June 11, 2018

Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of the Director
20 Massachusetts Avenue, NW
Washington, DC 20529-2140

Submitted via email: publicengagementfeedback@uscis.dhs.gov

Re: USCIS Policy Memorandum: Accrual of Unlawful Presence and F, J, and M Nonimmigrants

Dear Madam or Sir:

The American Immigration Lawyers Association (AILA) and the American Immigration Council (Immigration Council) respectfully submit the following comments in response to the USCIS Memorandum, "Accrual of Unlawful Presence and F, J, and M Nonimmigrants," posted on the USCIS website on May 11, 2017.[1]

Established in 1946, AILA is a voluntary bar association of more than 15,000 attorneys and law professors practicing, researching and teaching in the field of immigration and nationality law. Our mission includes the advancement of the law pertaining to immigration and nationality and the facilitation of justice in the field. AILA members regularly advise and represent businesses, U.S. citizens, U.S. lawful permanent residents, and foreign nationals regarding the application and interpretation of U.S. immigration laws.

The American Immigration Council is a non-profit organization established to increase public understanding of immigration law and policy, advocate for the fair and just administration of our immigration laws, protect the legal rights of noncitizens, and educate the public about the enduring contributions of America's immigrants. In addition, through its work on the economic benefits of immigration reform, the Immigration Council has helped to establish baseline standards for understanding the important role immigration plays in shaping and driving a twenty-first century American economy.

A. Background and Overview of Historical Interpretation of Unlawful Presence

"Unlawful presence" is a legal term defined under section 212(a)(9)(B)(ii) of the Immigration and Nationality Act (INA). The term refers to an individual who "is present in the United States after expiration of the period of stay authorized by the Attorney General or is present in the United States without being admitted or paroled." Under INA §212(a)(9)(B), a person who has been unlawfully

[1] PM 602-1060, "Accrual of Unlawful Presence and F, J, and M Nonimmigrants," (May 10, 2018) *available at* https://www.uscis.gov/sites/default/files/USCIS/Outreach/Draft%20Memorandum%20for%20Comment/AccrualofUnlawfulPresenceFJMNonimmigrantsMEMO_v2.pdf

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present for more than 180 days but less than one year and who departs the United States is barred from returning for three years. A person who departs after having been unlawfully present for more than one year is barred for ten years. Created by Congress with the enactment of the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA), the unlawful presence provisions took effect on April 1, 1997.[2]

In recognition of the fluidity of academic programs, F, M, and J nonimmigrants are not admitted to the U.S. until a date-certain. Instead, they are admitted for "duration of status," or "D/S," which means the student or exchange visitor can remain in the United States as long as he or she maintains nonimmigrant status. This generally means the individual must maintain a full course of study or remain in the exchange program, not engage in unauthorized employment or other unauthorized activities, and complete the academic or exchange program in a timely manner or obtain an extension.

Because international students are not admitted until a date-certain, legacy Immigration and Naturalization Service (INS) and USCIS have interpreted the statutory unlawful presence provisions to require notice of a status violation to individuals admitted for "D/S" before the unlawful presence clock will start. Such notice is provided in the context of the adjudication of a request for an immigration benefit by USCIS or a determination of a status violation by an immigration judge. Beginning in 1997, this interpretation was commemorated in a series of USCIS guidance documents and was most recently reiterated in the May 6, 2009 "Consolidation of Guidance Concerning Unlawful Presence for Purposes of Sections 212(a)(9)(B)(i) and 212(a)(9)(C)(i)(I) of the Act."[3] The 2009 guidance emphasizes that "the accrual of unlawful presence neither begins on the date that a status violation occurs, nor on the day on which removal proceedings are initiated."[4] Further, Chapter 40.9.2(a)(2) of the Adjudicator's Field Manual (AFM) makes it clear that "to understand the operation of sections 212(a)(9)(B) and 212(a)(9)(C)(i)(l) of the Act, it is important to comprehend the difference between being in an unlawful immigration status and the accrual of unlawful presence…. Although these concepts are related … they are not the same."

