



May 24, 2018

Mr. L. Francis Cissna  
Director  
U. S. Citizenship & Immigration Services  
Department of Homeland Security  
20 Massachusetts Avenue, NW  
Washington, DC 20529

Dear Director Cissna:

NAFSA: Association of International Educators writes in response to the U.S. Citizenship and Immigration Services (USCIS) policy memorandum of May 10, 2018, "[Accrual of Unlawful Presence and F, J, and M Nonimmigrants](#)." The memo is an abrupt, radical departure from more than 20 years of policy guidance. NAFSA requests that USCIS withdraw the memo and implement the recommendations provided below.

The proposed change is operationally complex and may lead to wrongly identifying a large number of foreign students and exchange visitors as failing to maintain lawful status, thus unfairly subjecting them to the 3-year, 10-year, or permanent bars to re-entry to the United States. Like American students, international students should be allowed to complete their studies at their chosen institution, without the stress or fear of being deported based on an oversight of which they may not be aware.

This memo eliminates the long-held distinction between violating immigration status and being unlawfully present in the United States. The concept of "unlawful presence" with various "clocks," "tolling" provisions, and "bars" has to this point been the purview of immigration law specialists and law school classes. Immigration policy is incredibly complex with dire consequences for violation. Foreign students, scholars, and exchange visitors are not immigration attorneys or policy professionals and it is unfair to treat them as such. Unlawful presence should only trigger when there is clear notice of remaining beyond an expiration date of authorized stay in the United States and not when there is a contestable allegation of violation of status.

This proposal is yet another policy which makes the United States less attractive to talented international students, scholars, and exchange visitors and undoubtedly will encourage them to look elsewhere to do their groundbreaking research and build diplomatic ties. Foreign students, scholars, and exchange visitors are here to learn, and they make America safer by becoming the nation's best ambassadors and allies. By treating them all as criminals for minor or technical violations, we will be making America less safe and a less desirable place to study. This is contrary to our nation's values as a welcoming nation of immigrants.

Further, USCIS may achieve the goal of reducing the number of nonimmigrants who violate immigration status or stay beyond the legally allowable period through the implementation of various policies within the sub-agencies of the Department of Homeland Security (DHS) and in collaboration with other federal agencies. These policy changes must be implemented before announcing a policy change that will apply a disproportionate punishment of the 3-year, 10-year, and permanent bars of admissibility to international students and exchange visitors and their spouses and children.

## **Background**

The current policy has held up for more than twenty years because it provides bright-line dates established in government systems, which give adequate notice to students and exchange visitors and their schools and exchange programs.

The expiration date on a Form I-94 is one such clearly established date. If an individual stays beyond that date, he or she begins to accumulate days of unlawful presence. Many status violations do not present such a bright line, particularly because there is overlap between different types of “status.” For example,

- Visa status (the validity period of the nonimmigrant visa in your passport)
- SEVIS status (the draft, initial, active, completed, deactivated, or terminated status of a nonimmigrant’s electronic record in the Student and Exchange Visitor Information System database)
- Nonimmigrant status (abiding by the duration and other conditions of the nonimmigrant category in which an alien is admitted to the United States by DHS)

DHS now proposes to directly equate a violation of nonimmigrant status accorded under INA 214, with the start of counting days of unlawful presence under INA 212(a)(9)(B).

While an alien who violates his or her nonimmigrant status is certainly removable, the policy in place for the last 20 years that distinguishes between status violations and unlawful presence makes sense for purposes of applying INA 212(a)(9)(B), from both legal and public policy viewpoints. A clear government determination, whether it is the expiration date on a nonimmigrant’s Form I-94, or a formal finding of a status violation made in the course of a DHS benefits determination or by an immigration judge, serves as a fair and clear warning to an alien that the clock is ticking, and he or she must take action to leave the United States or otherwise cure the status deficiency. An alien who persists after such fair notice, must face the possibility of not being able to return to the United States for either 3 or 10 years.

## **Complexity**

[INA 214\(a\)\(1\)](#) provides that, “admission to the United States of any alien as a nonimmigrant shall be for such time and under such conditions as the Attorney General [DHS Secretary] may by regulations prescribe...”

