

“SHOULD I STAY OR SHOULD I GO”: THE LEGAL RIGHTS OF STRANDED INTERNATIONAL STUDENTS

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Abstract

International students studying in the United States have specific legal rights under immigration laws when they are stranded because of worldwide health emergencies, like the COVID-19 pandemic, and armed conflict at home, like Russia’s invasion of Ukraine. These rights include the authorization to work off campus if the student experiences a severe economic hardship; and special student relief that can suspend the rules governing duration of status, full course of study, and employment eligibility. While in the United States on a nonimmigrant status, stranded students may also be simultaneously eligible for temporary protected status but not for humanitarian parole, provided by the Department of Homeland Security. The plight of international students in Ukraine is examined briefly, including possible violations of international law against evacuating African students. Improvements to the U.S. immigration system for international students are suggested, including private sponsorship of refugees, and “dual intent” in the visa process as a pathway to permanent residency. The pendulum swing of students’ rights during the pandemic illustrated the influence of presidential politics, the important role of legal advocacy, and the opportunity to craft comprehensive policy in the United States linking international higher education, workforce development, and pathways to citizenship.

* Associate Member of the Faculty, Rutgers University Ph.D. Program in Higher Education. I am grateful to NACUA Editor Barbara Lee and to the Editorial Board for inviting me to contribute this article, to Leigh Cole and Joanna Silver for their thoughtful review and comments, and to Refugee Health and Wellness Specialist Maya Wahrman in the New Jersey Department of Human Services’ Office of New Americans for sharing her expertise, especially regarding Ukrainian refugees. The article is dedicated to long-time NACUA member and leader Michael Olivas, my mentor and friend and the Rock and Roll Law Professor™, who conceived the idea for this article, inspired its title, and whose untimely passing kept his expertise in immigration law—and his special brand of cajoling and editing—from improving it.

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This indecision's buggin' me
If you don't want me, set me free.

—The Clash, *Should I Stay or Should I Go*¹

INTRODUCTION

In 2017, scholars of international students warned that “the international student community” was “living in a precarious world of insecurity” because international students were “increasingly ... the targets of violence and discrimination based on race, religion, ethnicity, and national origin.”² Five years later, the persistent COVID-19 pandemic and Russia’s invasion of Ukraine made the world of international students even more perilous and uncertain, often stranding them abroad.³ With concerns for their health and safety rising, international students needed to know the laws regarding their rights to stay abroad, their rights to return home, and their rights to continue their education.

The growing importance of understanding and strengthening the rights of stranded students parallels the increase in international student mobility. In 2019, “6.1 million tertiary students worldwide had crossed a border to study,” more than double the number in 2007.⁴ Between 1998 and 2019, the number of international and foreign tertiary students increased by an average of 5.5% annually.⁵ Among the countries composing the Organization for Economic Cooperation and Development (OECD),⁶ the United States is “the top OECD destination country for international tertiary students.”⁷ Following decades of consistent growth, international enrollment in U.S. institutions and the number of American students studying abroad reached their peaks in 2018–19: 1,095,299 international students attended U.S. institutions of higher education that year, while 347,099 U.S. students studied abroad for academic credit.⁸

1 THE CLASH, *Should I Stay or Should I Go*, on COMBAT ROCK (Epic Records/CBS, Inc. 1982).

2 CindyAnn Rose-Redwood & Reuben Rose-Redwood, *Rethinking the Politics of the International Student Experience in the Age of Trump*, 7 J. INT’L STUDENTS, I, II (2017).

3 Caitlin Dickerson, ‘I Kind of Stopped Existing’: Foreign Students Are Stuck, and Reeling, N.Y. TIMES, Apr. 26, 2020, at A11; Elizabeth Redden, *Stranded Abroad*, INSIDE HIGHER ED, Mar. 24, 2020, <https://www.insidehighered.com/news/2020/03/24/study-abroad-students-caught-international-border-closures>; Andrea Marks, *Thousands of International Students Are Stranded in Ukraine and Don’t Know What to Do Next*, ROLLING STONE, Feb. 25, 2022, <https://www.rollingstone.com/culture/culture-features/students-stranded-ukraine-nigeria-india-iran-1312509/>.