B. Summary of USCIS's New Interpretation of Unlawful Presence

As described in the May 11, 2018 memorandum (hereinafter "2018 memorandum" or "memo"), USCIS will now deem unlawful presence to have started accruing for F, M, and J nonimmigrants as of the day after the date that a status violation occurs, thus removing the critical procedural safeguard of providing notice to affected individuals that may find themselves subject to the three- and ten-year bars to admissibility. For status violations found to have occurred on or before August 9, 2018, the effective date of the memo, unlawful presence will be calculated beginning August 10, 2018, if not accrued earlier.

When assessing whether a status violation has occurred, the memo states that adjudicators are to consider: (1) information contained in systems available to USCIS; (2) information contained in the individual's "A file;" and (3) information obtained through a Request for Evidence (RFE) or Notice of Intent to Deny (NOID). Moreover, the memo states that while the status of the spouse and children of an F, J, or M nonimmigrant is contingent on the status of the principal nonimmigrant, the period of stay authorized for a dependent spouse or child may also end due to their own conduct or circumstances.

[2] Div. C of Pub. Law No. 104-208 (Sept. 30, 1996).
[3] *See* http://www.aila.org/infonet/uscis-consolidation-guidance-unlawful-presence.
[4] *Id*. at 25.

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After more than 20 years of consistent interpretation that recognizes the principle of fundamental fairness and provides certainty in determining when unlawful presence begins to accrue, USCIS is abruptly changing course and conflating the two distinct legal concepts of "status violation" and "unlawful presence." There is no doubt that this new approach to interpreting unlawful presence will have a significant negative impact on the student, vocational, and exchange visitor communities, and will further erode foreign student enrollments in U.S. colleges and universities. Moreover, for the reasons described below, we submit that the 2018 memorandum is an unlawful interpretation of the statutory unlawful presence provisions and cannot stand.

C. The 2018 Memorandum Conflicts with the Unlawful Presence Statute, which is Clear on its Face

The 2018 memorandum conflicts with the unambiguous language of the INA. In 1996, Congress created the new concept of unlawful presence, clearly stating that a person is "unlawfully present" if he or she "is present in the United States after the expiration of the period of stay authorized by the Attorney General or is present in the United States without being admitted or paroled."[5] Thus, equating unlawful presence with a status violation is contrary to Congress' clearly expressed intent. Moreover, principles of statutory construction confirm that Congress never intended such an interpretation, as the new unlawful presence provisions were incorporated into the INA without any modification to the numerous provisions that penalize a person for a "status violation" or "failure to maintain status." For example:

- **INA §212(a)(6)(G):** Renders a noncitizen who "violates a term or condition" of an F-1 student visa inadmissible until the noncitizen has been outside of the United States for a continuous period of five years after the violation.
- **INA §237(a)(1)(C)(i)**: Renders a noncitizen deportable if he or she has "failed to maintain the nonimmigrant status in which [he or she] was admitted ... or to comply with the conditions of any such status."
- **INA §245(c)(2)**: Renders a noncitizen ineligible for §245 adjustment of status if the noncitizen engages in unauthorized employment, "is in unlawful immigration status," or "has failed ... to maintain continuously a lawful status since entry into the United States."
- **INA §245(c)(7)**: Renders a noncitizen ineligible for §203(b) adjustment of status who is "not in a lawful nonimmigrant status."
- **INA §245(c)(8)**: Renders a noncitizen ineligible for §245 adjustment of status who "has otherwise violated the terms of a nonimmigrant visa."
- **INA §245(k)**: Includes, as part of its eligibility requirements, that an individual not "fail[] to maintain, continuously, a lawful status."

Other statutory provisions confirm that Congress intended the two concepts to remain distinct. For example, adjustment of status under INA §245A(a)(2) requires: (1) entry before January 1, 1982; (2) continuous residence in unlawful status since such date; and (3) that the period of authorized stay expired before January 1, 1982, or that the government knew of the unlawful status. The third prong makes it clear that expiration of a period of authorized stay and "unlawful status" of which the

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[5] INA §212(a)(9)(B)(ii).

