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DHS Commits Regulatory Overreach by Often Relaxing Work Authorization for Foreign Students Due to "Severe Economic Hardship"

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KEY TAKEAWAYS

Congress is responsible for setting immigration numbers and conditions through legislation; it has allowed the executive branch to absorb much of this power.

The Biden Administration is abusing this discretion, not least in regularly allowing students to work, instead of study, based on inconsistent standards.

Congress needs to re-establish its oversight and authority over the conditions under which foreign students can enter and remain in the country.

Under section 101(a)(15)(F) of the Immigration and Nationality Act (INA), a student is "an alien having a residence in a foreign country which he has no intention of abandoning, who is a bona fide student qualified to pursue a full course of study and who seeks to enter the United States temporarily and *solely for the purpose* of pursuing...a course of study."[1] (Emphasis added.) Despite the lack of any express authorization from Congress, the Department of Justice and its heir in immigration matters, the Department of Homeland Security (DHS),[2] allow—by regulation—foreign students in the U.S. to work while here on an F-1 student visa, thus departing from the intended and stated purpose of the F-1 visa—being a full-time student in the U.S. and returning home once studies have ended.

In 1998, the Justice Department subsequently expanded foreign students' work authorization, again via regulation, to allow some students to work even more hours, while reducing their study course load due to "severe economic hardship" for the purposes of paying their school fees and supporting themselves while living in the U.S. Per the regulation, though the statute is silent, the Secretary of Homeland Security may "suspend the applicability of any or all of the requirements" for work authorization, including allowing work before students have completed one full academic year, reducing their required course-load by up to half, and allowing them to work full time.

For comparison, during the Trump Administration, DHS used this "suspension of regulatory requirements" for "severe economic hardship" twice, to renew the status for Syrian and Nepali students. In just 18 months of the Biden Administration, DHS has used it 12 times, encompassing a total of more than 20,000 students. The administrative state should not be setting policy for foreign students in this manner. It is time for Congress to reclaim its authority over the conditions under which foreign students can enter and remain in the country.

Regulation, Not Statute, Allows Students to Work

The foreign student (F-1) visa is one of the most common types of visas that the U.S. government issues. U.S. embassies and consulates worldwide issued just under 380,000 student visas in fiscal year (FY) 2021,[3] only 8,000 fewer than in 2019. Unlike other categories of non-immigrant (temporary) visas, the U.S. prioritized students even amidst COVID-19 shutdowns, so numbers did not decline drastically.[4]

The Immigration and Nationality Act is silent on whether students can work, although in other visa categories Congress has clearly stated that "the Attorney General [Secretary] shall authorize the alien to engage in employment."[5] This wording is used, for example, to expressly grant permission to work to "V" visa holders[6] and to spouses of L-1 visa holders.[7] Thus, Congress has made choices to grant work authorizations in some cases but not all, and it is Congress that should exercise such authority rather than the administrative state.

Under current regulations, and without authority from Congress, foreign students who are in the U.S. on F-1 visas are allowed to work[8] on campus up to 20 hours a week if they are taking a full course of study, and longer on vacations. After their first full academic year, students can apply for permission to work off campus.[9] Students must demonstrate in the application, which must be approved in the Immigration and Customs Enforcement's

Student and Exchange Visitor Information System (SEVIS) by a Designated School Official (DSO), that they have had F-1 status for one full academic year, are a student in good standing, and carry a full course of study. The student must also demonstrate that acceptance of employment will not interfere with that full course of study.

Suspension of Requirements Based on "Severe Economic Hardship"

The original "severe economic hardship" exception was created by regulation in June 1998 in response to the Asian financial crisis of 1997.[10] The Immigration and Naturalization Service (INS) Commissioner at the time considered that students "from Indonesia, South Korea, Malaysia, Thailand, or the Philippines" were "experiencing severe economic hardship due to the rapid devaluation of their currencies against the United States dollar and the consequent reduction in financial support."[11]

Under this exception, the INS, then DHS, could "temporarily suspend the application of certain requirements governing on-campus and off-campus employment for F1 non-immigrant students" based on "severe economic hardship caused by unforeseen circumstances beyond the student's control."[12] Students seeking to work longer hours, and study fewer hours, under this authority are required to prove that it is necessary to "avoid severe economic hardship"[13] and, in general, that this hardship is "a direct result"[14] of the crisis or adverse conditions in their home country.[15]

DHS allows individual economic-hardship applications from nationals of particular countries, based on its blanket designation of those countries as facing economic, social, and political disruptions. There is no statutory or regulatory definition of which countries would qualify for such a designation, and the language that describes these conditions is not consistent across the 12 designations made since January 2021. DHS's assessment appears to be based largely on subjective State Department reporting on country conditions.

