NAFSA: Association of International Educators

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Ivan K. Fong
General Counsel
Office of the General Counsel
U.S. Department of Homeland Security
Washington, DC 20528- 0485

Via Email: Regulatory.Review@dhs.gov

Dear Mr. Fong:

I write today on behalf of NAFSA: Association of International Educators with respect to the proposed rule published at 76 Fed. Reg. 13526-13528 (March 14, 2011), in which the U.S. Department of Homeland Security (DHS) invited the public to provide input to assist DHS in responding to Executive Order 13563, "Improving Regulation and Regulatory Review,'' issued by President Obama on January 18, 2011. We applaud the Administration's goal of devising a regulatory system that protects "public health, welfare, safety, and our environment while promoting economic growth, innovation, competitiveness, and job creation." We also applaud DHS for soliciting comments from the public to ensure its regulatory program is more effective and less burdensome.

NAFSA is the world's largest nonprofit association for international education professionals, with nearly 10,000 members at approximately 3,500 colleges and universities throughout the United States and around the world. Our membership includes professionals at U.S. higher education institutions that enroll and engage with significant numbers of international students, professors, scientists, and researchers. NAFSA is in a unique position to comment on regulations and policies regarding temporary and permanent immigration because they directly impact the ability of U.S. higher education to attract and retain highly talented and skilled international students and scholars.

We know that the Obama Administration is committed to constructive American engagement in the global community, to an economic recovery that enhances long-term economic competitiveness, and to robust scholarly exchange. NAFSA shares these goals and is committed to helping the Administration achieve them. We believe international education is essential to meeting these goals. The United States must be open, accessible, and attractive to the world's best talent to staff its universities, research institutes, and cutting-edge industries, and to the

world's future leaders who seek to further their education here. Additionally, internationalizing our campuses by including foreign students, scholars and others provides American students with knowledge that will be needed in the job market—one that is more diverse and global than ever before. And the future will only require more global knowledge and intercultural understanding for our children to succeed.

The Paradigm Shift in Global Mobility

Throughout its history, the United States has been a magnet for immigrants from around the world. These newcomers have brought with them tremendous benefits for our country and our economy. But over the past couple of decades, the United States has not been proactive in sustaining its ability to maintain its attractiveness to foreign talent; debates about immigration policy have been mired in a short-sighted emphasis on obsolete ways of managing the immigration function. Other countries, meanwhile, have put in place proactive immigration and visa policies to attract people to their knowledge-based economies. While the United States provides a patchwork of limited, short-term work options with long and uncertain paths to permanent residency, other countries promise quick membership in their societies for talented people and their families. Canada has run advertisements in major U.S. newspapers seeking to attract knowledge workers and their families who are stuck in U.S. green card backlogs. Sending countries like China and India are luring their nationals back with state-of-the-art facilities and promises of good jobs with quick advancement. This is producing a phenomenon that is virtually unrecognized in the United States: the outflow of talent from this country back to its countries of origin or to other, more welcoming, countries.

Today's reality is that talent circulates: Skilled people leave their home countries for various reasons and seek to remain in receiving countries for varying periods of time based on complex factors. They may stay there permanently, move to a third country, travel back and forth to engage in multinational research projects, or follow a variety of other patterns. In order for the United States to attract and retain the best talent for our colleges, universities, research centers, and businesses, immigration law and visa policy must accommodate these realities.

The United States can no longer assume that it is the preferred destination for people who seek to improve their lives outside their home country. Talented students and skilled workers have multiple options around the world for study and work, and they are attracted to the places that offer them the best opportunities and the most options.

To assist DHS in its efforts to ensure its regulatory program is more effective and less burdensome, we submit the following comments. Given the relatively short timeframe provided in which to respond to this notice, we would also appreciate the opportunity to offer DHS comments in the future that support the same goal.

Realizing DHS's Full Potential

The promise of creating three specialized immigration agencies—U.S. Citizenship and Immigration Services (USCIS), U.S. Customs and Border Protection (CBP), and U.S. Immigration and Customs Enforcement (ICE)—and integrating them into a single new department (DHS), has not been realized. Each of the three immigration agencies must focus on its core mission, so that DHS can benefit from the specialized distribution of immigration functions. At the same time, mechanisms must be created to coordinate and integrate their work. To that end, DHS's Office of Policy must be dramatically upgraded in its level of responsibility so that it can function effectively as the secretary's instrument for setting and enforcing policy for the immigration agencies.