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government is aware are different concepts. Otherwise, adopting an interpretation in line with the 2018 memorandum, individuals who violated the terms of their status would automatically be deemed outside the "period of authorized stay" and the purposeful distinction noted in prong (3) would be irrelevant.[6]

In addition, the unlawful presence statute itself distinguishes between "unlawful presence" and "status" in INA §212(a)(9)(B)(iv)(II). That section states that the accrual of unlawful presence is tolled for an individual who "has filed a nonfrivolous application for a change or extension of *status* before the date of expiration of the period of stay authorized by the Attorney General …." (Emphasis added). By using the terms "status" and "unlawful presence" in this way, Congress evinced that these are separate legal concepts with distinct legal consequences.

As explained by the Supreme Court, "it is a normal rule of statutory construction that identical words used in different parts of the same act are intended to have the same meaning."[7] "A statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant."[8] Any interpretation of "unlawful presence" or "expiration of the period of authorized stay" that is conflated with a "status violation" or "failure to maintain status" would render sections of the INA superfluous.

When it intends to penalize a failure to maintain status or status violation, Congress has made that intention clear by the plain language of the statute. Section 212(a)(9)(B) of the INA makes no reference to these terms or concepts. Where "one interpretation of a statute or regulation obviously could have been conveyed more clearly with different phrasing, the fact that the authors eschewed that phrasing suggests ... that they in fact intended a different interpretation."[9] Therefore, the 2018 memorandum, which folds the concept of a status violation into the definition of unlawful presence, is contrary to the plain language of the statute and the unambiguous intention of Congress in its adoption of INA §212(a)(9)(B).

D. Assuming without Conceding that the Statute is Ambiguous, the Memorandum Is Not Entitled to Deference

Because there is no ambiguity in the statute, the law is applied as written and the 2018 memorandum receives no deference under *Chevron, U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*[10] Assuming only for argument's sake that an ambiguity exists, the guidance – which was not issued through the formal rulemaking process – would at most be afforded deference under *Skidmore v. Swift & Co*. but here too, that fails.[11] Deference under *Skidmore* depends on "the thoroughness evident in [the agency's] consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control."[12] Based on flawed and inconsistent reasoning, the 2018 memorandum reverses the agency's long-standing interpretation of unlawful presence without adequate justification, is not designed to achieve its stated goals, and cannot stand.

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[6] *See also* 8 USC §1365(b)(2), which similarly distinguishes between the expiration of a period of authorized stay and unlawful status known to the government.
[7] *Taniguchi v. Kan Pacific Saipan, Ltd.*, 566 U.S. 560, 571 (2012) (internal citations omitted).
[8] *Corley v. United States*, 556 U.S. 303, 314 (2009) (internal citations omitted).
[9] *Gerbier v. Holmes*, 280 F.3d 297, 309 (3d Cir. 2002) (quoting *United States v. Ibarra-Galindo*, 206 F.3d 1337, 1339 (9th Cir. 2000) (overruled on other grounds)).
[10] 467 U.S. 837, 842-43 (1984).
[11] 323 U.S. 134, 140 (1944).
[12] *Id* at 140.

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Skidmore instructs us to consider the agency's "consistency with earlier and later pronouncements." As noted above, the 2018 memorandum represents a significant departure from more than 20 years of a single, unified approach to unlawful presence for F, J, and M nonimmigrants. In evaluating "the thoroughness evident in [the agency's] consideration [and] the validity of its reasoning," we address each of the points USCIS makes to justify the change in unlawful presence interpretation.

