

August 14, 2018

The Honorable Charles E. Grassley  
Chairman  
Committee on the Judiciary  
United States Senate  
Washington, D.C. 20510

The Honorable Dianne Feinstein  
Ranking Member  
Committee on the Judiciary  
United States Senate  
Washington, D.C. 20510

Dear Chairman Grassley and Ranking Member Feinstein,

We the undersigned representing higher and international education, business, immigration, and human rights organizations are alarmed by what appears to be a comprehensive plan of the U.S. Citizenship and Immigration Services (USCIS) to target legal immigrants through reinterpretation of long-standing immigration law and policy. USCIS has released a series of guidance memos that will have the effect of shifting legal immigrants into unlawful status and put them on the path to removal from the United States, and in some cases, bar them from re-entry to the country for up to 10-years.

If these guidance memoranda are implemented, USCIS jeopardizes the ability of U.S. higher education to attract talented international students, scholars, professors, researchers, exchange visitors, and others to our campuses around the country. This will compromise our ability to remain the global leader in higher education. We urge the Senate to conduct oversight and advise USCIS to withdraw the memos.

Our colleges and universities have long been a magnet for talented people from around the world. U.S. students are provided the best education because of this. For generations our economy and our communities have benefited from international students and scholars, some of whom have remained to work and build lives here. The guidance memos proposed policy changes put this at risk.

**Guidance memos are extra-regulatory actions**

The three USCIS-issued guidance memos will substantially impact the regulated community by reinterpreting long-standing immigration law and policy. Individually and taken together, the reinterpretations are extra-regulatory actions as they go beyond the scope appropriate for guidance memos. These memos create unlawful status for immigrants who are in good faith endeavoring to remain in compliance with the law. The changes proposed impose dire consequences for an immigrant and his or her spouse and children, including removal and bars from re-entry to the country, all without allowing the regulated community an opportunity for notice and comment through the publishing of proposed rules.

The three USCIS guidance memos of concern are the following.

- The May 11, 2018 memo, Accrual of Unlawful Presence and F, J, and M Nonimmigrants, subjects foreign students, scholars, exchange visitors and their dependents to retroactive accrual of unlawful presence for minor and technical violations of status placing them and their families on the path to deportation and up to a 10-year bar to re-entry to the United States. An updated policy memorandum was released on August 9, 2018, the effective date of the new policy.
- The June 28, 2018 memo, Updated Guidance for the Referral of Cases and Issuance of Notices to Appear (NTAs) in Cases Involving Inadmissible and Deportable Aliens, directs USCIS adjudicators to issue NTAs for nonimmigrants denied a benefit who, based on that denial, are not maintaining prior status. USCIS issued updated guidance on July 30, 2018 delaying implementation of the memo until operational guidance is issued.
- The July 13, 2018 memo, Issuance of Certain RFEs and NOIDs; Revisions to Adjudicator's Field Manual (AFM) Chapter 10.5(a), Chapter 10.5(b), to end the routine practice of issuing requests for further evidence (RFEs) to support filings, and notices of intent to deny (NOIDs). The effective date is September 11, 2018.

### **Expands USCIS scope of work into enforcement**

The guidance memos further expand USCIS scope of work into the role of the Immigration and Customs Enforcement (ICE). A key feature in the creation of the Department of Homeland Security was to split the functions of the former Immigration Naturalization Service into sub-agencies to allow each to specialize. Hence the three sub-agencies specialize in customs and border protection, enforcement, and services. These memos, taken together, move USCIS farther away from its stated role as a service provider. A service orientation allows for a request for further evidence in support a benefit request. Ensuring clear notice to nonimmigrants of a determination of a status violation when it occurs without confusing retroactive backdating is a basic level of service. Fast tracking removal and implementing bars is the function of an enforcement posture. This falls far short of providing services to nonimmigrants, immigrants, and U.S. citizens who benefit from the contributions of talented individuals on our campuses and our communities.