Integrating and Maximizing the Use of Technology and Databases

It is astounding the number of databases within DHS and among the various federal agencies that are involved with the visa and immigration policy process that cannot communicate with each other. It is understandable when legacy programs are not able to communicate with each other; but when new databases are developed, they should be able to share vital information with databases and systems within the same agency at a minimum, and as appropriate, with other relevant agencies. For example, USCIS is moving toward a simplified online, paperless filing system through its "Transformation" program. This program must be developed in partnership with SEVP's SEVIS and SEVIS II database systems. Data on foreign students and exchange visitors who are tracked in SEVIS must be available to USCIS and vice versa. Additionally, USCIS Transformation must interface with the Department of Labor's database systems to facilitate the transfer of notifications of labor condition and labor certification applications. These are only a glimpse of the multitude of possibilities for data sharing and efficiencies available to save both the agency and the user's time and money.

Creating Immigration Processing Efficiencies

International students are caught in an immigration process that needs to be reformed to reduce unnecessary processes and paperwork that waste the time and resources of both the applicant and the adjudicator with no benefit to either. USCIS should eliminate procedures that duplicate those of other agencies (such as duplicate background checks or fraud-detection procedures) and focus on its core mission: adjudicating eligibility for immigration benefits. And, as mentioned earlier, any new USCIS databases or systems should be developed in coordination with other DHS agencies and with any other federal department that must either rely on or share information with the new database or system.

Focusing Enforcement Resources Effectively

ICE must focus on enforcement, which is its mandate, and get out of the business of making determinations of immigration status for students. When the Student and Exchange Visitor Program (SEVP) was created, it was inappropriately housed in ICE, whose primary responsibility is to track down and detain terrorists, criminal gangs, human traffickers, etc. For ICE, it means that resources that could be focused on the apprehension of people who are threats

to the security of the homeland are instead diverted to the management of an extensive database (SEVIS) of nonthreatening people and to the pursuit of "leads", many of which are generated primarily by minor, technical violations or infractions. For students and schools, it means that complex determinations of immigration status and the adjudication of immigration benefits for students (and exchange visitors) are made by a police agency that lacks both the mission and the specialized expertise for carrying out these responsibilities.

This constitutes a misuse of a specialized agency set up under the law for another purpose, and it negatively impacts international students for no security benefit. SEVIS should be housed in a part of DHS that deals with databases and has expertise in database management. SEVIS data should be available to the DHS immigration agencies to support the performance of their functions. ICE should be notified of violations of immigration status by students or exchange visitors requiring its action. USCIS should be responsible for policy interpretations, regulation writing, and determinations of immigration status in connection with SEVIS.

Additionally, we call your attention to the following regulations, organized by the relevant bureau, which we have identified for review, modification, or repeal:

ICE – SEVP

1. **Revise the regulations to allow for modern higher education models.**

Revise 8 CFR 214.2(f)(6) "full course of study" provisions to allow designated school officials (DSOs) to establish what constitutes a "full course of study" for short term programs and programs requiring intermittent brief periods in the United States. Such a revision would better suit the evolving nature of U.S. higher education and the needs of international students attending U.S. colleges and universities.

2. **Revise the regulations to accommodate students with disabilities and long-term medical conditions.**

Revise 8 CFR 214.2(f)(6)(iii) "reduced course load" provisions to allow the DSO to reduce course load due to student disability or revise 8 CFR 214.2(f)(6) "full course of study" provision to allow the DSO to establish full course of study for a student with a disability or a medical condition requiring long-term treatment.

3. **Eliminate the requirement that F-2 spouses must engage in only "avocational or recreational" study.**

Revise 8 CFR 214.2(f)(15)(ii)(A) to eliminate the phrase "study that is avocational or recreational in nature" so that F-2 spouses and dependents may engage in any study on a less than full-time basis. This prohibition severely restricts the opportunities for F-2 dependents, such as spouses of F-1 students, to make productive use of their time in the United States.

