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Re: DHS Docket No. ICEB-2019-0006-0001, Comments in Response to 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

The National Association for College Admission Counseling (NACAC) submits these comments in response to the Department's "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" proposed regulation issued for public comment on September 25, 2020. NACAC is a non-profit membership association comprised of 14,000 secondary school counselors and postsecondary admission officers at schools and institutions across the U.S.

Scope and impact

The Department opens its regulatory proposal by noting, "*DHS appreciates the academic benefits, cultural value, and economic contributions these foreign nationals make to academic institutions and local communities throughout the United States.*" However, it is clear that DHS does not, in fact, appreciate the academic benefits, cultural value, and economic contribution that "foreign nationals" make to academic institutions and local communities throughout the United States. If it did appreciate these contributions, rules such as this would not have been proposed.

Ending the Duration of Status (D/S) policy will apply to every international student and exchange visitor, as well as every higher education institution that admits or sponsors them. More than 1,095,000 international students are enrolled at thousands of postsecondary institutions across the country.¹ According to NAFSA, international students generate \$41 billion in revenue and support more than 450,000 jobs each year.² To be clear: if this rule were to go into effect, the negative effect on international enrollment would be certain to jeopardize both revenue and jobs for Americans at a time when we can least afford it.

¹ Open Doors, 2019. Institute for International Education (IIE), available at <http://opendoorsie.wpengine.com/annual-release/>

² See NAFSA, Economic Value Statistics, available at <https://www.nafsa.org/policy-and-advocacy/policy-resources/nafsa-international-student-economic-value-tool-v2>

In addition, this proposed rule, along with the successive administration policies openly hostile to international students, further detracts from the desirability of the United States as an educational destination. As such, it further jeopardizes America's already-tarnished public diplomacy efforts. This rule will create additional conflict within the federal infrastructure for diplomatic relations, as it contradicts other federal policy, including the Departments of State and Commerce, that attempts to welcome international students to the United States.

Worst of all, the proposal is a solution in search of a problem. The proposed regulations cite little to no evidence to support its claim that a regulatory change of this scale is warranted or needed. The Department would be more transparent if it openly acknowledged the nationalist, protectionist motivation for this proposed rule, rather than attempting to substantiate it with information cobbled together without a serious effort at analysis.

Flawed premise

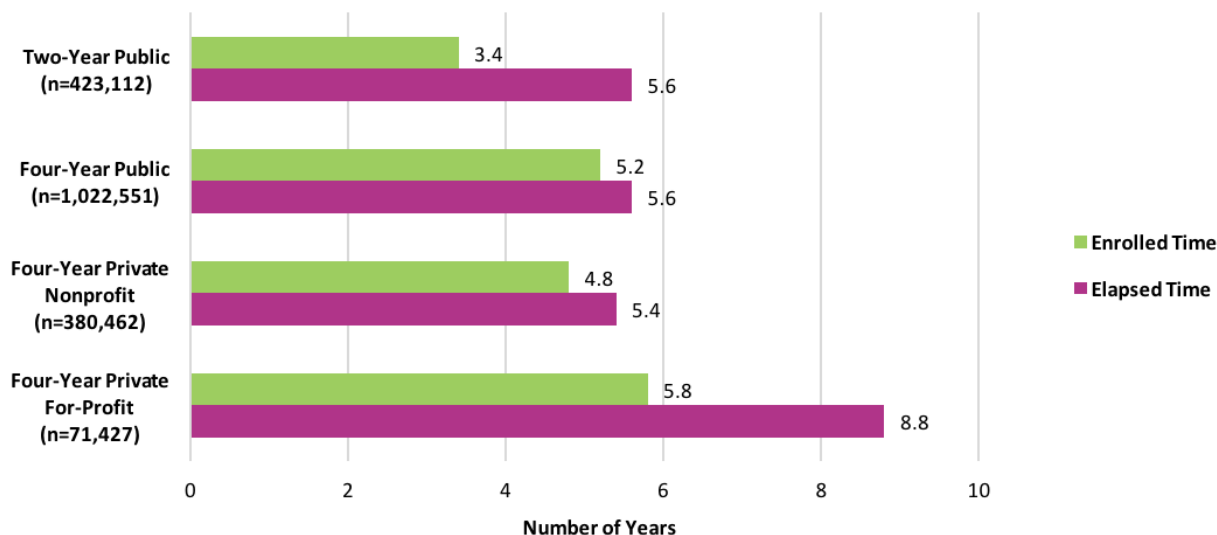
The Department's foundational premise for proffering this rule—that there should be a fixed time frame during which all international students will complete a degree—is fundamentally flawed. DHS states that it “anticipates that many F, J, and I nonimmigrants would be able to complete their activities within their period of admission.” However, such a statement is not supported by plentiful evidence as to the nature of postsecondary programs and student experiences in the US.