U.S. Citizenship and Immigration Services breaks down its data[16] for "Applications for Employment Authorization": by "Asylum," "Adjustment of Status," "DACA,"[17] and "All Other."[18] "Severe economic hardship" applications would fall in the latter catch-all bucket, for which 8,940 applications were denied and 155,758 approved in the first quarter of FY 2022. At that time, 563,933 applications were pending adjudication.

The latest country for which DHS Secretary Alejandro Mayorkas suspended certain regulatory requirements for student work authorization (on

June 6, 2022) is Cameroon. The Department of State issued 367 F-1 visas in 2019 and 457 F-1 visas in 2021[19] to Cameroonian students.

Undermining the Integrity of the Student Visa Program

Student visas are an important tool of diplomacy and foreign relations. Underlying them is the assertion made by student applicants, and accepted by consular officers overseas, that the recipients will pursue a full course of study, that they can pay for it, and that, ostensibly, they will return to put their degrees to work in their home countries.[20] Applicants for student visas must convince consular officers that they have "sufficient funds to cover expenses" and "provide evidence that sufficient funds are, or will be, available to defray all expenses during the entire period of anticipated study."[21] Applicants may not rely on future permission to work to cover their costs. For that reason, the visa-refusal rate for students applying in countries with civil unrest or extreme social or economic disruption is higher than for students applying in more prosperous, stable countries. (Students who are citizens of countries at war or for other reasons lack any U.S. diplomatic presence can apply elsewhere. For instance, wealthy Yemenis and Ukrainians living in London or Dubai can apply there.)

Under another section of the Immigration and Nationality Act,[22] the DHS Secretary can designate nationals of a foreign country for Temporary Protected Status (TPS) based on war, natural disaster, or other emergency conditions that break out while those nationals are in the United States. Congress requires an annual report on TPS, and the latest report stated that "[a]t the close of Calendar Year (CY) 2021, there were approximately 429,630 TPS beneficiaries."[23] Congress expressly authorized TPS beneficiaries to work. Foreign students are not precluded from applying for TPS if their country has been designated for TPS.

With the existing regulatory authorization to work on campus part time, and the TPS program, what is the need for DHS to use this *additional* regulatory authority ("severe economic hardship") to allow students from certain countries to study less, work more, and delay their eventual return to their native countries when their education in the U.S. is complete? This policy overreach shows that the Administration should not set student visa terms and conditions via regulation, and that it is abusing the regulatory process.

Visa overstay rates[24] are one indicator of the political and economic strength of a country. While the overall student visa overstay rate in the U.S. in FY 2020 was slightly higher (2.71 percent) than the business/tourist visa overstay rate (2.55 percent), those percentages mask massive differences

TABLE 1

Lowered Requirements for Student Work

Under the Biden Administration, the Department of Homeland Security has temporarily lowered regulatory requirements for student work authorization for the following countries:

Country	End Date	Reason	Number of Students in U.S.
Afghanistan	Nov. 20, 2023	Current situation	368
Burma*	Nov. 25, 2022	Current crisis	1,634
Cameroon	Dec. 7, 2023	Current crisis	1,020
Haiti*	Feb. 3, 2023	Current crisis	1,083
Hong Kong	Feb. 5, 2023	Emergent circumstances	5,067
Somalia*	Mar. 17, 2023	Current crisis	76
South Sudan*	Nov. 3, 2023	Current humanitarian crisis	107
Sudan*	Oct. 19, 2023	Current crisis	324
Syria*	Sept. 30, 2022	Civil unrest	254
Ukraine	Oct. 19, 2023	Ongoing armed conflict	2,604
Venezuela*	Sept. 9, 2022	Humanitarian crisis	7,274
Yemen*	Mar. 3, 2023	Current crisis	309
Total			**20,120**

*Also have Temporary Protected Status (TPS).
SOURCE: Author's research based on government notices published on Regulations.gov.

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between countries of origin. Chinese students, with more than 91,000 student visas issued a year, had an overstay rate of only 1.89 percent, while visa overstays by students from many countries in Africa were well into double digits, such as Burundi (38.80 percent) and Eritrea (33.82 percent). Students from some countries, which DHS has *not* designated as "in crisis" for the purpose of allowing their students to apply for the suspension of work authorization requirements because of "severe economic hardship," have much higher overstay rates than students from countries that *are* so designated. For example, students from Benin (overstay rate of 26.55 percent) cannot apply under the "severe economic hardship" exception, whereas students from Cameroon (overstay rate of 21.71 percent) can. This calls into question DHS's inconsistent methodology and subjective application of the conditions under which it is prepared to suspend regulatory requirements for foreign students.