4. Eliminate the prohibition on F-2 employment.

Revise 8 CFR 214.2(f)(15)(i) to eliminate the prohibition on F-2 dependents accepting employment. This prohibition, along with the prohibition on study mentioned above, severely restricts the opportunities for F-2 dependents, such as spouses of F-1 students, to make productive use of their time in the United States.

5. Revise the reinstatement eligibility requirement pertaining to unauthorized employment.

Revise the student reinstatement eligibility requirement at 8 CFR 214.2(f)(16)(i)(D) as follows: "(D) Has not engaged in unauthorized employment, unless that employment would have been normally approvable under 8 CFR 214.2(f)(9)-(11)." Students who inadvertently fall out of status may be engaged in authorized employment, and the current regulation leaves open the possibility that adjudicators will consider the otherwise authorized employment to have become unauthorized after the student has fallen out of status. For example, a student who is improperly placed in an advanced level class and subsequently drops it, causing the student to drop below a full course of study would normally be eligible for reinstatement under 8 CFR 214.2(f)(6)(iii)(A) because the DSO could have authorized this reduced course load.

6. Revise the reinstatement eligibility provision to include reinstatement for Optional Practical Training (OPT).

Revise 8 CFR 214.2(f)(16) "reinstatement to student status" provision at 214.2(f)(16)(i)(C), to permit a student on OPT following completion of studies to apply for reinstatement to student status. That paragraph could be amended to read, for example, "(C) Is currently pursuing, or intending to pursue, a full course of study in the immediate future at the school which issued the Form I-20, or is intending to begin or resume authorized practical training following completion of studies in the immediate future."

7. Update the M-1 regulations.

The regulations at 8 CFR 214.2(m) are in serious need of revision in almost all aspects. In particular, the current pre-SEVIS-based procedures for extension of stay and practical training should be made consistent with the SEVIS-based procedures used for the F-1 category. The M-1 regulations should also be reviewed to facilitate modern concepts and delivery of vocational, career, and technical education.

8. Publish regulations to implement the statutory F-3 and M-3 border commuter student categories.

DHS should publish F-3 and M-3 regulations for border commuter students that conform to the Border Commuter Student Act of 2002. In 2002, shortly after legacy INS issued its F-1 border commuter student regulation [67 Fed. Reg. 54941 (August 27, 2002)], the Border Commuter Student Act of 2002 [Pub. L. 107-274, 116 Stat. 1923 (November 2, 2002)] was enacted,

creating two new nonimmigrant student visa categories, F-3 and M-3, for Canadian and Mexican citizens who live in their home country and commute to academic or vocational classes in the United States. In 2003, the Department of State (DOS) promulgated a regulation to list the F-3 and M-3 nonimmigrant visa categories at 22 CFR 41.12 [68 Fed.Reg. 47460 (August 11, 2003)]. However, DHS has not yet issued regulations to implement the F-3 or M-3 categories, nor has it updated SEVIS to accommodate them. Although DHS has told NAFSA that admissions in F-3 status should not be occurring until implementing regulations are published, the existence of a valid statute and DOS regulation, but no DHS regulation or SEVIS functionality, has understandably given rise to instances of F-3 visas being issued by DOS and F-3 admissions being made by CBP.

9. Revise the regulations so that enrolled F-1 students who engage in an educational activity abroad do not lose eligibility for practical training.

Revise the regulations at 8 CFR 214.2(f)(10) to include among those eligible for practical training students enrolled in a full course of study at their "SEVIS school" while engaging in an educational activity abroad. Revise the "temporary absence" provisions at 8 CFR 214.2(f)(4) so that students enrolled in a full course of study at their "SEVIS school" while engaging in such an activity abroad would be considered to be "returning to the United States from a temporary absence" even if the activity lasted more than five months. The current regulations fail to recognize that international students often engage in a period of academic activity while enrolled full-time in their academic program in the United States, for example, in order to pursue a required or curricular-based internship, conduct field work, or engage in an experiential learning component of their degree program.

10. Revise the regulations to recognize visa validity for returning students.

The 5-month period referenced in the current rule at 8 CFR 214.2(f)(4) should merely define what constitutes a "temporary absence." This temporary absence should not affect the validity of an F-1 visa issued for a prior visit to the United States, but rather indicate only when a new I-20 or SEVIS record is needed. The Department's regulations should clearly establish that an individual can apply for readmission to the United States in F-1 status regardless of how long he or she has been absent, provided 1) the student has an unexpired F-1 visa; and 2) the student's SEVIS status and I-20 are valid.

