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June 11, 2018

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

RE: U.S. Citizenship and Immigration Services policy memorandum of May 10, 2018, "Accrual of Unlawful Presence and F, J, and M Nonimmigrants."

Dear Director Cissna:

As unions, workers' organizations and advocates representing millions of working men and women of all immigration status – including many who work in this country on J, F and other nonimmigrant visas – the AFL-CIO and the undersigned strive to ensure that all who labor in this country receive decent pay, good benefits, safe working conditions, and fair treatment.

We write to convey serious concerns about the proposed changes to the unlawful presence determination process. Although we recognize that nonimmigrants must be in compliance with the law and that visa overstays are a concern, we do not believe that the measures proposed in this memo will be a fair or effective means to address the problem.

The memo creates a subjective and retroactive process with dire potential consequences for international students, researchers, and working men and women in a wide range of industries. The proposed change is likely to lead to wrongful determinations that unfairly trigger bars to re-entry to the United States. The fear of being denied entry, losing eligibility for a visa and other benefits as a result of an unappealable status determination will also have a chilling effect on the ability of these individuals to exercise their civil and workplace rights. This in turn also affects the ability of U.S. citizen co-workers to exercise their own civil and workplace rights, making our workplaces less safe and our country a less desirable place to study and work.

We urge you not to implement this memo and instead to ensure that nonimmigrant students, exchange visitors and workers receive clear notice and full due process before any accrual of unlawful presence.

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The proposed revision erodes due process and places an undue burden on visa holders.

To reduce the number of nonimmigrants who violate immigration status or stay beyond the legally allowable period, USCIS must articulate the appropriate role of the sub-agencies of the Department of Homeland Security (DHS) and other federal agencies in ensuring that visa holders have adequate information and notice. There is no indication that USCIS has coordinated implementation of this extreme policy shift with other government stakeholders, including the Department of State (including the Visa Office and the Bureau of Education and Cultural Affairs' Exchange Visitor Program), and other divisions of DHS, such as Immigration and Customs Enforcement (ICE), the Student and Exchange Visitor Program (SEVP), and Customs and Border Protection.

Visa holders who may not be aware of a violation of status will now be considered guilty not only of the original infraction, but also of overstaying their visa in the period since that infraction. While it is clearly the responsibility of nonimmigrant visa holders to remain in compliance with the law, it is crucial that they receive complete and detailed information concerning the rules that govern their stay in the United States and have the right to fair notice, a hearing and the right to appeal.

In the proposed policy, however, due process will be extremely limited. For example, virtually all students whose Student and Exchange Visitor Information System (SEVIS) reinstatement applications are denied would find themselves subject to at least the 3-year bar, merely because USCIS takes so long to adjudicate applications for reinstatement. In addition, a student or exchange visitor might not even know that he or she was in violation of status until DHS issues a formal determination. If the unlawful presence "clock" is seen to start at some distant time in the past in such cases, any window for departing the country will have passed.

The proposed change threatens to chill the exercise of civil and workplace rights.

It is well-documented that workers who are in the United States working pursuant to nonimmigrant work visas, including J-1 visa holders, are frequently exploited during the recruitment process and in their U.S. jobs. These abuses abound in part because the very structure of the program places workers at the mercy of a single employer for both their job and continued presence in the U.S. When a job is abusive, guest workers often cannot leave without facing severe immigration consequences, including loss of status and deportation. As a result, many visa holders choose to endure the abuse, creating a dynamic that lowers standards and working conditions for all workers. The proposed guidance significantly increases the severity of the immigration consequences that workers looking to escape an abusive employer will face. As a result, workers will be even less likely to escape abusive employers and those employers will be able to break the law with impunity.