First, not all programs are set at the same length. There are nearly as many permutations of program duration as there are institutions and degrees—one reason why the current D/S policy was initially established. For instance, many colleges offer dual degree programs in which students can earn a Bachelor's and Master's degree, or some such combination, as part of the same university program. These programs often vary in length and would be disproportionately affected by this rule. The Department's proposal would effectively end these programs as options for international students, causing additional economic hardship for US postsecondary institutions.

Second, research demonstrates that students rarely complete degrees within the windows suggested by the Department for a variety of reasons. The graph below demonstrates that the time frames recommended by the Department have no consistent justification in terms of students' time to degree.³

³ Shapiro, D., Dundar, A., Wakhungu, P.K., Yuan, X., Nathan, A., & Hwang, Y. (2016, September). Time to Degree: A National View of the Time Enrolled and Elapsed for Associate and Bachelor's Degree Earners (Signature Report No. 11). Herndon, VA: National Student Clearinghouse Research Center.

Time to Degree for Associate (N=573,014) and Bachelor's (N=1,474,682) Degree Earners by Type of Institution where Degree was Received



In fact, the knowledge that students often do not complete a Bachelor's degree in four years is so pervasive that even the federal government, though the Department of Education's National Center for Education Statistics, collects graduation data from postsecondary institutions based on a six-year graduation rate.⁴ Did DHS consult with the Department of Education before drafting this rule to gain even a rudimentary understanding of time to completion data? It does not appear from the proposed regulation that it did so.

In addition, there are valid reasons why international students and exchange visitors would remain beyond an expiration date given at the port of entry. Students both international and domestic often seek additional degrees (such as moving on from a BA to a master's program or master's to Ph.D.).

Insufficient analysis and justification

The Department claims to possess awareness *"that the F-1 program is subject to fraud, exploitation, and abuse."* However, the cases cited by DHS to justify their regulatory proposal exist solely in the domain of 'fringe' operations, such as English language centers, for-profit trade schools, and profit-making enterprises operating under the guise of language or training colleges. (See Appendix)

To collect a handful of examples of clearly corrupt enterprises over more than a decade and prop them up as the justification for this proposed regulation is disingenuous. That should be reason to vacate these regulations. More importantly, the proposed remedy to the putative problem is grossly and absurdly overblown. The Department has provided no data to illustrate whether these examples constitute anything more than a fringe percentage of the total volume of students that enter the US to study. The Department has not provided such data because, we suspect, it is aware that these cases

⁴ See U.S. Department of Education, National Center for Education Statistics, Integrated Postsecondary Education Data System: <https://nces.ed.gov/ipeds/use-the-data/survey-components/9/graduation-rates>

constitute outliers, and to illustrate their frequency with data would effectively undermine their proposal.

The Department further states that it “believes that this process would help to mitigate risks posed by foreign adversaries who seek to exploit these programs.” Again, we must ask: What evidence has the Department presented that “foreign adversaries” are currently taking advantage of this system? In the cases cited by the Department, the closest thing to a “foreign adversary” that appear to have taken advantage of a commercial program are Russian prostitutes.⁵

The Department also states that

Admission for D/S, in general, does not afford immigration officers enough predetermined opportunities to directly verify that aliens granted such nonimmigrant statuses are engaging only in those activities their respective classifications authorize while they are in the United States. In turn, this has undermined DHS’s ability to effectively enforce compliance with the statutory inadmissibility grounds related to unlawful presence and has created incentives for fraud and abuse

However, this regulation does nothing to address this issue. Arbitrarily limiting the duration of status for postsecondary students will not improve the Department’s ability to determine what activities in which students are or are not engaged. The current system is significantly better equipped to handle this purported concern.

In short, the Department has proposed an unreasonably misaligned, sweeping proposal purportedly to address a problem that, in reality, is already well in hand. In fact, the cases cited by the Department were addressed by federal agencies using existing law and regulations. As such, these regulations should be abandoned, as the remedies proposed do not address the poorly-justified concerns expressed by the Department.

