



## AILA's Take on Visa Overstays

Policymakers are calling for a solution to address those who have “overstayed their visas.” However, the label of “visa overstays” is widely misused and misunderstood. The reality is that identifying visa overstays is an ambiguous, difficult task, a fact often overlooked in these debates.

### Who overstays their visas?

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Family members visiting their relatives, tourists and business travelers, and students frequently overstay their visas. Additionally, military spouses regularly enter and overstay their visas in order to adjust status, often due to well-meaning but erroneous advice.

#### *Common cases of visa overstays*

- ♦ Most people who come to the United States on an **E-1 or E-2 nonimmigrant visa (traders and investors)** receive a visa valid for 5 years. However, when people with E visa enter the U.S., they are usually admitted for a period of only 2 years. If these nonimmigrants stay beyond those 2 years, their visas will still appear to be valid, but they have in fact overstayed, usually without realizing it.
- ♦ **Canadian citizens** visiting the U.S. are rarely required to have a visa. It is equally rare that Canadians receive any form of documentation from a U.S. immigration inspector upon entry. Will the Canadian ever be viewed to have overstayed? Even the agencies that administer immigration laws do not agree. The State Department has said that Canadians are treated as “duration of status”—in other words, as long as individuals are pursuing the purpose of their entry, and have not been adjudicated as an overstay, they are not accruing unlawful presence as an overstay. Within DHS, Customs and Border Protection has indicated that Canadian visitors have started accruing unlawful presence after 6 months, regardless of whether they were ever given a date to depart. U.S. Citizenship and Immigration Services has never committed itself on the question.
- ♦ **Foreign students** coming to study in the U.S. are given an F-1 student visa. Depending on a number of factors, including the expected duration of studies and the nationality of each student, student visas may be valid for a few months or a few years. Students must have a visa that is still valid in order to be admitted to the U.S., but once admitted, the validity period of the visa no longer matters: students are admitted for “duration of status (D/S).” This means that, as long as students are obeying the rules under which they were admitted, they are in status. If students cease to obey those rules, even by accident, by inadvertently dropping below a full course of study, or taking a part-time off-campus job without prior authorization, they might be considered to be out of status, but would not be considered to be unlawfully present unless and until someone in government adjudicates them to be so.
- ♦ **L-1 nonimmigrants (employees of an international company with offices in the U.S.)** are admitted for three years. At the end of those three years, employers can petition to extend a nonimmigrant’s status. While the extension petition is pending, the original admission period expires. Under the INA, nonimmigrants are not accruing unlawful presence. Under USCIS regulations, nonimmigrants are authorized to work for up to 240 days after the original period of admission or until when the extension is decided, whichever is earlier. Nevertheless, DHS takes the position that these individuals are out of status during the time between when the original admission expired and the extension petition is decided, even if the delay is entirely the fault of USCIS. In other words, this group is not unlawfully present, but still out of status.

### What is not the solution to visa overstays?

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Some policymakers have proposed expedited removal or mandatory imprisonment of visa overstays as a viable solution. As the above scenarios indicate, visa overstays are common situations for nonimmigrants, and criminalizing the act of overstaying a visa is taking an already unforgiving system and turning it into a harsh and expensive absurdity.

- ♦ With detention costing the American taxpayers about \$160 per person per day, mandating imprisonment for visa overstays would result in a massive and expensive expansion of the federal prison system that would cost taxpayers millions of dollars.
- ♦ Expedited removal authorizes removal without any hearing or opportunity to produce evidence that the person is not subject to expedited removal. Subjecting visa overstays to expedited removal would be a severe consequence that would ultimately harm American families and businesses.

### How does S.744 address visa overstays?

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S.744 proposes several measures that will alleviate visa overstays, including: directing DHS to address at least 90% of cases of where individuals have overstayed their visa by more than 180 days; the establishment of a visa overstay notification pilot program; the expansion of the integrated exit data system; the expansion of the employment verification system; the elimination of the backlogs in the family and employment immigration system; and an increase in temporary workers.