11. Eliminate the E-Verify requirement for employers of students applying for STEM OPT extension.

Revise 8 CFR 214.2(f)(10)(ii)(C)(3) to eliminate the requirement that in order to be granted an "STEM extension" for OPT, the student's employer must be registered in the E-Verify program. DHS provided no rationale, other than an interest in increasing E-Verify enrollment, for requiring employers to enroll in E-Verify in order to employ a student engaged in a STEM OPT extension. In fact, the Department simply noted in the supplementary information to the rule that "less than 1 percent of the total number of employers in the United States are currently enrolled

in E-Verify [and] DHS anticipates that most employers who would want to employ these students . . . would need to register . . .” 73 *Fed. Reg.* 18952 (April 8, 2008). DHS has indicated that in 2008, when the rule was issued, fewer than 88,116 employers were enrolled in E-Verify, but by 2010 enrollment had nearly tripled, and 216,721 employers had enrolled.[1] DHS has also noted that “the number of registered employers is growing by approximately 1,400 per week.”[2] Furthermore, new provisions since 2008 require certain federal grant recipients to enroll, and many states have passed laws requiring all or certain employers to enroll. Thus, it is clear that DHS’s efforts to help “jump start” E-Verify enrollment by implementing this requirement were successful, and that such a requirement is no longer necessary.

12. Revise the regulations concerning withdrawal of SEVIS certification and reconsideration/appeal process.

NAFSA recognizes the need for a process for withdrawing SEVIS certification of schools that do not comply with the law and regulations, misrepresent information to DHS, or become ineligible for certification, and NAFSA supports DHS’s efforts in taking action against such schools. Key to this is focusing resources on high-risk schools in the first place. DHS must, however, provide a fair and open process through which established schools, particularly those who have been mistakenly identified as noncompliant, can present information to assist DHS in making a valid decision and through which an erroneous decision can be reconsidered. By creating a thoughtful and transparent process, DHS is better able to use its resources most wisely in pursuing schools that actually warrant decertification.

USCIS

1. Revise the regulations pertaining to change of status and extension of stay to recognize maintenance of nonimmigrant status if a timely-filed application for change or extension of status remains pending beyond the applicant’s period of admission.

Revise 8 CFR 248.1(a) change of nonimmigrant status provisions and 214.1(c) extension of nonimmigrant status provisions to recognize that an alien applicant for change or extension of status has not “failed to maintain” his or her nonimmigrant status for purposes of INA 237(a)(a)(C) if the applicant’s timely-filed application for change or extension of status remains pending beyond the applicant’s period of admission. Many such applicants are even given work authorization during such periods of pendency. Recognizing that a nonimmigrant status violation has not occurred in these circumstances would also be consistent with INA 212(a)(9)(B)(ii) and (iv)(II), which provide that the accrual of unlawful presence tolls for those who have filed a timely and nonfrivolous change of status or extension of status application or petition and that they remain in “a period of stay authorized by the Attorney General . . . during the pendency of such application.” It is recognized that a “period of authorized stay” for

[1] http://www.uscis.gov/portal/site/uscis/menuitem.eb1d4c2a3e5b9ac89243c6a7543f6d1a/?vgnextoid=84979589cdb76210VgnVCM100000b92ca60aRCRD&vgnextchannel=84979589cdb76210VgnVCM100000b92ca60aRCRD
[2] http://www.dhs.gov/files/programs/gc_1185221678150.shtm

purposes of unlawful presence is a separate concept from maintenance of status for purposes of removability, but DHS's position [see, for example Adjudicator's Field Manual 40.9.2(a)(2)] that legitimate applicants for change or extension of status are removable but for an exercise of prosecutorial discretion is simply not tenable, especially given long adjudication times. It is fundamentally unfair to determine whether someone maintains status or loses status based on how quickly DHS adjudicates a benefit. This change will clarify the situation of nonimmigrants who have filed a timely and nonfrivolous change of status or extension of stay application while they wait in the United States for the Department to adjudicate the application.