4 OECD, EDUCATION AT A GLANCE 2021: OECD INDICATORS 213 (2021). The OECD defines “tertiary education” to include “short cycle” programs (minimum duration of two years) that are typically “occupation-specific and prepare students to enter the labour market directly,” as well as bachelor’s, master’s, and doctoral programs. *Id.* at 21.

5 *Id.* at 213.

6 As of 2021, the OECD comprised thirty-eight countries spanning North, Central, and South America; Europe; and the Asia-Pacific region. OECD, OUR GLOBAL REACH, <https://www.oecd.org/about/members-and-partners/> (last visited June 5, 2022).

7 OECD, *supra* note 4, at 217.

8 INST. OF INT’L EDUC., OPEN DOORS: 2021 FAST FACTS (2021), <https://opendoorsdata.org/fast-facts/fast-facts-2021/>.

This growth was halted first by a virus about 0.1 micron in diameter,⁹ and then by a military with the fifth-largest budget in the world.¹⁰ After the initial cases of COVID-19 caused by the SARS-CoV-2 virus occurred in Wuhan, China in December 2019,¹¹ the highly contagious virus spread around the world, leading the World Health Organization on March 11, 2020, to declare the situation to be a pandemic.¹² By then, over one hundred colleges and universities in the United States had canceled in-person classes and transitioned courses online.¹³ By April 1, 2020, schools and institutions of higher education in 185 countries were shuttered, involving over 1.54 billion students, representing over 89% of total enrolled learners worldwide.¹⁴ A joint report from the United Nations Educational, Scientific and Cultural Organization (UNESCO), the United Nations Children's Fund (UNICEF), and the World Bank bluntly stated, "The global disruption to education caused by the COVID19 pandemic constitutes the worst education crisis on record."¹⁵

This drastic upheaval caused total international enrollment in the United States and the number of U.S. students studying abroad to fall precipitously. Compared to the previous year, the number of international students at U.S. institutions fell 15%, to 914,095 students, in 2020–21; and in 2019–20, the number of U.S. students studying abroad for academic credit declined by 53%, to 162,633 students.¹⁶

After "the largest mobilization of forces" in Europe since 1945,¹⁷ the internationalization of higher education was again jeopardized. Russia, after amassing 190,000 soldiers along its border with Ukraine, invaded Ukraine on February 24, 2022,¹⁸ creating "Europe's largest and fastest-growing refugee crisis since World War II."¹⁹ By June 2022, almost seven million Ukrainians had crossed

9 Yinon M Bar-On et al., *SARS-CoV-2 (COVID-19) by the Numbers* 3, 9 eLIFE (2020), [HTTPS://ELIFESCIENTES.ORG/ARTICLES/57309#DOWNLOADS](https://elifesciences.org/articles/57309#downloads).

10 INT'L INST. FOR STRATEGIC STUD., *MILITARY BALANCE 2022 FURTHER ASSESSMENTS* (2022), <https://www.iiss.org/blogs/analysis/2022/02/military-balance-2022-further-assessments>.

11 Wen-Hua Kong et al., *SARS-CoV-2 Detection in Patients with Influenza-like Illness*, 5 NATURE MICROBIOLOGY 675 (2020), <https://www.nature.com/articles/s41564-020-0713-1.pdf>.

12 WHO, WHO DIRECTOR-GENERAL'S OPENING REMARKS AT THE MEDIA BRIEFING ON COVID-19 - 11 MARCH 2020 (2020), <https://www.who.int/director-general/speeches/detail/who-director-general-s-opening-remarks-at-the-media-briefing-on-covid-19---11-march-2020>.

13 Chronicle staff, *The Coronavirus Is Upending Higher Ed. Here Are the Latest Developments*, CHRON. HIGHER EDUC., Mar. 25, 2020, <https://www.chronicle.com/article/the-coronavirus-is-upending-higher-ed-here-are-the-latest-developments/>.

14 Giorgio Marinoni et al., *The Impact of COVID-19 on Higher Education Around the World*, IAU GLOBAL SURVEY REP. (2020), https://www.iau-aiu.net/IMG/pdf/iau_covid19_and_he_survey_report_final_may_2020.pdf.

15 WORLD BANK, UNESCO & UNICEF, *THE STATE OF THE GLOBAL EDUCATION CRISIS: A PATH TO RECOVERY* 4 (2021).

16 INST. OF INT'L EDUC., *supra* note 8.

17 Dan Bilefsky et al. *Can the West Stop an Invasion by Russia into Ukraine?* N.Y. TIMES, Jan. 10, 2022, at A8.

18 Anton Troianovski & Neil MacFarquhar, *Russia Attacks as Putin Warns World; Biden Vows to Hold Him Accountable*, N.Y. TIMES, Feb. 24, 2022, at A1.