In addition, foreign students with F-1 visas are admitted into the U.S. without an "admit until" or end date in their passport, which other temporary visa holders receive. Instead, F-1 visa holders are admitted for a "duration of status,"[25] which is supposed to align with their course of study length. Without a final or specific end date for their stay in the U.S., students can and do abuse this vague permission and overstay the terms of their visa. By allowing students from "severe economic hardship" countries to work more and study less, DHS prolongs their period of study, further aggravating the duration of status issue.[26] The longer a temporary foreign student remains in the U.S., the more economic and personal ties the student develops here, which increases the likelihood the student will overstay the temporary student visa.

By suspending certain regulatory requirements for students to obtain work authorization using the "severe economic hardship" rubric, thus allowing them to study less and work more, even full time, DHS raises questions about the basis under which the State Department would issue such visas in affected countries. This situation calls for more explicit and timely coordination between the two agencies about future visa adjudications. Logically, once DHS designates a specific country as being in crisis, the State Department should suspend visa applications from that country, or at least scrutinize them with extra caution to "ensure that the student has sufficient funds to successfully study in the United States without being forced to resort to unauthorized employment."[27] No such explicit linkage between the DHS hardship designation and Department of State adjudication of visa applications exists.

During the Trump Administration, DHS used the authority under 8 CFR 214.2(f)(9)(ii)(C) to renew the suspension of requirements for students from Syria (originally granted in 2011) and Nepal (originally granted in 2015).

Under the Biden Administration, DHS has determined "severe economic hardship" for students from Venezuela in April 2021 (estimated 7,274 students then enrolled); Syria in April 2021 (4,202 students); Burma in May 2021 (1,634 students); Haiti in August 2021 (1,083 students); Somalia in September 2021 (76 students); Yemen in September 2021 (309 students); Hong Kong in November 2021 (5,067 students); South Sudan in March 2022 (107 students); Sudan in April 2022 (324 students); Ukraine in April 2022 (2,604 students); Afghanistan in May 2022 (368 students); and, most recently, Cameroon in June 2022 (1,020 students). In total, that is more than 20,960 students (not counting the Nepalis) who are now allowed to work full time and study half the hours considered a "full course of study."

DHS Discretionary Authority Needs Clarity and Limits

The current definition of student visa status in the INA says nothing about any authorization to work. The introduction and expansion of students' ability to work legally has been introduced through regulatory overreach. Now, as in other areas of immigration law, the Biden Administration is abusing that authority. In this case, the suspension of regulatory restrictions for students to work alters the conditions under which more than 20,000 foreign nationals were issued visas and then admitted to the United States.

DHS has been granting permission for students to apply for exceptions to the regulatory requirements governing work authorization under the rubric of "severe economic hardship" excessively and inconsistently.

To bring this regulatory authority under control, Congress should:

- Take back its authority by determining whether and under which circumstances to authorize work, as it does for TPS, rather than allowing the administrative state to create work authorizations though successive regulations and expansions.[28]

- Amend the INA to limit the admission of foreign students to the program end date noted in the students' Certificate of Eligibility for Nonimmigrant Student Status (Form I-20) or Certificate of Eligibility for Exchange Visitor Status (DS-2019), not to exceed four years, unless they are subject to a more limited one-year or two-year admission, plus a period of 30 days following their program end date.

- Use its oversight power to monitor variances by DHS to the requirements for student work authorization. Criteria for suspending regulatory requirements for work authorization under the "severe economic hardship" rubric should be consistent across countries.

- Mandate in statute that DHS report annually on the number of applications, including the number granted or refused, for each country for which DHS has suspended regulatory requirements under 8 CFR 214.2(f)(9)(ii)(C).

The Department of Homeland Security should:

- Inform the Secretary of State in writing when DHS suspends any regulatory requirements for work authorization for students under 8 CFR 214.2(f)(9)(ii)(C).

- Amend its regulation to stop admitting foreign students for "duration of status." In addition to Congress amending the INA to codify student-admission time limits, DHS should amend its current "duration of status" regulation to admit students only until the program end date noted in their Certificate of Eligibility for Nonimmigrant Student Status (Form I-20) or Certificate of Eligibility for Exchange Visitor Status (DS-2019), not to exceed four years, unless they are subject to a more limited one-year or two-year admission, plus a period of 30 days following their program end date.

The Department of State should:

- Direct consular officers to apply additional scrutiny, particularly to the application of INA §§ 214(b) and 212(a)(4)(A), to the financial circumstances of students from countries designated as "in crisis" or analogous descriptions by DHS for the purposes of suspending regulatory requirements for work authorization.

Conclusion

Under the Biden Administration, DHS is using regulation and executive action at unprecedented levels over immigration. Congressional oversight and legislation are needed to reassert Congress's authority—and rein in the administrative state—by codifying limits to DHS's regulatory discretion.

