CompeteAmerica

The Alliance for a Competitive Workforce

Comment filed to: publicengagementfeedback@uscis.dhs.gov

L. Francis Cissna, Director
U. S. Citizenship & Immigration Services
20 Massachusetts Avenue, NW
Washington, DC 20529

June 11, 2018

Re: Comments on Proposed Policy Memorandum entitled "Accrual of Unlawful Presence and F, J, and M Nonimmigrants," PM-602-1060

Dear Director Cissna,

On behalf of Compete America, we submit this letter in response to the May 11th publication by USCIS of a proposed Policy Memorandum suggesting a new agency approach concerning the "Accrual of Unlawful Presence and F, J, and M Nonimmigrants." The agency proposes abandoning the prior policy that, in most situations, required an official government determination and notice, or the expiration of a date-certain period of stay, before unlawful presence could accrue.

The Compete America coalition is the leading advocate for reform of U.S. immigration policy for highly educated foreign professionals. Our coalition members include higher education associations, industry associations, and employers. Coalition members collaborate to reflect where possible the common interests of universities and colleges, research institutions, and corporations, and administrators and lawyers that represent these organizations, with regard to high-skilled employment-based immigration. For more than 20 years, Compete America has worked with successive administrations and Congress on issues critical to immigration compliance in the employment-based immigration system, as well as the global mobility of talent. The Coalition is committed to continuing its efforts to ensure that the United States has the capacity to educate, obtain, and retain the talent necessary for continued innovation and job creation in the United States.

INCORPORATING STATEMENTS BY OTHERS

As an initial matter, we want to state that the Compete America coalition supports the comments filed by the members of our coalition from the higher education community. Specifically, Compete America would like to incorporate by reference the detailed comment filed by NAFSA, the Association of International Educators, as well as the comment filed by AAU and APLU, respectively the American Association of Universities and the Association of Public and Land-grant Universities. The joint letter from AAU and APLU was also co-signed by the American Council on Education, the American Association of Community Colleges, the American Association of State Colleges and Universities, the National Association of Independent Colleges, and Universities, and the Association of Jesuit Colleges and Universities, thus representing almost all post-secondary institutions in the United States.

Compete America also incorporates by reference the statements of legacy INS Executive Associate Commissioner Paul Virtue, who was recently interviewed by *Forbes* magazine about the origins of the current agency policy governing Accrual of Unlawful Presence and F, J, and M Nonimmigrants. We include in the Compete America comment the entirety of the *Forbes* article on unlawful presence policy, so that is considered by the agency in your assessment of public comments on the current proposal. The article highlights that:

The USCIS proposed new policy "strays from the bright line created in 1997."

"The earlier policy put the foreign national on notice by virtue of an official determination that he or she had begun to accrue unlawful presence on a specific date. … [F]undamental fairness dictates such clear notice."

We believe that Mr. Virtue's statements, coming from one of the chief architects of the current policy, lay out two critical defects with the agency's proposed new policy, one legal and one practical. We believe that each of these defects, standing alone, warrants USCIS dropping the proposed policy change until further analysis can be completed by the agency.

As a matter of law, we do not believe that federal agencies are free to adopt policies that do not comply with Fundamental Fairness. As explained by the NAFSA comment as well as the AAU and APLU comment, the new suggested policy will *inevitably* lead to individuals finding out after the fact that they have already accrued months of unlawful presence, thus subjecting themselves to the three- and ten-year bars to admission. For example, it appears that USCIS consistently takes in excess of six months to adjudicate requests for reinstatement which means that any student that seeks to correct even a minor violation will automatically be left with at least a three-year bar should that request be rejected for any reason. Furthermore, under the new policy the spouses of impacted students and exchange visitors, as well as children over age 18, will face three- and ten-year bars through no fault of their own and without knowledge of when the principal F-1, M-1or J-1 visa holder may have inadvertently violated a term or condition of student or exchange visitor status. These severe and unforgiving results seem unfair, especially in the vast and dispersed enterprise that is the activities of foreign-born students and exchange visitors in the United States, primarily conducted on the campuses of U.S. universities and colleges.

As a matter of policy, operationalizing the approach reflected in the new proposal leaves the unlawful presence determination *without* a bright line, which is impractical for the agency. This is fraught with an expectation of inconsistencies and uncertainty. While the current policy was initially adopted 20 years ago to be implemented primarily by one agency – INS, as part of the Department of Justice, there are three separate component agencies of the Department of Homeland Security that now have significant and active responsibilities related to this policy – USCIS as well as its sister agencies Immigration and Customs Enforcement and Customs and Border Protection. The draft policy memorandum does not reflect whether ICE's Student and Exchange Visitor Program was properly consulted, if other alternatives might solve the problem USCIS is trying to address, or if ICE and CBP stand ready to implement the new suggested approach. Under both the old and new proposal, the Bureau of Consular Affairs at the Department of State plays a role as well. It would seem there are, or should be, operational concerns about this new approach including but not limited to significant interagency work that must be completed before announcing the implementation of a new policy.