19 Richard Pérez-Peña, *In Scathing Speech, Zelensky Chastises U.N. for Inaction*, N.Y. TIMES, Apr. 6, 2022, at A1.

the border out of the country,²⁰ and another seven million were displaced inside Ukraine. In late April 2022, the United Nations projected that the number of refugees could reach 8.3 million by the end of the year.²¹

While the COVID-19 pandemic and Russia's invasion of Ukraine caused disruption at colleges and universities worldwide, this article largely focuses on the rights of international students attending institutions in the United States on F-1 visas and the rights of U.S. students studying abroad, particularly when these students are unable to return home. It traces the history of "stranded students" in the United States and—highlighting the influence of politics on immigration laws—follows the restrictions on international students placed by the Trump Administration that were in turn largely removed and replaced by more lenient and supportive rules by the Biden Administration. The article concludes with suggested legal reforms that would clarify and strengthen the rights of stranded students in the United States.

I. "Stranded" Immigrants: History and Evolution of U.S. Immigration Law

A. Definition of "Stranded"

Under U.S. and international law, stranded students can be considered to be in a state of limbo. The U.S. Supreme Court described an immigrant who had lived in the United States for twenty-five years as "stranded in his temporary haven on Ellis Island" after he had traveled to Europe, was denied reentry into the United States for "security reasons," and was refused entry by France, Great Britain, Hungary, and "about a dozen Latin American countries."²² Unwilling to "exert... further efforts to depart... respondent sat on Ellis Island because this country shut him out and others were unwilling to take him in."²³

International law provides a precise definition of "stranded." The United Nations High Commissioner for Refugees (UNHCR) defines "stranded migrants" as persons "who are not in need of international protection and who cannot remain lawfully on the territory of a host State, move lawfully to another country,

20 UNITED NATIONS REFUGEE AGENCY, UKRAINE REFUGEE SITUATION (2022), <https://data2.unhcr.org/en/situations/ukraine>.

21 John Ismay et al., *U.S. Pushes Allies for Ukraine Arms as War Escalates*, N.Y. TIMES, Apr. 27, 2022, at A1.

22 *Shaughnessy v. U.S. ex rel. Mezei*, 345 U.S. 206, 207, 208, 209 (1948).

23 *Id.* at 209. The Court held that "respondent's continued exclusion" without a hearing did not "deprive[] him of any statutory or constitutional right." *Id.* at 215. Congress subsequently passed the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA), which provides for the expedited removal of certain "applicants" seeking admission into the United States. 8 U.S.C. § 1225(a)(1) (2018). Applicants can prevent expedited removal by demonstrating to an asylum officer a "credible fear of persecution." *Id.* § 1225(b)(1)(B)(v). IIRIRA prohibits, however, judicial review of "the determination" that an applicant lacks a credible fear of persecution. *Id.* § 1252(a)(2)(A)(iii). See *Dep't of Homeland Sec. v. Thuraissigiam*, 140 S. Ct. 1959 (2020).

or return to their country of origin.”²⁴ While this definition has been criticized as inadequate,²⁵ it is useful for the purposes of this article, particularly regarding international students. The scenarios generally explored below cover instances where international students cannot remain in the country in which they are studying, cannot travel, or cannot return home.

B. From Chinese Exclusion Acts to Immigration Reform for Stranded Students from China

Decades of racist and exclusionary immigration laws in the United States were established until World War II helped to chip away at them, in part because of the growing value of international students. In 1882, the first of the Chinese Exclusion Acts made it unlawful “for any Chinese laborer” to come to the United States and prohibited citizenship to Chinese nationals.²⁶ The Immigration Act of 1924 prohibited immigrants from “the Continent of Asia and the islands adjacent thereto,” while also establishing an “annual quota” of other nationalities to 2% “of the number of foreign-born individuals of such nationality resident in continental United States as determined by the United States census of 1890.”²⁷ The law defined a group of “non-quota immigrants,” which included an immigrant “who is a bona fide student at least 15 years of age and who seeks to enter the United States solely for the purpose of study at an accredited school, college, academy, seminary or university.”²⁸ Two years after China became an ally of the United States in World War II, Congress repealed the Chinese Exclusion Acts but established a quota for immigrants from China.²⁹