A number of prominent recent cases from around the country make clear that universities, like other employers, often threaten immigration enforcement consequences when workers engage in concerted activity protected under federal labor law. For example, at Washington University in St. Louis, the employer told graduate students attempting to exercise their federal labor rights that F-1 visa students would immediately lose their status in case of a lawful strike. *See The Washington University in St. Louis*, Case 14-CA-202172, National Labor Relations Board Office of the General Counsel Advice Memorandum, dated Oct. 31, 2017, available at <https://apps.nlr.gov/link/document.aspx/09031d45826e5ffd>. Likewise, at Pennsylvania State University, graduate students alleged that the university had threatened that students on international visas could be affected in case of a strike. Juliana Feliciano Reyes, “Union organizers say Penn State is trying to scare foreign grad students with ICE - and it's working,” Philadelphia Inquirer, April 13, 2018, available at <http://www.philly.com/philly/education/penn-state-graduate-union-international-student-visa-ice-20180413.html?mobi=true>.

Such threats by employers of nonimmigrant visa holders will be significantly more forceful should this memorandum be implemented because employers will be incentivized to hold out the possibility that employees who participate in strikes or other protected collective activity will risk not only a loss of status but also the accrual of unlawful presence and its attendant consequences. It will be very difficult for nonimmigrant visa holders to evaluate the accuracy of such threats.

If nonimmigrant visa holders have reasonable basis to fear that their status and ability to remain in and return to the country may be retroactively denied, this will cause a chilling effect on collective activity that undermines the rights of nonimmigrant visa holders and all workers, regardless of their immigration status. *See, e.g., Labriola Baking Co.*, 361 NLRB No. 41, at *2 (Sept. 8, 2014) (noting that “threats touching on employees’ immigration status warrant careful scrutiny” because “they are among the most likely to instill fear among employees.”).

As such, this proposal will allow employers to drive down standards and encourage retaliation against people who blow the whistle on workplace crimes, making our workplaces less safe and our country a less desirable place to study and work. It is yet another policy that will encourage international students, scholars, and workers to take their talents elsewhere.

The proposed change will put well-intentioned students and workers at a risk of severe penalties for accidental or unwitting violations of status.

The memo is an abrupt departure from more than 20 years of policy guidance. The current policy has held up for decades because it provides bright-line dates established in government systems, which give adequate notice to nonimmigrant students, exchange visitors and workers, as well as their schools and exchange programs.

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For example, if an individual stays beyond the expiration date on a Form I-94, he or she begins to accumulate days of unlawful presence. However, many status violations, such as those related to SEVIS and nonimmigrant visa renewals, do not present such a bright line, which is why a clear government determination is needed. A formal finding of a status violation made in the course of a DHS benefits determination or by an immigration judge serves as a fair and clear warning to an individual that the clock is ticking, and he or she must take action to leave the United States or otherwise cure the status deficiency. Without definitive notice, the complexity of our system makes unwitting violations likely.

Various documents and the data contained in databases serve as indicators of nonimmigrant status. If all documents and electronic records are consistent, their reliability as indicators is high. However, these documents and records reflect only a snapshot in time and are subject to both machine and human error.

A failure to account for inconsistency among immigration documents, electronic records, and real world developments could easily lead to an adverse determination on status or benefit eligibility. Whether the data in documents and electronic records is being interpreted correctly, taking into account all applicable law and policy, is also a primary concern.

Immigration law is complicated, and both compliance and enforcement are technical matters that require training and expertise. Because of this complexity, an individual on an F, J, or M visa often does not even know he or she is “out of status” until informed by the government.

We oppose the changes proposed in this guidance, and urge USCIS to maintain a fair process of notification and review before unlawful status can begin to accrue.

Thank you for the opportunity to comment.

Sincerely,

AFL-CIO
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American Federation of Teachers
Centro de los derechos del Migrante, Inc.
Communication Workers of America
Freedom Network USA
National Education Association
Service Employees International
Southern Poverty Law Center
United Automobile, Aerospace and Agricultural Implement Workers
United Food and Commercial Workers
United Steelworkers