaten their visa status for years to come. Should a student not be in compliance with their university’s standards of education such as medical leave, reduced course-load, or administrative errors such as an incorrect address, a student could accrue “unlawful presence” in the United States and be barred from reentry for three or ten years. By altering the current duration of status process, all those who overstay would begin to accrue unlawful presence, generally the day after their period of stay expires, when admitted for a fixed period of admission.

Addressing Federal Costs and USCIS Capacity

Historically, USCIS has struggled with the timely processing of applications. Indeed, the reason the “duration of status” process was established in 1978 was due to the untenable processing burden and the re-deployment of agency resources would allow the government to focus on the small number of noncompliant visa holders. Given USCIS’ FY20 fiscal situation²⁹ and current staffing vacancies, there is no credible indication that USCIS is or will be well-positioned to process EOS applications in a timely manner according to DHS’s 2020 [Annual Report to Congress](#). The NPRM states that “DHS estimates the between 2025-2029 approximately 301,000 EOS application would be filed with USCIS annually.”

Further, the Department’s estimates of federal costs to upgrade SEVIS, \$22.5 million, and hire an additional 55 employees are not a probable estimation of costs.³⁰ Given the considerable difficulties, time, and expense of years-long efforts to update USCIS and SEVIS systems as well as establish new I-539 process for J-1 visa holders, the burden to the government seems to have negligible benefit.

The NPRM fails to make the case that the burden to the government, universities, hospitals and other and employers will offset any benefit to discourage visa overstays. The current system to tracks students and those completing OPT, STEM OPT, and J-1 exchange visitors including physicians and scholars is sufficient. AAU asserts that the major impact of the NPRM will be to discourage international students and scholars for coming to the U.S. further damaging the education sector’s considerable benefit to the economy.³¹

²⁸ [“Accrual of Unlawful Presence and F, J, and M Nonimmigrants”](#), *NAFSA: Association of International Educators*, August 3, 2020

²⁹ [“USCIS Averts Furlough of Nearly 70% of Workforce”](#), *US Citizenship and Immigration Services*, August 25, 2020

³⁰ [Overview of Federal Information Technology](#), 2019

³¹ [“Economic Impact of International Students”](#), *Institute of International Education*, 2019

Conclusion

For the reasons stated above, we strongly urge the Department to withdraw the NPRM as it would create significant procedural uncertainty for international students and universities and seriously damage our ability to attract top international students, scholars, and researchers who contribute mightily to our nation's higher education and research enterprises, the highly-skilled U.S. workforce, and the economy. The Department already has the existing tools, resources, and capacity to investigate and handle fraud and abuse concerns. We do not believe the creation of an entirely new process creates efficiencies, addresses a large-scale problem, or supports the ability of the U.S. compete successfully for global talent.

Thank you for considering our views.

Sincerely,

A handwritten signature in blue ink that reads "Barbara R. Snyder". The signature is written in a cursive style with a large initial 'B' and a long, sweeping tail on the 'y'.

Barbara R. Snyder
President