Under its new wartime alliance with the United States, the Chinese Nationalist government in 1942 began sending students, technical trainees, diplomats, and military members to the United States for additional education to prepare to help lead China’s modernization after the war.³⁰ Up to several thousand of these individuals came to the United States until early 1948, when the Chinese Communist Party made advances in the Chinese civil war. With the Nationalist government in retreat, about five thousand “highly skilled, well-connected Chinese” were left in the United States

24 UN HIGH COMM’R FOR REFUGEES (UNHCR), THE 10-POINT PLAN IN ACTION 284 (2016), <https://www.refworld.org/docid/59e99eb94.html>.

25 “The notion that stranded migrants are ‘persons who are not in need of international protection’ portrayed them as being not vulnerable and protected under some other framework. In effect the definition appears to ignore that being ‘stranded’ in a humanitarian crisis and left unprotected to human rights violations is a valid case for needing international protection. Further, a major shortcoming is the definition’s generality.... Also, the definition is not reflective of perspectives other than UNHCR’s mandate, and thus while the definition might serve UNHCR’s mandate, it is not contributing to the field on the whole.” Vincent Chetail & Matthias A. Braeunlich, *Stranded Migrants: Giving Structure to a Multifaceted Notion*, in 5 GLOBAL MIGRATION RESEARCH PAPER at 18 (2013).

26 Pub. L. No. 47-126, 22 Stat. 58 (1888).

27 Immigration Act of 1924, Pub. L. No. 68-139, 43 Stat. 153 (1924).

28 *Id.* at § 4.(e).

29 Pub. L. No. 78-199, 57 Stat. 600 (1943).

30 Madeline Y. Hsu, *The Disappearance of America’s Cold War Chinese Refugees, 1948-1966*, 31 J. AM. ETHNIC HIST. 12, 13 (2012).

"without funding or a home to which to return."³¹ To support these "stranded students,"³² Congress appropriated about \$10 million in scholarships and living stipends for an estimated 3500 individuals to complete their degrees and legally gain employment and permanent residency.³³

C. *The Emergence of Modern U.S. Immigration Law*

The Immigration and Nationality Act of 1952 ended the exclusion of Asians from the United States but maintained quotas based on national origin. It also introduced an immigration system prioritizing skilled laborers and family reunification.³⁴ The act amended the Immigration Act of 1924's definition of student under the classes of "nonimmigrant aliens" who were not considered immigrants, as follows:

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 such a course of study at an established institution of learning or other recognized place of study in the United States, particularly designated by him and approved by the Attorney General after consultation with the Office of Education of the United States, which institution or place of study shall have agreed to report to the Attorney General the termination of attendance of each nonimmigrant student, and if any such institution of learning or place of study fails to make reports promptly the approval shall be withdrawn.³⁵

The Immigration and Nationality Act of 1965 finally abolished the quota system based on national origin and instead emphasized priorities for skilled laborers and immigrants with family already living in the United States.³⁶ The 1965 act maintained the classification and definition of students as nonimmigrant aliens, and it also added a provision authorizing a visa to be issued to an international student if the consular officer receives notice from the Attorney General of "a bond with sufficient surety" ensuring that at the expiration of the student's visa, the student "will depart from the United States."³⁷

D. *Visa Rules for International Students to Study in the United States*

Under U.S. immigration law, "any person not a citizen or national of the United States" is defined as an "alien,"³⁸ and for purposes of entry into the United States,

31 *Id.* at 13.

32 ROSE HUM LEE, *THE CHINESE IN THE UNITED STATES OF AMERICA* 103 (1960).

33 Hsu, *supra* note 30, at 13, 30 n.5.

34 Immigration and Nationality Act of 1952, Pub. L. No. 82-414, 66 Stat. 163 (1952).

35 *Id.* at § 101(a)(15)(F); 8 U.S.C. § 1101(a)(15)(F)(i) (2018).

36 Immigration and Nationality Act of 1965, Pub. L. No. 89-236, 79 Stat. 911 (1965).

37 *Id.* at § 17.