### **Ensure notice for accrual of unlawful presence**

Of specific concern to our community is the USCIS policy memorandum of May 11, 2018, updated on the day it went into effect August 9, 2018, on the accrual of unlawful presence that will have the effect of placing foreign students, scholars, and exchange visitors (those in F, M, or J status) on the path to removal following even inadvertent or minor immigration status infractions. It will also bar them from reentering the country for up to 10 years. Under current policy, those in F, M, or J status are aware when unlawful presence begins to accrue. The guidance memo would change that making the accrual of unlawful presence retroactive.

Since its addition to immigration law in 1996, higher and international education had scant interaction with the concept of "unlawful presence." Up to this point it has been clear when those in F, M, or J status have violated immigration status and begun to accrue time in the country in unlawful status: when USCIS denies a petition, application, or other request, or a decision by a

judge. The USCIS guidance memo erases this certainty and replaces it with a date that may be unascertainable by the foreign student or exchange visitor.

We welcome the August 9, 2018 memorandum update to stop the accrual of unlawful presence during the pendency of a timely filed reinstatement application with USCIS. While this is an improvement, it does not address the underlying reality that foreign students may inadvertently violate status whether by their own action or inaction or that of an official on campus such as the designated school official (DSO) charged with updating individual student records in the Student and Exchange Visitor Information System (SEVIS). International students are confronted with two confusing systems: U.S. higher education and immigration law. Navigating them both at the same time brings unique challenges. Often it is clear when a student runs afoul of either or both of these systems. However, there are instances when this is less clear. Here are a few examples.

- **Example 1. Drop below full course load.** Undergraduate student receives permission from academic advisor (but not the DSO) to drop a course, is now registered for 11 rather than 12 semester credit hours as required. If the student becomes aware of this at the beginning of the next academic year following summer break, the student will already have accumulated more than 180 days of unlawful presence and will be beyond the 5-month “timely” reinstatement filing window that tolls unlawful presence.
- **Example 2. Experiential learning integral to study.** Student is authorized for curricular practical training by the DSO and with permission of the student’s department chair. USCIS later disagrees with the DSO and chair that the student’s internship is “integral” enough and deems the student retroactively in violation of status, unlawfully present, and subject to the 10-year bar.
- **Example 3. Incorrect date to begin experiential learning.** Through a miscommunication with the DSO and failure to inspect the I-20 closely enough, a student begins an internship one day before the authorized start date of her/his curricular practical training and is unknowingly deemed by USCIS to be in violation of status and unlawfully present.
- **Example 4. Work hours.** Student serving as a graduate research assistant and authorized to work 20 hours per week unexpectedly needs to work two extra hours one week on the research project to avoid jeopardizing the project, then works two hours less the following week so that the average employment for both weeks is 20 hours, and is unknowingly deemed by USCIS to be in violation of status and accruing unlawful presence.
- **Spouses and children.** In each example above, dependents (spouse or child of the student) over 18 years of age would also be deemed by USCIS to be out of status and unlawfully present.

The bars are an unfair, disproportionate punishment that are counter to the goal of welcoming immigrants who will be great for our country. USCIS must abandon this proposal and maintain the current policy.

These memos are yet another policy which makes the United States less attractive to talented foreign students, scholars, and exchange visitors and undoubtedly will encourage them to look elsewhere to do their groundbreaking research and build diplomatic ties. Foreign students and

scholars are here to learn, and they make America greater by becoming the nation's best ambassadors and allies. By treating them as criminals for minor or technical violations, we move away from the goal of welcoming talented individuals and become a less desirable place to study or conduct research.

Sincerely,

American Association for the Advancement of Science

American Immigration Lawyers Association

FWD.us

Hispanic Association of Colleges and Universities

NAFSA: Association of International Educators

National Association of Colleges and Employers

New American Economy

Presidents' Alliance on Higher Education and Immigration

Shorelight Education

Washington Office on Latin America