



# GMS Flash Alert

## Immigration Edition

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## United States - DHS Proposes Eliminating 'Duration of Status' Designation

The U.S. Department of Homeland Security (DHS) September 25, 2020, proposed a new rule that seeks to replace the current "Duration of Status" (D/S) designation for international students (F-1 status), exchange visitors (J-1 status), representatives of foreign information media (I status), and their dependents with a rule that would impose a fixed period of stay.<sup>1</sup>

Published in the *Federal Register*, the proposed rule also seeks to change policies related to "cap-gap" periods and grace periods for F-1 students.

Employers and other members of the public have 30 days to submit comments on the DHS proposed rule. Public comments must be received on or before October 26, 2020.

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### WHY THIS MATTERS

If finalized and implemented, the proposed rule will impose additional compliance and administrative requirements not only on F-1, J-1, and I nonimmigrants, but also on their educational institutions, exchange visitor program sponsors, and employers. Maintaining compliance with these new policies will be critical in helping to ensure impacted foreign nationals do not inadvertently fall out of status or accrue unlawful presence. For educational institutions, exchange visitor program sponsors, and employers, maintaining compliance with the updated guidance will be paramount to their continued ability to host or employ F-1, J-1, and I nonimmigrants.

The new policy, if implemented as drafted, will replace the long-standing practice of admitted F-1, J-1 and I nonimmigrants for their unspecified D/S, and instead impose a finite period of admission with a set expiry date, a practice that is already in place with common nonimmigrant classifications such as the H-1B visa for specialty occupation workers and L-1 intra-company transferees.

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## Background

Currently, for F-1 international students, a D/S admission is the time it takes to complete their academic program, including any authorized periods for practical training, plus an additional 60-day grace period.

For J-1 nonimmigrants, a D/S admission is the time it takes to participate in the J-1 program plus a 30-day grace period.

For I nonimmigrants, the D/S designation aligns to their duration of assignment or employment as representatives of a foreign media organization.

To summarize, F-1, J-1 and I nonimmigrants are currently allowed to remain in the United States for unspecified periods as long as they continue to engage in activities authorized under their respective nonimmigrant classifications.

## Summary of Proposed Changes

**F-1 students and their dependents:** The new rule generally will limit their admission to the length of the F-1 principal's program, including periods of practical training, limited to four years, plus a 30-day grace period. However, for the following students, admission will be limited to a period of two years:

- Foreign nationals born in or citizens of countries listed on the State Sponsors of Terrorism list<sup>2</sup> or citizens of countries where there is a 10 percent or higher over-stay rate for students and exchange visitors;
- Foreign nationals attending unaccredited institutions or institutions not enrolled in or in good standing with E-Verify; and
- Foreign nationals enrolled in language training programs.

Foreign nationals attending high school will be admitted into the United States for a 12-month period.

The proposed rule will also replace the current 60-day grace period for F-1 students with a grace period of 30 days. Additionally, the new rule will extend the cap-gap (extension of status) benefit for eligible F-1 students with timely-filed H-1B-cap-subject change-of-status petitions, by pushing the provision's end date from October 1 to April 1 of the fiscal year for which H-1B classification is sought.

The extended cap-gap benefits will help to mitigate possible disruptions in the employment authorization of F-1 OPT students resulting from delays with H-1B cap processing times.

Further, the new rule clarifies automatic extensions of employment authorization for certain eligible F-1 students. Specifically, F-1 students with timely-filed extensions of stay and whose applications remain pending after their admission period has expired, will receive an automatic extension of their F-1 nonimmigrant status and, as applicable, extension of their on-campus employment authorization, off-campus employment authorization due to severe economic hardship, or STEM OPT employment authorization for up to 180 days. This automatic extension of employment authorization however will not be available to F-1 students using Curricular Practical Training or pre- or post-completion Optional Practical Training.

**J-1 exchange visitors and their dependents:** The new rule will impose a limit on the admission of J-1 exchange visitors and their dependents up to the length of the J-1 principal's program, limited to four years, plus an additional 30-day grace period. However, for the following, admission will be limited to a period of two years:

- Foreign nationals who were born in, or citizens of, countries listed on the State Sponsors of Terrorism List or citizens of countries where there is a 10 percent or higher over-stay rate for students and exchange visitors; and

- Foreign nationals whose program sponsors are not enrolled in or in good standing with E-Verify.

**I foreign media representatives and their dependents:** The new rule will limit I nonimmigrants and their dependents to a period of admission necessary to complete their assignment, limited to 240 days. However, for foreign nationals from the People’s Republic of China or the Hong Kong Special Administrative Region, admission to the United States will be limited to a period of 90 days or less.

The new rule further clarifies that I and J-1 nonimmigrants with timely-filed extensions will receive an automatic extension of employment authorization of up to 240 days after their admission period has expired, while their extension applications are pending with the government.

## Impact of Proposed Rule

Once the proposed rule is implemented, F-1, J-1 and I nonimmigrants who require additional time to stay in the U.S. will need to file Form I-539, *Application to Extend or Change Status*, and complete the biometrics screening process. In adjudicating such an extension request, the U.S. Citizenship and Immigration Services (USCIS) will evaluate whether the foreign national has sufficiently demonstrated compelling academic or medical reasons causing the inability to complete their program by its end date; or other extraordinary circumstances outside of their own control to warrant an extension. Lastly, if an F-1, J-1 or I nonimmigrant fails to depart or file a request to change or extend their status at the conclusion of their admission period, the individual will begin to accrue unlawful presence similar to other nonimmigrant classifications.

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## KPMG NOTE

DHS is currently accepting public feedback on the proposed rule. Once the comment period ends October 26, 2020, DHS will review the feedback and prepare to issue a final rule. As of the date of this *Flash Alert*, there is not a timeframe for publication of a final rule. Once the rule is implemented, impacted foreign nationals, educational institutions, exchange visitor program sponsors, and employers will need to familiarize themselves with the updated regulations to make sure they are in continued compliance with the relevant visa programs.

KPMG Law LLP in Canada is tracking this matter closely. We will endeavor to keep readers of GMS *Flash Alert* posted on any important developments.

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## FOOTNOTES:

1 See “[Establishing a Fixed Time Period of Admission and an Extension of Stay Procedure for Nonimmigrant Academic Students, Exchange Visitors, and Representatives of Foreign Information Media](#),” in the *Federal Register* on September 25, 2020.

2 See U.S. Department of State, “[State Sponsors of Terrorism](#).”

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