38 8 U.S.C. § 1101(a)(3) (2018).

aliens are considered to be immigrants, unless they fall under one of twenty-two classes of “nonimmigrant aliens.”³⁹ Generally, international students can study in the United States if they qualify under one of three of these nonimmigrant classes,⁴⁰ which are named for the corresponding letter of its subsection in the Immigration and Nationality Act, as described below.⁴¹

1. F-1 Visas

The majority of international students enter the United States with an F-1 visa.⁴² To qualify, individuals must have a residence in a foreign country that they have “no intention of abandoning,” must be “a bona fide student qualified to pursue a full course of study,” and seek “to enter the United States temporarily and solely for the purpose of pursuing such a course of study” at “an established college, university, seminary, conservatory, academic high school, elementary school, or other academic institution or in an accredited language training program in the United States.”⁴³ The institution must be “particularly designated” by the student and “approved by the Attorney General after consultation with the Secretary of Education,” and the institution must “have agreed to report to the Attorney General the termination of attendance of each nonimmigrant student.” If the institution “fails to make reports promptly the approval shall be withdrawn.”⁴⁴

A “full course of study” for undergraduates is largely based on traditional semesters and credit hours, with a limit on online courses. A full course of undergraduate study generally consists of at least twelve hours of instruction per academic term, “where twelve semester or quarter hours are charged full-time tuition or are considered full-time for other administrative purposes.”⁴⁵ F-1

39 8 U.S.C. § 1101(a)(15)(A)–(V) (2018).

40 The law allows an international student’s “alien spouse and minor children” to qualify for admission “if accompanying” the student or “following to join” them. 8 U.S.C. § 1101(a)(15)(F)(ii), (a)(15)(J), (a)(15)(M)(ii) (2018).

41 Beyond the three major classifications described here, nonimmigrants who hold visas under other categories may also be able to attend colleges and universities during their stay in the United States. As indicated by the U.S. Immigration and Customs Enforcement agency, unless otherwise noted, “Nonimmigrants who are attending school incidental to their primary purpose for being in the United States may attend the school of their choice either part-time or full-time.” U.S. IMMIGR. AND CUSTOMS ENFORCEMENT, DEP’T OF HOMELAND SEC. [ICE], STUDENT AND EXCH. VISITOR PROGRAM, NONIMMIGRANTS: WHO CAN STUDY? (2018), <https://www.ice.gov/doclib/sevis/pdf/Nonimmigrant%20Class%20Who%20Can%20Study.pdf>. Additionally, holders of G-4 visas—resident representatives of foreign governments who are employees of international organizations, as well as members of their families and staff—are eligible to pay in-state tuition at public colleges and universities in the states in which they reside because they are not precluded “from establishing domicile in the United States,” unlike other nonimmigrants. *Toll v. Moreno*, 458 U.S. 1, 14 (1982).

42 ICE, SEVIS BY THE NUMBERS (2021), <https://www.ice.gov/doclib/sevis/pdf/sevisBTN2021.pdf>.

43 8 U.S.C. § 1101(a)(15)(F)(i) (2018).

44 *Id.* While the Immigration and Nationality Act delegates these responsibilities to the Attorney General, Congress transferred them to the Secretary of Homeland Security. *See* Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2135.

45 8 C.F.R. § 214.2(f)(6)(i)(B) (2022). For graduate students, school officials certify that their “[p]ostgraduate study is “a full course of study.” *Id.* § 214.2(f)(6)(i)(A).

students may count "no more than the equivalent of one class or three credits per session, term, semester, trimester, or quarter" toward their full course of study "if the class is taken on-line or through distance education and does not require the student's physical attendance for classes, examination or other purposes integral to completion of the class."⁴⁶

2. *M-1 Visas*

International students studying at a vocational or "nonacademic" institution in the United States gain access through an M-1 visa.⁴⁷ The statutory language defining their status is similar to that of F-1 students: they must have a residence in a foreign country that they have "no intention of abandoning," seek temporary entry "solely for the purpose of pursuing a full course of study at an established vocational or other recognized nonacademic institution (other than in a language training program) in the United States" that is "particularly designated by" the student and approved by the Department of Homeland Security, after consultation with the Secretary of Education, and the institution must have agreed to report to the Department of Homeland Security "the termination of attendance of each nonimmigrant nonacademic student."⁴⁸