DHS capacity

The Department asserts that “the significant increase in the volume of F academic students, J exchange visitors, and I foreign information media representatives poses a challenge to the Department’s ability to monitor and oversee these categories of nonimmigrants while they are in the United States.” How could a federal agency that—by its own admission—does not have the capacity to review the volume of data compiled by front-line monitors at colleges and universities possibly have the capacity to undertake all of the administrative functions currently maintained by university personnel? Absent a massive infusion of funding, staffing, training, and technology, the Department’s lack of ability to effectively administer the system created by this rule would effectively grind international student entry processes to a halt, effectively affording the Department authority (to end international student entry into the US) that it does not statutorily possess.

⁵ “Operator of English Language Schools Charged in Massive Student Visa Fraud Scheme: Some ‘Students’ Were Russian Prostitutes Who Allegedly Paid Cash for Visas” Available at: <https://www.justice.gov/archive/usao/cac/Pressroom/pr2008/038.html>

The Department further states:

These changes would ensure that the Department has an effective mechanism to periodically and directly assess whether these nonimmigrants are complying with the conditions of their classifications and U.S. immigration laws, and to obtain timely and accurate information about the activities they have engaged in and plan to engage in during their temporary stay in the United States.

Again, the Department, by its own admission, lacks the capacity to oversee the current system. Absent a magical infusion of funding and staff capacity, the Department would be less capable of administering this new proposed regulatory structure. Given the absence of a Congressional appropriation to support this regulation, the Department has proposed a regulation it cannot possibly sustain, and should therefore withdraw this proposal.

Burden on Higher Education Institutions

This rule would place significant burdens on higher education institutions. Subjecting all international students who are not able to complete their degrees or programs within the initial time period, which is sizeable, to an expensive and time-consuming process is unnecessary and duplicative. Determining an extension of status based on a compelling academic reason is a process that colleges and universities already undertake, and more importantly, have the appropriate qualifications and resources to decide.

The additional workload that this rule places on institutions to support students' extension of status applications reduces other critical supports that institutions provide to students. These comprehensive support services and programming initiatives are part of what attract international students to US colleges and universities, and help to ensure they have a successful academic, cultural, and social experiences at our institutions. International students' positive experiences are necessary to ensure that the societal and economic benefits of their enrollment at our nation's institutions can be realized. The rule also fails to account for the costs associated with hiring additional staff, such as legal services professionals, to comply with what would be an unnecessary and duplicative process.

Frivolous and unnecessary recasting of carefully constructed system

As the proposed rule itself demonstrates, the current system of international student monitoring is the result of decades of carefully-constructed experience, practice, and policy that spans multiple presidential administrations and bipartisan input on federal immigration legislation. The Department's attempt to unilaterally rewrite decades of statute and regulation suggests, at a minimum, overreach that exceeds the agency's authority to act by itself.

- Immigration and Customs Enforcement (ICE), a branch of DHS, already monitors the international students in the U.S. through the Student and Exchange Visitor Information System ([SEVIS](#)) program. If the Department believes this system is inadequate or unmanageable, how can it possibly expect to assume greater control over the monitoring system? The Department has presented no evidence to suggest that the current system is significantly flawed.

- [Biometrics](#) of international students are already collected at the port of entry by Customs and Border Protection (CBP) so, that data is already available to DHS.
- The current system of shared responsibility between institutions of postsecondary education—in which Designated School Officials (DSOs) and Responsible Officials (ROs) are approved by the Bureau of Citizenship and Immigration Services to serve—has been constructed over decades of experience, and with the explicit acknowledgement that the federal government simply cannot handle the volume of work that is required to maintain the monitoring system required by statute. The Department offers no evidence that this system is flawed in any way. Moreover, the Department has offered no information to substantiate the need for the changes it suggests in this arrangement. Absent such evidence, and combined with the lack of capacity within the Department to absorb the additional work this would require, it appears as though to Department is either unaware of the likelihood that this regulation would grind the student visa system to a halt, or that achieving such a result is the unstated objective of these regulations.

