

June 11, 2018

Mr. L. Francis Cissna
Director
U.S. Citizenship & Immigration Services
Department of Homeland Security
20 Massachusetts Avenue, NW
Washington, D.C. 20529

Dear Director Cissna:

As leaders of associations representing two and four year, public and nonprofit, institutions of higher education, we write to express serious concern with the U.S. Citizenship and Immigration Services (USCIS) policy memorandum dated May 10, 2018 concerning the “Accrual of Unlawful Presence for F, J, and M Nonimmigrants.” As written, the memo obscures and conflates the important distinction between “unlawful presence” – illegal presence in the United States – and “maintenance of status” – as defined under the Immigration and Nationality Act (INA). This proposed action would cause significant disruption and harm to educational and research programs at American colleges and universities. We want to work with USCIS to address any security concerns related to visa overstays and to ensure that visa policies and systems are efficient and effective so that our nation can continue to benefit from the presence of talented international students, scholars, and researchers.

As you are aware, there are very serious consequences if an individual is found unlawfully present in the United States – including a bar to reenter the country for a period of three or 10 years. Under the proposed policy, USCIS would rely on the information entered into the Student and Exchange Visitor Information System (SEVIS) to determine if an F, M, or J visa holder violated their immigration status, rather than on an official determination by an immigration judge or the Department of Homeland Security. By equating “unlawful presence” with “failure to maintain status,” this new policy may pose very serious consequences for foreign students, the U.S. universities where they pursue higher education, and contribute to a highly problematic trend of sending the wrong messages about the U.S. as a welcoming country for international students.

Unlike all other visa holders, F, M and J nonimmigrants (foreign students and exchange visitors) are allowed to enter the United States for the duration of status– known as “Duration of Status” or “(D/S)” – rather than for a “date certain.” Under current agency policy promulgated by the 1997 “Virtue memo,”¹ a student or exchange visitor only begins to accrue “unlawful presence” after a USCIS adjudicator or immigration judge makes a formal finding that the individual violated their status. If implemented, the May 10, 2018 USCIS policy memorandum would fundamentally change the way the federal government calculates periods of unlawful presence for students beyond their Duration of Status.

There are many benign reasons why a student or exchange visitor might inadvertently fail to maintain status, including a change in practical training or employment status, medical leave, or a reduction in credit-bearing coursework. The SEVIS system attempts to capture information confirming compliance with some but not all situations that might be useful in identifying a failure to maintain status, including unintentional failures. Additionally, SEVIS is not a flawless system. It has been subject to automated and clerical errors including human error on the part of government agencies. These are not infrequent occurrences. The compliance and enforcement implications of USCIS’ new proposed policy are incredibly nuanced and complex, with very serious consequences for a violation. As a matter of good faith, fairness, and practicality, unlawful presence should only trigger if and when the student has been clearly notified of a potential violation. Moreover, unlawful presence policy, because of the severe

¹ 1997 Virtue Memo: https://www.nafsa.org/uploadedFiles/virtue_memo_on_interpreting.pdf?n=234

consequences, should not by definition regularly capture unknowing violations. International students should not be expected to have deep expertise in immigration law to be able to interpret a potential violation without clear notification from the U.S. government.

We are very concerned that under the proposed policy, “unlawful presence” could be erroneously triggered by technical, unintentional or unknown violations in an individual’s SEVIS records. We are also concerned that the proposed policy can be applied retroactively, and that an ambiguous or inconsistent regulatory interpretation may bar a student from the U.S. for up to 10 years without the ability to cure the mistake or challenge the finding. This would have very far-reaching impacts on the higher education community as well as the United States’ ability to attract students, scholars, scientists and researchers to our campuses.


As a legal matter, this new interpretation of “unlawful presence” suggested by the agency is directly inconsistent with statutory language. The Immigration and Nationality Act (INA) contains no language suggesting that “failure to maintain status,” a term used frequently throughout the statute, is equivalent to “unlawful presence,” a term used in the Act only for the purpose of creating bars to inadmissibility. Congress has been very clear that “maintenance of status” relates to F, M, and J visas while “unlawful presence” is a wholly distinct concept inapplicable to these visa categories. In enacting the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Congress overhauled the enforcement provisions of the INA while retaining or adding references to “maintenance of status.” In doing so, Congress clearly chose *not* to use the phrase “unlawful presence” relative to F, M, and J visas rather retaining the use of “maintenance of status” with the intent of keeping distinct definitions that the policy memorandum would eliminate.

In IIRIRA, Congress left the harshest statutory penalties for unlawful presence – three year and ten year bars for admission to the United States. There is no mechanism for exceptions or waivers once an individual is subject to one of these bars. Elsewhere, Congress established other penalties, including removal from the United States or ineligibility for lawful permanent resident status, for failure to maintain status - but allowed some exceptions and waivers in those situations, although extremely limited. The statutory scheme quite simply does not permit a reasonable reading that conflates unlawful presence and maintenance of status.

Moreover, we are deeply troubled with the manner in which USCIS announced this proposed change, without an official regulatory notice in the Federal Register for public comment. The U.S. higher education and research communities have long enjoyed constructive partnerships with the State Department and Department of Homeland Security in support of national security. We urge DHS to engage the higher education community and other stakeholders through the standard rulemaking process as required under the Administrative Procedures Act before implementing such a drastic shift in policy.

We are eager to work with USCIS and other federal agencies to address any concerns regarding student visa overstays to ensure the protection of our national security while upholding our nation’s values and interests. Please do not hesitate to reach out to Hanan Saab at hsaab@aplu.org if we can be helpful as you consider our concerns.

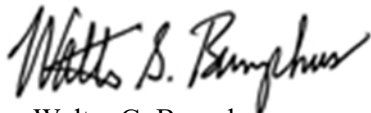
Sincerely,



Peter McPherson
President
Association of Public and Land-grant
Universities



Mary Sue Coleman
President
Association of American Universities



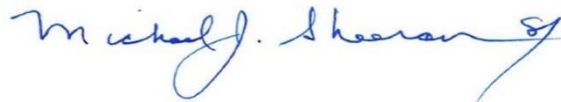
Walter G. Bumphus
President
American Association of Community Colleges



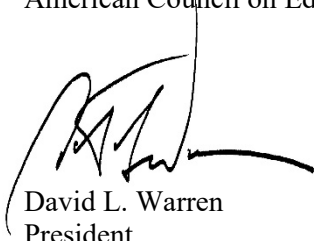
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