

## DHS Proposed Rule on Duration of Status

### *Summary of Major Provisions*

As of September 29, 2020

#### **Background**

On September 25, the Department of Homeland Security (DHS) issued a [proposed rule](#)<sup>1</sup> that would carry significant implications for F-1 students and their F-2 dependents and J-1 exchange visitors and their J-2 dependents. Nonimmigrants on I visas (representatives of foreign media) would also be impacted, however, only F and J visa holders are discussed in detail for the purposes of this summary.

More specifically, DHS is proposing to eliminate duration of status (“D/S”) and instead replacing it with fixed time periods in which individuals under F and J status are legally allowed to remain in the United States. Public stakeholders have until **October 26, 2020** to submit comments in response to DHS’s proposed rule.

*Note:* In its proposed rule, DHS describes “duration of status” for F visa holders as “generally the time during which a student is pursuing a full course of study at an educational institution approved by DHS, or engaging in authorized practical training following completion of studies, plus authorized time to depart the country.”<sup>1</sup>

#### **Rationale for the Proposed Rule**

(further discussed in “II. Risks to the F Classification” and “III. Risks to the J Classification” in the proposed rule language)

#### ***Challenges with DHS Monitoring and Regulating***

- According to DHS, “the number of F, J, and I nonimmigrants admitted each year into the United States has significantly increased. In 2019 alone, there were over a million admissions in F status, a dramatic rise from the 263,938 admissions in F status when the legacy Immigration and Naturalization Service (INS) shifted to D/S admission in 1978.”<sup>1</sup>
- This creates a challenge for DHS to “monitor and oversee these categories of nonimmigrants while they are in the United States,”<sup>1</sup> thus raising concerns about national security.
- Individuals with D/S are not required to interact with DHS (aside from authorization for Optional Practical Training (OPT) or reinstatement), thus agency staff may not be able to accurately determine whether these nonimmigrants are solely participating in activities allowed by their visa terms.

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<sup>1</sup> *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*. Docket ID: ICEB-2019-0006-0001, Federal Register Citation: 85 FR 60526. <https://www.federalregister.gov/documents/2020/09/25/2020-20845/establishing-a-fixed-time-period-of-admission-and-an-extension-of-stay-procedure-for-nonimmigrant>.

### ***Alignment with Other Nonimmigrant Classifications***

- DHS believes that these changes would align F, J, and I visa terms with other categories of nonimmigrants, and would allow for closer monitoring an individual's status.

### ***Discouraging Unlawful Presence***

- According to DHS, eliminating duration of status and replacing with fixed time periods will help curb [unlawful presence](#), or time spent in the United States not authorized by DHS. Individuals who are found to have accrued unlawful presence may be barred future entry into the United States for up to 10 years.<sup>2</sup>

### ***Discouraging Bad Actors***

- DHS believes that by eliminating D/S, it would be better able to prevent individuals seeking to enter into the United States believing they would be able to remain undetected for long periods of time, thus taking advantage of remaining in the U.S. under the guises of F-1 status.<sup>1</sup>
- DHS notes that exchange visitors on J visas pose similar national security risks to F visa holders, citing threats of foreign influence to the U.S. research enterprise. Since exchange visitors are also tracked in SEVIS, "DHS believes it would be more effective for an immigration officer to periodically confirm that an alien has properly maintained status."<sup>1</sup>

### ***Greater Assessment of Extension of Stay (EOS) Requests***

- DHS notes that the proposed changes would allow immigration officers to verify that students applying for an extension of stay:
  - Have the funds needed to live/study in the U.S. without engaging in unauthorized work
  - Are maintaining a residence abroad to which they intend to return
  - Have pursued/are pursuing a full course of study
  - Completing their studies within the four-year timeframe, and if not, are able to provide an explanation why they need more time to do so.<sup>1</sup>

## **Major Proposed Changes**

(for full scope and details of changes, please refer to the [proposed rule](#) language)

### ***Elimination of Duration of Status***

- DHS proposes eliminating the current duration of status framework for F, J, and I nonimmigrants and replacing it with fixed time periods of allowable stay. This would be based on an admission period and specific end date on which authorized stay ends.
- Individuals who wish to stay beyond their fixed date would need to apply for an extension from a DHS immigration officer.