Conclusion

This proposed regulation is so flawed, its true goals so obfuscated, and its feasibility unrooted in reality that we recommend they be withdrawn. We suspect the Department is well aware of the weakness of this set of proposed rules when it states, “[T]o protect the Department’s goals for proposing this rule, DHS proposes to add regulatory text stating that the provisions be severable so that, if necessary, the regulations may continue to function even if a provision is rendered inoperable.” Such an explicit recognition that these regulations may be successfully challenged argues against the idea that they should ever have been promulgated in the first place. The potential costs to students, American postsecondary institutions, and the economic well-being of millions of Americans imposed by this rule demand greater rigor and care than the Department has offered.

APPENDIX

Excerpted from footnotes to DHS proposed regulation:

49 DOJ Press Release, “Operator of English language schools charged in massive student visa fraud scheme,” April 9, 2008, available at <https://www.justice.gov/archive/usao/cac/Pressroom/pr2008/038.html> (last visited Jan. 27, 2020); DOJ Press Release, “Owner/Operator and employee of Miami-based school sentenced for immigration related fraud,” Aug. 30, 2010, available at <https://www.justice.gov/archive/usao/fls/PressReleases/2010/100830-02.html> (last visited Jan. 27, 2020); ICE Press Release, “Pastor sentenced to 1 year for visa fraud, ordered to forfeit building housing former religious school,” June 13, 2011, available at <https://www.ice.gov/news/releases/pastorsentenced-1-year-visa-fraud-ordered-forfeitbuilding-housing-former-religious> (last visited Jan. 27, 2020); DOJ Press Release, “School Official Admits Visa Fraud,” Mar. 12, 2012, available at https://www.justice.gov/archive/usao/pae/News/2012/Mar/tkhir_release.htm (last visited Jan. 27, 2020); ICE Press Release, “Owner of Georgia English language school sentenced for immigration fraud,” May 7, 2014, available at <https://www.ice.gov/news/releases/owner-georgia-english-language-schoolsentenced-immigration-fraud> (last visited Jan. 27, 2020); ICE Press Release, “3 senior executives of for-profit schools plead guilty to student visa, financial aid fraud,” (last visited Jan. 27, 2020); Apr. 30, 2015, available at <https://www.ice.gov/news/releases/3-senior-executives-profit-schoolsplead-guilty-student-visa-financial-aid-fraud> (Jan. 27, 2020); ICE Press Release “Owner of schools that illegally allowed foreign nationals to remain in US as ‘students’ sentenced to 15 months in federal prison,” Apr. 19, 2018, available at <https://www.ice.gov/news/releases/owner-schools-illegallyallowed-foreign-nationals-remain-us-studentssentenced-15> (last visited Jan. 27, 2020).

50 ICE Press Release, “3 senior executives of forprofit schools plead guilty to student visa, financial aid fraud,” April 30, 2015, available at <https://www.ice.gov/news/releases/3-senior-executivesprofit-schools-plead-guilty-student-visa-financialaid-fraud> (last visited Jan. 27, 2020).

51 DOJ Press Release, “Operator of English language schools charged in massive student visa fraud scheme,” April 9, 2008, see <https://www.justice.gov/archive/usao/cac/Pressroom/pr2008/038.html>; DOJ Press Release, “Owner/Operator and employee of Miami-based school sentenced for immigration-related fraud,” Aug. 30, 2010, see <https://www.justice.gov/archive/usao/fls/PressReleases/2010/100830-02.html>; ICE Press Release, “Pastor sentenced to 1 year for visa fraud, ordered to forfeit building housing former religious school,” June 13, 2011, see <https://www.ice.gov/news/releases/pastor-sentenced-1-year-visa-fraudordered-forfeit-building-housing-former-religious>; DOJ Press Release, “School Official Admits Visa Fraud,” Mar. 12, 2012, see https://www.justice.gov/archive/usao/pae/News/2012/Mar/tkhir_release.htm; ICE Press Release, “Owner of Georgia English language school sentenced for immigration fraud,” May 7, 2014, see <https://www.ice.gov/news/releases/owner-georgia-english-language-schoolsentenced-immigration-fraud>; ICE Press Release, “3 senior executives of for-profit schools plead guilty to student visa, financial aid fraud,” Apr. 30, 2015, see <https://www.ice.gov/news/releases/3-seniorexecutives-profit-schools-plead-guilty-student-visafinancial-aid-fraud>; ICE Press Release “Owner of schools that illegally allowed foreign nationals to remain in US as ‘students’ sentenced to 15 months in federal prison,” Apr. 19, 2018, see <https://www.ice.gov/news/releases/owner-schools-illegallyallowed-foreign-nationals-remain-us-studentssentenced-15>