First, USCIS states that "the former INS policy, as consolidated in the AFM, went into effect in 1997, prior to the creation of some of the technologies and systems currently used by DHS to monitor nonimmigrants … in F, J, or M status."[13] More specifically, it notes that "since the creation of the policy, the Student and Exchange Visitor Information System (SEVIS) … has provided USCIS officers additional information on an alien's immigration history."[14] However, SEVIS went into effect in 2003. Although this was six years after INA §212(a)(9)(B) took effect in 1997, it was also six years *before* the 2009 consolidated guidance reaffirmed USCIS's long-standing interpretation of unlawful presence. Moreover, as acknowledged by SEVIS itself, the accuracy and integrity of SEVIS data is flawed,[15] and "[i[Inaccurate data can affect the status of the student's SEVIS record and put the student's eligibility for benefits at risk."[16]

Second, USCIS claims that the purpose of the new policy is to "reduce the number of overstays."[17] However, this is not borne out by the policy itself, which provides no instructions or guidance on preventing overstays, such as notifying students and exchange visitors in advance of the end of their program. Instead, the memorandum introduces a "gotcha" approach, instructing adjudicators to search records for perceived status violations and retroactively calculate periods of unlawful presence without notice. Far from reducing the number of overstays, the memorandum expands the very definition of what constitutes an overstay – something the agency has no legal authority to do. The approach to unlawful presence described in the memo does nothing to advance this stated purpose.

In support of this stated goal, USCIS cites the DHS Fiscal Year 2016 Entry/Exit Overstay Report,[18] which notes that for FY 2016, "the estimated overstay rate was 6.19 percent for F nonimmigrants, 3.80 percent for J nonimmigrants, and 11.60 percent for M nonimmigrants."[19] However, the figures cited by USCIS include "out-of-country" overstays, or individuals whose departure was recorded after their lawful period of admission expired. This could easily encompass individuals who stayed just a few days longer than the conclusion of their program to tie up their personal affairs and is not a true representation of the "overstay" population with which the administration is concerned. The "suspected in-country" overstay rate (individuals for whom no departure has been recorded) is in fact much lower than the figures cited by USCIS: 2.99 percent for F nonimmigrants, 2.94 percent for M nonimmigrants, and 2.42 percent for J nonimmigrants. In addition, as noted in the Executive Summary, determining lawful status is not a straightforward analysis:

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[13] PM-602-1060 at 2.
[14] *Id.*
[15] *See* https://www.ice.gov/sevis/data-integrity.
[16] https://studyinthestates.dhs.gov/2016/06/maintaining-accurate-sevis-records-when-to-request-a-correction-or-data-fix
[17] PM-602-1060 at 2.
[18] *See* https://www.dhs.gov/sites/default/files/publications/Entry%20and%20Exit%20Overstay%20Report%2C%20Fiscal%20Year%202016.pdf
[19] PM-602-1060 at 2.

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> … [D]etermining lawful status is more complicated than solely matching entry and exit data. For example, a person may receive from CBP a six-month admission upon entry, and then he or she may subsequently receive from U.S. Citizenship and Immigration Services (USCIS) a six-month extension. **Identifying extensions, changes, or adjustments of status is necessary to determine whether a person is truly an overstay**.

In addition:

> Valid periods of admission to the United States vary; therefore**, it was necessary to establish "cutoff dates" for the purposes of a written report**. Unless otherwise noted, the tables accompanying this report refer to departures that were expected to occur between October 1, 2015 and September 30, 2016….[20]

In other words, due to limitations associated with producing a written report, DHS acknowledges that the "overstay" data in the report includes some individuals who were later granted permission to remain beyond their initial period of authorized stay. The fact that this data was inflated is confirmed by the fact that four months after the "cutoff dates," the number of overstays substantially decreased:

> Due to continuing departures and adjustments in status by individuals in this population, by January 10, 2017, the number of Suspected In-Country Overstays for FY 2016 decreased to 544,676, rendering the Suspected In-Country Overstay rate as 1.07 percent. **In other words, as of January 10, 2017, DHS has been able to confirm the departures or adjustment in status of more than 98.90 percent of nonimmigrant visitors scheduled to depart in FY 2016 via air and sea POEs, and that number continues to grow.**[21]

The report also concedes to other factors limiting its accuracy, such as its reliance on information from the Arrival and Departure Information System (ADIS). ADIS has limited capacity to record exits and entries made via land and makes no distinction of those who overstay one day versus one year or longer.[22] Yet this is a significant difference, as a one-day overstay may be the result of a person missing their flight or sustaining an injury that renders them unable to travel.