LEGAL ISSUES

In the short time period provided for public review and comment, shortened in effect, in part, because the agency's policy concerns regarding unlawful presence were not otherwise publicly known in advance of the May 11th publication of the draft policy memorandum, our coalition has not been able to fully flesh out nor agree on how to address the complex legal issues presented by USCIS's new suggested approach. Nevertheless, we want to flag two primary legal issues for consideration. We hope the comments of other stakeholders will delve into more substantive analysis of these same points, as well as other legal concerns, but we want to at least identify what we see as two principal legal concerns.

We believe the following two legal issues are considerable and complicated, and merit USCIS stepping back from its proposal:

1. Failure to Comply with Requirements for an Agency Change in Interpretation

We are surprised the agency is moving forward with such a dramatic departure from the policy that has been in place since September 1997 without either satisfying the controlling "good guidance" requirements, providing a sufficiently robust rationale for its new approach, or complying with the Administrative Procedure Act (APA).

The Office of Management and Budget, Executive Office of the President, laid out requirements for agencies that seek to put forward new policies without engaging in notice and comment rulemaking, found in the Final Bulletin for Agency Good Practices, 72 Fed. Reg. 3432 (Jan. 25, 2007). The Bulletin establishes requirements for significant guidance documents, including publication in the Federal Register and an agency obligation to provide a comment and response document. Under the Bulletin, a ''significant guidance document'' means a guidance document disseminated to regulated entities or the general public that may reasonably be anticipated to, among other things, either materially alter the rights and obligations of the regulated community or raise novel legal or policy issues. (See p. 3439 of the Jan. 25, 2007 Federal Register notice.) It seems clear that the proposed policy memorandum announcing a new interpretation of unlawful presence under the Immigration and Nationality Act is a significant guidance document.

At a minimum, even where an agency is merely engaging in an effort to change its interpretation of a controlling statute, the Supreme Court has made clear the agency has an obligation to identify a rationale for its changed position that is not arbitrary. (See Encino Motorcars v. Navarro, 138 S.Ct. 1134 (2018).) It does not seem USCIS has satisfied that requirement given that it is unclear from the proposed policy memorandum either what the precise problem is that the agency is trying to solve or its reasoning for the proposed change. For example, part of the rationale provided seems to be based on a DHS Overstay Report that identifies an approximate overstay rate of 6% for F-1 students, but the report's methodology leaves it murky at best what this overstay calculation is based in. It is not evident that F-1 overstay representations in the report account for individuals who remain *lawfully* in the United States after the date identified on their SEVIS I-20, including individuals who change nonimmigrant status or adjust status to permanent resident after marrying an American. It also is not clear whether the F-1 overstay rates include or exclude students on STEM OPT extensions. Moreover, another part of the rationale USCIS provided is grounded in an unfounded reliance on what USCIS apparently believes is the uncontroverted precision and completeness in the Student and Exchange Visitor Information System (SEVIS). The agency's suggested reliance on SEVIS as a panacea to accurately identify failures to maintain status is misplaced, especially because SEVIS does not necessarily provide notice to the impacted individuals. The claimed basis for this policy shift must be cogent and may not be capricious in order to pass muster in the first instance, a standard it is difficult to see that the agency has satisfied. Perhaps most vitally, the agency has not described the problem it is attempting to resolve with the new interpretation. The Immigration and Nationality Act provides full authority, in clear and unequivocal terms, to initiate removal proceedings concerning any alien that it can show has violated the terms and conditions of her nonimmigrant status. Why this authority needs to be supplemented by a broad expansion of the definition of unlawful presence is never explained.

In addition, it may be that the suggested policy is in fact a substantive rule and not an interpretive one, necessitating APA compliance. We are aware that in recent years the Supreme Court has acted to largely remove the obligation of federal agencies to undergo public notice and comment rulemaking to revise a "mere" interpretation. (See Perez v Mortgage Bankers Association, 135 S. Ct. 1190 (2015).) However, the suggested policy shift on unlawful presence may require public notice and comment rulemaking nevertheless. It seems that where a statute has not changed but an agency's abrupt change of course will create *binding* new and wholly unexpected changes to the rights and obligations of the regulated community, public notice and comment rulemaking is indeed required – because the new interpretation is in effect a substantive rule. Especially when, as here, the agency's new interpretation will itself *create* severe and unforgiving results (bars to admission for which there are largely no waivers or exceptions), it may the interpretation is best considered a substantive rule, where the public is entitled to the protections afforded by the APA.

2. <u>As a Matter of Statutory Interpretation, Unlawful Presence Should Not Be Interpreted as Equivalent to a Failure to Maintain Status</u>

The new, suggested interpretation seems to ignore fundamental principles of statutory construction by equating "unlawful presence" and "failure to maintain status" under the Immigration and Nationality Act (hereafter INA).

In enacting the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (Division C of Pub.L. 104–208, enacted September 30, 1996) (hereafter referred to as IIRIRA), Congress overhauled the enforcement provisions of the INA. Among other things, Congress reworded and revised the grounds of inadmissibility generally, removed the previous distinction between exclusion and deportation, removed discretion that had long been left to Immigration Judges, and in general took many steps to provide a stricter system concerning immigration enforcement.