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Endnotes

1. The policy wisdom of allowing student visa holders to work while studying is beyond the scope of this *Issue Brief*. This *Issue Brief* examines the regulatory authority and expansion of student work authorization.
2. John Miano, "A History of the 'Optional Practical Training' Guestworker Program," Center for Immigration Studies, September 18, 2017, https://cis.org/Report/History-Optional-Practical-Training-Guestworker-Program (accessed July 6, 2022).
3. U.S. Department of State, *Annual Report of the Visa Office*, "Nonimmigrant Visas Issued by Classification and Nationality: Fiscal Year 2021," p. 8, https://travel.state.gov/content/dam/visas/Statistics/AnnualReports/FY2021AnnualReport/FY21_TableXVI.pdf (accessed June 10, 2022).
4. For context: The State Department issued 379 F-1 visas to Yemenis, 502 to Guatemalans, 964 to Hondurans, more than 7,000 to Nigerians, 82,000 to Indians, and 91,000 to Chinese students in 2021.
5. After the passage of the Homeland Security Act of 2002, certain powers, including this one, passed from the Department of Justice, headed by the Attorney General, to the Department of Homeland Security, headed by the Secretary.
6. 8 U.S. Code of Federal Regulations § 214(q)(1)(A).
7. 8 U.S. Code of Federal Regulations § 214(2)(E).
8. 8 U.S. Code of Federal Regulations § 214.2(F)(9)(i).
9. 8 U.S. Code of Federal Regulations § 214.2(F)(9)(ii)(A).
10. 8 U.S. Code of Federal Regulations § 214.2(f)(9)(ii)(C).
11. Immigration and Naturalization Service, "Authorizing Suspension of Employment Authorization Requirements in Emergent Circumstances for Certain F-1 Students," *Federal Register*, Vol. 63, No. 111 (June 10, 1998), p. 31872.
12. Ibid.
13. 8 U.S. CFR § 214.2(F)(9)(ii)(D)(4).
14. National Association of Foreign Student Advisers, "Special Student Relief for F-1 Students: Essential Concepts," https://www.nafsa.org/professional-resources/browse-by-interest/special-student-relief-f-1-students-essential-concepts (accessed August 9, 2022).
15. See, for example, U.S. Department of Homeland Security, "Employment Authorization for Venezuelan F-1 Nonimmigrant Students Experiencing Severe Economic Hardship as a Direct Result of the Current Humanitarian Crisis in Venezuela," *Federal Register*, Vol. 86, No. 76 (April 22, 2021), pp. 21328–21333.
16. U.S. Citizenship and Immigration Services, "Number of Service-Wide Forms by Quarter, Form Status, and Processing Time, October 1, 2021–December 31, 2021," https://www.uscis.gov/sites/default/files/document/reports/Quarterly_All_Forms_FY2022_Q1.pdf (accessed June 10, 2022).
17. Deferred Action for Childhood Arrivals. This is an Obama Administration program that, in effect, suspended the enforcement of immigration law and deportation proceedings against certain individuals who entered illegally when they were minors.
18. "All Other" includes students, beneficiaries of Temporary Protected Status, recipients of Humanitarian or Significant Public Benefit Parole, and other categories.
19. U.S. Department of State, Bureau of Consular Affairs, *Annual Report of the Visa Office*, FY 2021, Table XVII, https://travel.state.gov/content/dam/visas/Statistics/AnnualReports/FY2021AnnualReport/FY21_TableXVII.pdf (accessed June 10, 2022).
20. Immigration and Nationality Act of 1952, § 214(b).
21. U.S. Department of State, *Foreign Affairs Manual*, Vol. 9, Section 402.5, https://fam.state.gov/fam/09FAM/09FAM040205.html#M402_5_5_G (accessed June 10, 2022).
22. Immigration and Nationality Act of 1952, § 244.
23. U.S. Citizenship and Immigration Services, *Temporary Protected Status: Calendar Year 2021 Annual Report*, https://www.uscis.gov/sites/default/files/document/reports/TPS-CY21-Congressional-Report.pdf (accessed June 10, 2022).
24. U.S. Department of Homeland Security, "Fiscal Year 2020 Entry/Exit Overstay Report," September 30, 2021, https://www.dhs.gov/sites/default/files/2021-12/CBP%20-%20FY%202020%20Entry%20Exit%20Overstay%20Report_0.pdf (accessed July 26, 2022).
25. 8 U.S. CFR § 214.2(F)(5).
26. A student visa holder is generally admitted into the U.S. by Customs and Border Protection for "duration of status" and is considered "in status" as long as his record in ICE's Student and Exchange Visitor Information System (SEVIS) is active (valid). If SEVIS status is terminated by ICE due to failure of the student or Designated School Official to comply with student visa regulations, the student is "out of status" and begins accruing unlawful presence in the U.S.
27. U.S. Department of State, *Foreign Affairs Manual*, Vol. 9, Section 402.5, updated February 28, 2022.
28. For example, permission to work is expressly granted to spouses of L-1 visas, while such a right is merely inferred and regulated into existence for spouses of H-1B visas.