Lastly, USCIS states that the new memo will "improve" how USCIS implements the unlawful presence ground of inadmissibility but fails to offer any reason or explanation as to how the new memo will accomplish that. In sum, USCIS has clearly failed to thoroughly consider the implications of its new unlawful presence interpretation, failed to adequately justify a need for the change, and has cited no concrete authorities to support its stated goals. The memorandum cannot stand under *Skidmore* deference.

E. The Memorandum Is a Legislative Rule that Requires Notice and Comment Rulemaking under the Administrative Procedure Act (APA)

The Administrative Procedure Act (APA) recognizes two types of administrative rules: legislative rules issued through formal notice and comment rulemaking, which are given the full force and effect of law, and interpretive rules designed to advise the public of agency interpretation of a legal rule. Interpretive rules do not require notice and comment and lack the force of law.[23] While the 2018

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[20] *Id*. (emphasis added).
[21] *Id*. (emphasis added).
[22] *Id*.
[23] *See Perez v. Mortg. Bankers Ass'n*, 135 S. Ct. 1199, 1200-01 (2015).

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memorandum purports to merely advise the public of how the term "unlawful presence" is to be interpreted, that conclusion is neither factually correct nor legally supported.

As noted above, over the course of two decades, USCIS has stood by its 1997 interpretation of unlawful presence, reiterating it most recently in 2009 when it undertook a comprehensive review of its various memoranda and case law on unlawful presence and issued consolidated guidance that ultimately became chapter 40.9.2 of the AFM. While we maintain that the 2018 memorandum, which erases the distinction between the concepts of "unlawful presence" and "violation of status" is unlawful, the APA requires USCIS to give the public advance notice and an opportunity to comment through formal rulemaking before attempting to impose what constitutes a change in how the law will be applied in the future.

While the courts have not developed a unified approach to evaluating whether a rule is legislative or interpretive, the reasoning of various decisions is instructive. Employing textual analysis, the Ninth Circuit has held that legislative rules "are those which effect a change in existing law or policy."[24] Another critical characteristic of legislative rules is that they have general application.[25] Conversely, "interpretive rules are those which merely clarify or explain existing law or regulations."[26] While a legislative rule is a broad wholesale change in interpretation and application of law, interpretive rules are used more for "discretionary fine-tuning than for general law-making."[27] For example, in *Jean v. Nelson,* the Eleventh Circuit considered whether a blanket change in how INS treated arriving aliens [detention (new) vs. parole (old)] was a legislative or interpretive rule.[28] The court found that even though parole was still a discretionary option, the rule was legislative because it had general applicability, and did more than just clarify or explain an existing rule.[29] Because the rule created an entirely new procedure for all cases, notice and comment rulemaking was required.[30] Similar analytical approaches are found in *N.H. Hosp. Ass'n v. Azar,*[31] and *Dia Navigation Corp. Ltd. v. Pomeroy.*[32]

Applying this analysis, the 2018 memorandum is a legislative rule because it changes the manner in which unlawful presence is determined for all F, J, and M nonimmigrants who have been admitted "D/S" and is therefore of general applicability. It will result in future enforcement actions against persons under facts and circumstances that did not previously result in enforcement actions, thus doing far more than merely "explaining" an existing policy. Finally, it is a 180-degree change in the manner in which USCIS treats persons admitted for the duration of their status by conflating the fact (or even potential fact) of a status violation with the beginning of a period of unlawful presence.

F. USCIS Has Failed to Articulate a Satisfactory Explanation for its New Approach to Unlawful Presence as Required by *Encino Motorcars*

In *Encino Motorcars, LLC v. Navarro*, the U.S. Supreme Court reaffirmed several longstanding rules of administrative rulemaking, including the basic procedural tenet that agencies must give adequate

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[24] *Alcaraz v. Block,* 746 F.2d 593, 613 (9th Cir. 1984).
[25] *Flagstaff Med. Ctr. v. Sullivan,* 962 F.2d 879, 886 (9th Cir. 1992).
[26] *Alcaraz*, 746 F.3d at 613; *Hoctor v. USDA*, 82 F.3d 165, 170-71 (7th Cir. 1996).
[27] *Alcaraz,* Id. at 613.
[28] 711 F.2d 1455 (11th Cir. 1983), *vacated in part as moot*, 727 F.2d 957 (11th Cir. 1984) (new regulations issued).
[29] 711 F.2d at 1476, 1478.
[30] *Id*. at 1478.
[31] 887 F.3d 62, 72-73 (1st Cir. 2018).
[32] 34 F.3d 1255 (3d Cir. 1994).