Under the Department of Homeland Security's regulations for the Student and Exchange Visitors Program, several types of institutions qualify as vocational or nonacademic. They include community colleges and junior colleges that provide "vocational or technical training" and award associate degrees, vocational high schools, and schools that provide "vocational or nonacademic training other than language training."⁴⁹

3. *F-3 and M-3 Visas for Canadian and Mexican Part-Time Students*

Before the terrorist attacks on September 11, 2001, students from Canada and Mexico could attend colleges and universities in the United States part-time as visitors without a formal student visa,⁵⁰ which would otherwise, as per the requirements for F-1 and M-1 visas, require full-time attendance and proof of financial resources.⁵¹ After 9/11, the U.S. Immigration and Naturalization Service—which was reorganized under the Homeland Security Act of 2002 into three agencies, including the U.S. Citizenship and Immigration Services, in 2003—⁵² began enforcing the visa requirement, curtailing

46 *Id.* § 214.2(f)(6)(i)(G).

47 8 U.S.C. § 1101(a)(15)(M)(i) (2018).

48 *Id.*

49 8 C.F.R. § 214.3(a)(2)(ii) (2022).

50 Charles Dervarics, *Bill to Create New Visa Category Gets Endorsement*, DIVERSE ISSUES IN HIGHER EDUC., Nov. 6, 2002, <https://www.diverseeducation.com/home/article/15078826/bill-to-create-new-visa-category-gets-endorsement>.

51 8 U.S.C. § 1101(a)(15)(F)(i); (a)(15)(M)(i) (2018).

52 Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2135 (2002). *See also* Soo-Young Lee et al., *The Reorganization of the US Citizenship and Immigration Services (USCIS) and Its Effects*, 20 PUB. ORG. REV. 647 (2020).

enrollment at many two-year and four-year institutions in Texas, Arizona, New Mexico, and the Pacific Northwest that relied on enrollment from part-time students from across their respective international borders.

In response, the Border Commuter Student Act of 2002 established two new subcategories of visas for citizens of Canada and Mexico who live near the U.S. border and want to commute to a U.S. institution to study part time.⁵³ The legislation created F-3 visas “for an alien who is a national of Canada or Mexico, who maintains actual residence and place of abode in the country of nationality” and who meets the other criteria of a student obtaining an F-1 visa, except that their “qualifications for and actual course of study may be full or part-time,” and they commute “to the United States institution or place of study from Canada or Mexico.”⁵⁴ The statutory language for the M-3 visa for vocational education mirrors the F-3 language.⁵⁵

The flexibility afforded by the F-3 and M-3 visas also comes with some drawbacks. Students are not allowed to live in the United States anytime while on an F-3 or M-3 visa. Moreover, their family members cannot obtain derivative visas to join them. And as a practical matter, students face geographic realities to reach schools within commuting distance of the border, limiting their educational options.⁵⁶

4. *J-1 Visas*

The third major category of visas for international students in the United States is J-1 visas for exchange students or “exchange visitors,” as they are called more broadly under the regulations of U.S. Citizenship and Immigration Services.⁵⁷ The statute defines this category to include any alien “having a residence in a foreign country” that they have “no intention of abandoning” who is

a bona fide student, scholar, trainee, teacher, [or] professor. . . who is coming temporarily to the United States as a participant in a program designated by the Director of the United States Information Agency, for the purpose of teaching . . . studying, . . . conducting research . . . or receiving training.⁵⁸

The U.S. Information Agency lists twelve categories of exchange visitor programs.⁵⁹ The regulations for programs for college students give broad authority to the Department of State. The department “may, in its sole discretion, designate bona fide programs which offer foreign students the opportunity to study in the

53 Border Commuter Student Act of 2002, Pub. L. No. 107-274, 116 Stat. 1923 (2002).

54 8 U.S.C. § 1101(a)(15)(F)(iii) (2018).

55 *Id.* § 1101(a)(15)(M)(iii).

56 D’ALESSIO LAW GROUP, F-3 CANADIAN OR MEXICAN NATIONAL ACADEMIC COMMUTER STUDENTS (2018), <https://dlgimmigration.com/f-3-canadian-or-mexican-national-academic-commuter-students>.

57 8 U.S.C. § 1101(a)(15)(J) (2018); 8 C.F.R. 214.2 (j)(1)(i) (2022).

58 8 U.S.C. § 1101(a)(15)(J) (2018).