In IIRIRA, Congress established three-year and ten-year bars to inadmissibility under section 212(a)(9)(B) of the INA for aliens who are "unlawfully present" in the United States for a period of 180 days or one year, respectively. Congress defined "unlawful presence" as being "present in the United States after the expiration of the period of stay by the Attorney General." Similarly, for purposes of nonimmigrant visa validity IIIRIRA established at section 222(g)(1) of the INA that for aliens admitted to the country on nonimmigrant visas who "remained in the United States beyond the period of stay authorized by the Attorney General" such visas were deemed voided "beginning after the conclusion of such period of stay." Section 222(g) has been consistently interpreted by the Departments of Justice, Homeland Security, and State as applying only to aliens who remain beyond a specific date on their I-94 Record of Admission or any extension or change of status, and consistently interpreted as not including aliens who violated the terms of their nonimmigrant status. Indeed, the plain meaning of "the expiration of the period of stay authorized" is remaining beyond a specified date – not violating the terms of status. And, the meaning of this phrase in both 222(g) and 212(a)(9) *must* be the same. It is the most basic tenet of statutory construction that Congress could not have intended two different meanings when it used the exact same language in two different sections.

Moreover, equating unlawful presence with a failure to maintain status, as proposed in USCIS's draft policy memorandum, fails to account for the numerous places in IIIRIRA where Congress retained or added references to "maintenance of status" while Congress chose *not* to use that phrase in *defining* unlawful presence. In the context of IIRIRA's enactment, it is particularly significant that Congress *retained* and expanded the use of the maintenance of status concept while *also* creating a new concept of unlawful presence that was *not* defined in the INA in terms of maintenance of status.

To expand the definition of unlawful presence to include all violations of status cannot be reconciled with other language utilized by Congress in IIRIRA and in the INA. When defining unlawful presence, Congress did not make specific reference to violation of the terms of status or unauthorized employment or a failure to maintain status. Rather, Congress made specific reference to presence in the United States after the expiration of a specified period of time.

Indeed, when Congress intended to punish any failure to maintain nonimmigrant status or failure to comply with the conditions of such status, Congress stated such intention in plain language. For example, the following sections of the INA establish penalties tied to maintenance of status:

- Section 241(a)(1)(C) renders an alien removable if she has "failed to maintain nonimmigrant status … or to comply with the conditions of any such status."
- Section 245(c)(2) renders an alien ineligible for adjustment of status to permanent resident if the alien engages in unauthorized employment or "is in unlawful immigration status" or "has failed to maintain continuously a lawful status."
- Section 245(c)(7), added by section 375 of IIRIRA, creates a bar to adjustment of status to permanent resident for an alien who "is not in a lawful nonimmigrant status."
- Section 245(c)(8), added by section 375 of IIRIRA, renders an alien ineligible for adjustment of status to permanent resident status if the alien "has otherwise violated the terms of a nonimmigrant visa.

In other words, the INA language shows that failure to maintain status and unlawful presence are not the same. Congress established exceedingly harsh penalties for unlawful presence – three year and ten year bars for admission to the United States in any status for any purpose – that in most cases are not subject to exceptions or waivers. It established other penalties, including removal or ineligibility for lawful permanent resident status described above, for failure to maintain status, for which waivers may be available and for which there are exceptions for a technical violation. The two – unlawful presence and failure to maintain status – cannot be conflated under the statutory scheme.

CONCLUSION

The Compete America coalition is concerned about USCIS's proposal. In short, the draft policy memorandum suggests revising a bright-line rule that has been in place for the last 20 years that has been both fair and practical. The negative impact to the higher education community and foreign-born students and exchange visitors is clear and direct. In addition, the new approach will ultimately have a negative impact in the employer community. It will create the dynamic of employers engaged in on-campus recruitment finding out years after an inadvertent violation or innocuous, technical violation that a foreign-born employee earning her undergraduate or graduate degree in the United States was unlawfully present, and inadmissible for a new status. Moreover, conflating unlawful presence and maintenance of status does not as a matter of logic only apply to students and exchange visitors admitted for a "D/S" period (duration of status) or Canadian visitors who are treated as duration of status nonimmigrants. Thus, adopting the proposed new approach seems to necessarily portend a future – although as of yet unannounced – where *all* nonimmigrants are presumed by USCIS to accrue unlawful presence without notice if later determined to have violated a term or condition status, to include employer-sponsored nonimmigrant classifications such as the H-1B and L-1 categories. This overbreadth would inject significant uncertainty into the legal immigration system.

Compete America urges USCIS to abandon implementation of a new policy interpreting Accrual Unlawful Presence for F, J, and M visa holders until the agency has had more time to carefully consider the legal implications of and legal requirements for a new approach while also allowing time to complete what should be necessary interagency work as well as work with stakeholders to address some of the unnecessary and negative implications of a change in policy.

Compete America always welcomes the opportunity to work with the agency to improve the nation's immigration system. We would be willing to sit with policymakers to discuss this issue, should that be helpful. We thank you in advance for any consideration you can give to the concerns we have raised.

Respectfully,

Scott Corley
Executive Director, Compete America