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reasons for their decisions.[33] Citing *Motor Vehicle Mfrs. Assn. of United States v. State Farm Mut. Automobile Ins. Co*. (*MVMA*), the Court stated that an agency "must examine the relevant data and articulate a satisfactory explanation for its actions including a rational connection between the facts found and the choice made."[34] That requirement is satisfied when the agency's explanation is clear enough that its "path may reasonably be discerned."[35] In explaining its changed position, an agency must also be cognizant that longstanding policies may have engendered serious reliance interests that must be taken into account.[36] When an agency fails to provide even that level of minimal analysis, its actions are arbitrary and capricious and cannot carry the force of law.[37]

As described in Part D, *supra*, and Part G, *infra*, the change in unlawful presence interpretation articulated in the 2018 memorandum is not supported by a reasoned explanation, eliminates a critical notice element, and fails to take into consideration fundamental fairness and due process requirements, as well as the reliance interests of the regulated public that have built up over the past two decades. For all of these reasons, the 2018 memorandum is an arbitrary and capricious change in interpretation that cannot stand.

G. The 2018 Memorandum Raises Significant Due Process and Fundamental Fairness Concerns and is Constitutionally Suspect

Unlike foreign nationals who are admitted until a "date certain," and will trigger unlawful presence if they remain in the U.S. beyond the date recorded on Form I-94 (or recorded in CBP electronic systems), plus any extension thereafter granted, students and exchange visitors that are admitted for "D/S" lack the benefit of such a bright-line test. As a result, legacy INS and USCIS created a different bright-line standard, one that incorporates the principle of fundamental fairness: formal notification by USCIS or an immigration judge that a status violation occurred before the unlawful presence clock can start. The exceedingly harsh penalties associated with unlawful presence, and the clear distinctions Congress created between the concepts of unlawful presence and status violation, have informed more than 20 years of policy, which ascribes caution to calculating unlawful presence.

The new memorandum throws caution to the wind. The government's new interpretation of unlawful presence raises serious due process concerns and is unfair and unworkable in its application. Since 1997, the Service has interpreted INA §212(a)(9)(B) as requiring some form of notice to individuals for unlawful presence to accrue. Under the 2018 memorandum, while the government's finding that an F, M, or J nonimmigrant has violated status would still typically occur in the course of a USCIS benefits adjudication, the date on which unlawful presence will accrue is imposed retroactively. The 2018 memorandum instructs adjudicators to consider information in the systems available to USCIS, in the alien's record, and alien's admissions regarding his or her immigration history or other information discovered during the adjudication," but provides no limitation as to how far back adjudicators may reach, such that a student or exchange visitor may abruptly learn that he or she has been unlawfully present for several years.[38] Moreover, the memo states that "an F-2, J-2, or M-2 nonimmigrant's period of stay authorized ends when the F-1, J-1, or M-1 nonimmigrant's period of stay authorized ends." This means that a spouse may find out only many years after the fact that they too accrued unlawful presence.[39]

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[33] 136 S. Ct. 2117, 2125 (2016).
[34] 463 U.S. 29, 43 (1983).
[35] *Bowman Transp., Inc. v. Arkansas-Best Freight System, Inc*., 419 U.S. 281, 286 (1974).
[36] *Encino Motorcars*, 136 S. Ct. at 2126; *Perez*, 135 S. Ct. at 1209.
[37] *See* 5 U.S.C. § 706(2)(A); *MVMA*, 463 U.S. at 42-43.
[38] PM-602-1060 at 4 n.12.
[39] *Id*. at 5.