Nonimmigrant status is a legal condition, not a physical thing. It is also dynamic, not static, which means that a person's nonimmigrant status must be acquired and maintained, and can be changed, or lost, and in some circumstances, reinstated. In many respects,

nonimmigrant status is a relationship with the U.S. immigration system, with actions, events, and data in the "real" world contributing to the acquisition and maintenance, change, loss, or restoration, of the nonimmigrant relationship.

These actions, events, and data are often recorded and presented in relation to one another in the form of physical and electronic documents and records. Documents and electronic records only point to immigration status, though; they do not stand in the place of it. In this sense, the various documents associated with a nonimmigrant status, and the data contained in databases associated with that status, should be viewed as indicators of nonimmigrant status. If all documents and electronic records are consistent, their reliability as indicators of immigration status is high. However, these documents and records reflect only a snapshot in time, they reflect only some, not all, actions, events, and data, and they are subject to both machine and human error.

A failure to account for inconsistency among immigration documents, electronic records, and actions and events in the real world could lead to an adverse determination on status or benefit eligibility. Whether the data in documents and electronic records is being interpreted correctly, taking into account all applicable law and policy, is also a primary concern.

Immigration law is complicated, and both compliance and enforcement is a very technical matter that requires training and expertise. Because of this complexity, an alien might not even know he or she is "out of status" until informed by the government.

### **Fairness**

Because the INA 212(a)(9)(B) penalties are so severe, we must also weigh the fairness of the policies enforcing that law. Long USCIS adjudication times, for example, may lead to someone becoming subject to the unlawful presence penalties in any case that is ultimately denied. For example, consider a student who registers for fewer classes than she should have one semester, which leads her school to terminate her SEVIS record. In good faith, the student registers for a full course of study the next semester, and applies in good faith to USCIS to reinstate her student status. It is not uncommon for a USCIS Service Center to take six months or longer to adjudicate an application for reinstatement to student status.

Under current USCIS policy, if USCIS ultimately denies her reinstatement the student would start counting unlawful presence as of the date of the denial, which gives sufficient time to either make arrangements to leave the country, or possibly to ask USCIS to reconsider its decision. In the proposed policy, virtually all students whose reinstatement applications are denied would find themselves subject to at least the 3-year bar, merely because USCIS takes so long to adjudicate applications for reinstatement.

In addition, a student or exchange visitor might not even know that he or she was in violation of status until DHS makes a formal determination of that. If the unlawful presence "clock" is seen to start at some distant time in the past in such cases, any window for departing the country will have passed.

## **Interagency Coordination**

There is no indication that USCIS has adequately coordinated implementation of this extreme policy shift with other government stakeholders, including the Department of State (including the Visa Office and the Bureau of Education and Cultural Affairs' Exchange Visitor Program), and other divisions of DHS, such as Immigration and Customs Enforcement (ICE), the Student and Exchange Visitor Program (SEVP), and Customs and Border Protection.

## **Recommendations**

In lieu of implementing the policy described in the memo, NAFSA recommends the following.

- Leave in place the current policy, which has served for over 20 years. Neither DHS nor legacy INS ever published regulations to implement this important area of law. If the agency wishes to implement such a drastic change to longstanding common interpretation of the law, it must be done through the notice and comment process.
- Do not implement any policy change until implementation has been fully coordinated with the Department of State and other DHS units such as CBP and SEVP.
- Exclude from the unlawful presence count any status violations that occurred under color of law, to avoid “gotcha” scenarios, where the student reasonably relied on the authorizations granted. For example, curricular practical training authorized in SEVIS that DHS later determines may have been improperly given, should not start the unlawful presence “clock” until DHS or an immigration judge makes a formal status determination.
- Apply the change of status/extension of stay tolling rules to reinstatement applications.
- Expand the sections describing examples where F, M, and J nonimmigrants “do not accrue unlawful presence in certain situations.” [draft Adjudicator’s Field Manual 40.9.2(b)(1)(E)(iii)].

Thank you for the opportunity to comment.

Sincerely,

[signature]

Esther D. Brimmer, Executive Director and CEO