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<sup>2</sup> Department of Homeland Security U.S. Citizenship and Immigration Services. Unlawful presence and bars to admissibility. <https://www.uscis.gov/laws-and-policy/other-resources/unlawful-presence-and-bars-to-admissibility>

- Certain categories of nonimmigrants would be eligible for shorter periods of admission “based on national security, fraud, or overstay concerns.” DHS believes this “would help to mitigate risks posed by foreign adversaries who seek to exploit these programs.”<sup>1</sup> The next section highlights these considerations.

### ***Replacing with Fixed Length of Stay Periods***

Broadly speaking, all current and future F and J nonimmigrants would be converted to a maximum four-year period of stay (unless they are only eligible for a maximum two-year period of stay), plus an additional 60 days for F nonimmigrants and 30 days for J nonimmigrants. More details are as follows:

- DHS would implement fixed stay periods, or a predetermined length of time that an F-1, F-2, J-1, or J-2 visa holder would be allowed to stay in the United States. This would be depend upon an individual’s program end date.
- “Any F or J nonimmigrant previously admitted for duration of status would be transitioned to a fixed date of admission.”<sup>1</sup> For these individuals, period of admission would expire on program end date on Form I-20 (up to 4 years from effective date of final rule), plus an extra 60 days for F nonimmigrants and 30 days for J nonimmigrants.
  - These individuals would also need to file an EOS if they require additional time to complete their program or require post-completion OPT or STEM-OPT extensions.
- The initial length of stay is not to exceed four years.
- Certain individuals would be subject to a shorter two-year admission, should DHS have concerns with:
  - Country of origin: Individuals born in or citizens of North Korea, Iran, Sudan, and Syria
  - Overstay rates: Citizens from countries that have >10 percent overstay rate<sup>3</sup>
  - U.S. national interest, such as whether an individual may pose a possible security threat or are enrolled in specific courses of study
  - Enrollment in a non-accredited institution
  - Enrolled at a school that does not participate in E-Verify, which compares information from an employee’s Employment Eligibility Verification (Form I-9) with DHS records
- Language training students would be limited to “an aggregate 24-month period of stay, including breaks and an annual vacation.”<sup>1</sup>

### ***Limiting Changes Between and Within Educational Levels***

- Students who complete a program would be limited to changing programs within the same educational level no more than 2 times (total of 3 programs over a student’s lifetime).
- Students would be able to change to a lower educational level 1 time while in F-1 status (lifetime restriction).

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<sup>3</sup> Department of Homeland Security. (2020). Fiscal year 2019 entry/exit overstay report. Retrieved from: [https://www.dhs.gov/sites/default/files/publications/20\\_0513\\_fy19-entry-and-exit-overstay-report.pdf](https://www.dhs.gov/sites/default/files/publications/20_0513_fy19-entry-and-exit-overstay-report.pdf).

### ***Extension of Stay (EOS) Applications***

- DHS notes that certain individuals who leave the U.S. before their authorized period of stay has expired, and are awaiting adjudication of their timely filed EOS application, or are applying for F or J status after their EOS application is granted, could be eligible for a period of time approved by CBP.
- USCIS would collect biometric data (such as fingerprints, photographs, and digital signatures) from F, J, and I applicants and others involved in the EOS process.
- EOS denials would not be eligible for appeals.

### ***Applying for Post-Completion OPT and STEM-OPT***

- Students with F status who are under transition from D/S to a fixed period may be permitted to remain in the U.S. while awaiting authorization for post-completion OPT and STEM-OPT so long as: “1) they are in the United States on the effective date of the final rule with admission for D/S; (2) they properly filed an application for employment authorization; and (3) their application is pending on the final rule's effective date. Unless otherwise advised by USCIS, they would not have to file for an EOS or re-file an application for employment authorization.”<sup>1</sup>
- DHS notes that because USCIS is unable to complete adjudication of H-1B petitions by October 1, it is proposing to “provide an automatic extension of F-1 status and post-completion OPT, as applicable, until April 1 of the fiscal year for which the H-1B petition is filed.”<sup>1</sup>

### ***Decreasing Post-Completion Period from 60 Days to 30 Days***

- F visa holders would have a shorter amount of time (30 days instead of 60 days as is currently allowed) to depart the U.S. after completion of a course of study or post-completion of Optional Practical Training.