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The regulation at 8 CFR §214.2(f)(5)-(6) articulates the circumstances in which an F-1 student is deemed to be "out of status." F-1 students who work without authorization, who are deemed to not be pursuing a full course of study, who transfer to another school without permission, and who fail to complete a full course of study are deemed to be "out of status." However, F-1 students are subject to additional reporting requirements that may constitute a status violation if not completed timely. These reporting requirements include: reporting biographical information to a Designated School Official (DSO) every six months during a STEM OPT extension;[40] and completing an annual self-evaluation report that is signed by the employer and submitted to the DSO within 1 year and 10 days of the validity period on the Employment Authorization Document, as well as a final evaluation within 10 days of the conclusion of the 24-month period of STEM OPT.[41] Additionally, employers of STEM OPT students are required to report absences to the DSO; and any material change in a STEM OPT training plan must be reported to the DSO by the student after having the employer sign a new training plan.[42] USCIS has not articulated whether the failure to undertake any of these actions would trigger the accrual of unlawful presence. The 2018 memorandum makes no distinction between minor technical violations (e.g. reporting a change in employment a few days late) versus a major violation (dropping all classes without authorization).

In practice, this policy will create a large class of inadmissible aliens who have received no notice of their unlawful presence because in many cases, F, M, and J nonimmigrants have no knowledge that a status violation has even occurred. In addition, a significant number of individuals will only become aware of a status violation when it is too late to correct course and they find themselves subject to a three- or ten-year bar to admissibility. Under the new memo, accidental and inadvertent status violations will subject unsuspecting individuals who have not acted in bad faith to extreme penalties. Examples of situations where students or exchange visitors may be found to have inadvertently violated their status include:

1. **Inadvertently Engaging in Unauthorized Employment**. While 8 CFR §214.2(f)(9) clearly states that a student may work on campus for up to 20 hours per week and requires authorization in the form of curricular or optional practical training to work off-campus in certain circumstances, there is no clear guidance on what constitutes "employment." A student may believe that off-campus volunteer work is not unauthorized "employment" even though it is possible that the Service could view it as such, particularly if it involves activities that normally would be compensated. Other activities that are not clearly defined include working for and being paid by an overseas entity while physically present in the U.S.; selling something on eBay; selling personally created art work or photography; getting paid for publication of one's dissertation; getting paid to host a seminar or speak at an academic conference or event; getting paid a royalty for activities associated with research, etc.

2. **Practical Training Issues**. Issues may also arise when a student on OPT drops below 20 hours of work one week, starts a degree program while on OPT, or works just a few days or one week beyond CPT.

3. **Inadvertently Violating Status by Following the Advice of a School or Designated School Official (DSO)**. A school may err in advising a student, leading to an accidental status violation through no fault of the student. For example, a school may incorrectly advise a student as to the number of hours that he or she may work on campus, or incorrectly advise

[40] 8 CFR §214.2(f)(12).
[41] 8 CFR §214.2(f)(10)(ii)(C)(9)(i).
[42] 8 CFR §214.2(f)(10)(ii)(C)(6); and 8 CFR §214.2(f)(10)(ii)(C)(9)(ii).

a student to drop a class that causes the student to fall below a full course of study. A DSO may grant a reduced course load authorization in good faith, but SEVP or USCIS may later determine this authorization should not have been granted. Further, a program administrator may send a J-1 student physician to a training location that has not been approved or may improperly advise a student physician that he or she may moonlight doing non-GME work within the same training hospital.

4. **Extraordinary Circumstances Beyond One's Control**. Extraordinary circumstances can also cause a student or exchange visitor to unintentionally violate status. For example, in May 2018, an F-1 student on OPT was walking down the sidewalk in Denver when a car hit him and pinned him to a tree. His leg had to be amputated.[43] Under 8 CFR §214.2(f)(10)(ii)(E), he will be out of status as soon as he is unemployed for 90 days. If he is hospitalized for more than 180 days after the effective date of the new policy and after he falls out of status through no fault of his own, he will be subject to the three-year bar when he departs. Additionally, USCIS has never issued clear guidelines on maintaining status when on maternity leave.