2. Revise the regulations to allow 90-day window for change of status to F, J, or M status.

Revise 8 CFR 248.1(a) change of nonimmigrant status provisions to allow a change of status to F, J, or M student for an applicant whose program of study will begin within 90 days of current status. DHS currently relies on 8 CFR 214.2(f)(5), which indicates that a student may enter the United States up to 30 days before the course of study is to begin, to deny a change of status to an applicant whose prior status would expire more than 30 days before the program start date. For example, an H-1B professional who wishes to pursue a graduate degree would be denied a change of status if her H-1B status ended on July 30 and her program of study was to begin on September 1. The potential graduate student would be required to return home, apply for a new visa, and return to the United States to gain F-1 status and begin the program of study. The unnecessary cost of such travel and potential for delays, among other problems, could be avoided if DHSwould allow a 90-day window, rather than a 30-day window, for the change of status.

3. Revise the regulations to allow filing of an adjustment of status application for employment-based applicants facing immigrant visa backlogs.

Revise 8 CFR 245.1(a) and (g) to define more broadly the phrase (adapted from INA 245(a)(3)) "and an immigrant visa is immediately available at the time of filing of the application" to allow beneficiaries of a pending or approved employment-based immigrant petition and their dependents to file provisionally adjustment of status applications that will be held in abeyance until their priority dates are current. Many beneficiaries of approved employment-based immigrant visa petitions face long delays before their priority dates become current and they can file adjustment of status applications. For example, Indian nationals who are beneficiaries approved second-preference petitions currently face a backlog of approximately five years. Until they are able to file an adjustment of status application and (180 days later) benefit from "portability," accepting a job promotion or employment with another employer could require them to begin all over the lengthy, expensive, and burdensome permanent residency process. Allowing them to file an adjustment application would eliminate such hardships.

4. Revise the regulations pertaining to B-1/B-2 (and WT/WB) nonimmigrants to permit certain limited educational activities.

Revise 8 CFR 214.2(b)(7) provisions prohibiting B-1 and B-2 nonimmigrants from enrolling in a course of study to allow short-term study programs and to allow other activities such as

completion of an examination, dissertation defense, and meeting with graduate committee or advisor.

5. Revise the regulations concerning "outstanding professor or researcher" petitions to allow additional kinds of evidence.

Revise 8 CFR 204.5(i)(3) "initial evidence" to be included with a petition for an outstanding professor or researcher to allow the petitioner to submit "comparable evidence to establish the beneficiary's eligibility" (as provided, for instance, in the "extraordinary ability petition regulations at 8 CFR 204.5(h)(4). Currently the regulations limit evidence to six categories which are dated and may no longer be considered reasonably inclusive. Allowing "comparable evidence," as allowed for related classifications, would provide petitioners the opportunity to present fuller documentation of a beneficiary's important achievements such as important patents or prestigious, peer-reviewed funding grants.

6. Update the regulations concerning extension of work authorization to include E-3s and H-1B1s.

Update 8 CFR 274a.12(b) "aliens authorized for employment" to include E-3 and H-1B1 nonimmigrants in the list at 8 CFR 274a.12(b)(20) of certain "aliens . . . authorized to continue employment with the same employer for a period not to exceed 240 days beginning on the date of the expiration of the authorized period of stay" if an extension petition has been filed.

7. Revise the H-1B regulations to eliminate unnecessary credential evaluations.

Revise 8 CFR 214.2(h)(4)(iii)(C) requiring a beneficiary of an H-1B petition to "hold a foreign degree determined to be equivalent to a United States baccalaureate or higher degree required by the specialty occupation from an accredited college or university;" to clarify that USCIS may make the determination that if the degree granted and the granting institution are widely recognized, then the petitioner need not submit a credential evaluation. This change would help avoid unnecessary requests for evidence (RFE) for a credential evaluation when the beneficiary has presented, for example, a Ph.D. diploma from Oxford University in the United Kingdom or McGill University in Canada or other well-recognized non-U.S. college or university.

Conclusion

Thank you for the opportunity to offer our recommendations for making DHS's regulations more effective and efficient. It is changes such as these that will ensure the United States continues to attract talented international students, professors, researchers, scientists, and future leaders to advance academic scholarship, increase mutual understanding between the United States and other countries, and enhance our economic and scientific competitiveness. I look forward to the opportunity to provide further input as the review process moves forward.

Sincerely,

Marlene M. Johnson
Executive Director and CEO