5. **Dependents May Be Unlawfully Present Without Knowing It**. Since the status of dependents of F-1, J-1 and M-1 nonimmigrants depends upon the principal nonimmigrant maintaining his or her status, those family members (with the exception of children under the age of 18, who are statutorily exempt from accruing unlawful presence) would be out of status and unlawfully present upon a violation of the principal's status. Thus, a spouse who is unaware of a principal's status violation would become subject to serious immigration penalties without even knowing it. This could occur, for example, when the principal tries to hide his or her failure at school from an unknowing spouse or in an abusive situation.

By collapsing the distinction between "unlawful presence" and "status violation" and deeming unlawful presence to accrue retroactively, the 2018 memorandum removes the important procedural safeguard of notice to individuals that they may be deprived of a liberty interest. This lack of notice raises due process concerns. The Fifth Amendment's due process clause is a core concept in the Bill of Rights and requires all levels of American government to operate within the law, using procedures that are fundamentally fair. The core elements of due process are notice and a hearing before an impartial tribunal, which "minimize substantively unfair or mistaken deprivations" by providing individuals an opportunity to contest the basis on which the government seeks to deprive them of protected interests.[44] "An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections."[45]

The three- and ten-year bars to admissibility represent a deprivation of liberty, as subject individuals are barred from returning to the United States for a lengthy period of time. In *Kent v. Dulles*, the Supreme Court held that the right to travel is a "liberty" interest protected by the Fifth Amendment and that where governmental restrictions on travel are involved, the Court will construe narrowly all delegated powers that curtail or dilute them.[46] Moreover, the constitutional guarantee of due process is not limited to U.S. citizens but applies equally to all "persons" present in the United States, regardless of alienage or immigration status.[47]

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[43] http://kdvr.com/2018/05/03/25-year-old-man-sedated-and-on-ventilator-following-crash-in-lone-tree/
[44] *Fuentes v. Shevin*, 407 U.S. 67, 81 (1972).
[45] *Mullane v. Central Hanover Bank & Trust Co*., 339 U.S. 306, 314 (1950).
[46] 357 U.S. 116 (1958).
[47] *Plyler v. Doe*, 457 U.S. 202 (1982).

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The Supreme Court has held that in applying the Fifth Amendment's due process guarantee, one must balance the private interests of affected individuals with the government's interest. In *Mathews v. Eldridge*, the Court indicated that the identification of the specific dictates of due process generally requires consideration of three distinct factors:

> [F]irst, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and, finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.[48]

Applying the *Eldridge* test to the aforementioned examples of cases where students may inadvertently violate their status illustrates the problems inherent in the new interpretation of unlawful presence. Take, for example, a student who inadvertently violates F-1 status by engaging in activities later deemed to have constituted unauthorized "employment." First, the student has a private interest that will be affected by the application of the new policy to his case, given that he will likely have accrued sufficient unlawful presence at the time the determination is made to trigger a three- or ten-year bar upon departure from the United States. Second, the lack of legal guidance on what constitutes "employment" creates a significant likelihood of an erroneous deprivation, and the additional procedural safeguards, which previously existed in the form of notice before deeming the accrual of unlawful presence to have commenced, no longer exist. Third, although the government may have a compelling interest in enforcing the immigration laws and in implementing policies to minimize overstays, the policy at issue in this case does nothing to further that interest. As outlined above, the 2018 memorandum will severely penalize individuals for status violations that were unintentional and of which they were likely unaware until it is too late. It is precisely this risk of the erroneous deprivation of a liberty interest that is at stake in application of the 2018 memorandum. This new approach to unlawful presence is devoid of fundamental fairness and is constitutionally suspect.

H. Conclusion

For these reasons, we urge USCIS to abandon this misguided directive and to maintain the unlawful presence guidance that has been in place for decades. It is critical that USCIS ensure that fundamental fairness is a critical component in interpreting and implementing the unlawful presence statute.

Sincerely,

THE AMERICAN IMMIGRATION LAWYERS ASSOCIATION
THE AMERICAN IMMIGRATION COUNCIL

[48] 424 U.S. 319, 335 (1976).

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