59 U.S. DEP’T OF STATE, EXCH. VISITOR PROGRAM CATEGORY REQUIREMENTS (2016), <https://j1visa.state.gov/wp-content/uploads/2017/06/Exchange-Visitor-Program-Category-Requirements.pdf>.

United States at a post-secondary accredited academic institution or to participate in a student internship program."⁶⁰

Students coming to the United States for graduate medical education or training may also obtain J-1 visas.⁶¹ They must meet additional requirements, including making a commitment to return to their country of nationality or last residence upon completing their education in the United States, and providing written assurance from their home government that there is a need in that country for doctors with the skills they will learn.⁶²

E. Rules for International Students to Work in the United States

1. On-Campus Employment

International students on an F-1 visa may be employed by their institution. "On-campus employment" encompasses work on the school's premises—including "on-location commercial firms" serving students on campus, such as school bookstores and cafeterias—or at an off-campus location that is educationally affiliated with the school.⁶³ Students may work up to twenty hours per week while school is in session and work full-time when school is not in session or during vacation breaks.⁶⁴

2. Off-Campus Employment

After their first academic year, F-1 students may work off campus under one of three different programs.

a. Curricular Practical Training

An F-1 student may participate in "a curricular practical training program that is an integral part of an established curriculum."⁶⁵ Curricular practical training encompasses "alternative work/study, internship, cooperative education, or any other type of required internship or practicum that is offered by sponsoring employers through cooperative agreements with the school."⁶⁶ Most students who participate for one year or more in full-time curricular practical training become ineligible for "post-completion academic training," unless they are enrolled in "graduate studies that require immediate participation in curricular practical training."⁶⁷

60 22 C.F.R. § 62.23 (2022).

61 8 U.S.C. § 1101(a)(15)(J) (2018).

62 8 U.S.C. § 1182(j)(1)(C) (2018).

63 8 U.S.C. § 214.2(f)(9)(i) (2018).

64 *Id.*

65 8 C.F.R. § 214.2(f)(10)(i) (2022).

66 *Id.*

67 *Id.*

b. Twelve-Month Optional Practical Training.

Students on an F-1 visa can, after a full academic year of enrollment, work up to twelve months under the Optional Practical Training (OPT) program, if the employment is directly related to their major area of study.⁶⁸ Students can complete their OPT employment before they complete their academic studies (“precompletion”) by working part-time or full-time.⁶⁹ Students can also complete their OPT employment after they complete their degree (“postcompletion”) by working part time or full time.⁷⁰

c. Twenty-Four-Month Science, Technology, Engineering, or Mathematics Optional Practical Training.

Holders of an F-1 visa can apply for an extra twenty-four months of postcompletion OPT if they earn a bachelor’s, master’s, or doctoral degree in certain listed science, technology, engineering, or mathematics (STEM) fields, and if their employer meets certain requirements as well.⁷¹ The OPT extension for STEM students began in 2008 and has vastly increased participation in the OPT program. The original STEM extension was seventeen months,⁷² and it was expanded to twenty-four months in 2016.⁷³ The total number of students participating in OPT grew from 24,838 in 2007 to 200,162 in 2018, an increase of over 700%.⁷⁴ During the same period, the cohort of students pursuing extended STEM OPT rose from two students, when the category was established, to 69,650 students.⁷⁵

68 *Id.* § 214.2(f)(10)(ii).

69 U.S. DEP’T OF HOMELAND SEC., F-1 OPTIONAL PRACTICAL TRAINING (OPT) (2022), <https://studyinthestates.dhs.gov/sevis-help-hub/student-records/fm-student-employment/f-1-optional-practical-training-opt>.

70 8 C.F.R. § 214.2(f)(11)(i)(B)(1), (f)(10)(ii)(A)(3) (2022).

71 *Id.* § 214.2(f)(10)(ii)(C)(2). Employers must be enrolled in E-Verify, a web-based system through which employers can confirm the eligibility of their employees to work in the United States by matching information on employees’ Form I-9 (Employment Eligibility Verification) against the records of the Social Security Administration and the Department of Homeland Security. U.S. DEP’T OF HOMELAND SEC., ABOUT E-VERIFY, <https://www.e-verify.gov/> (last visited July 15, 2022). Among other requirements, employers must implement a formal training program customized for the student that enhances their academic learning through practical experience; ensure that the student will not replace a full- or part-time, temporary, or permanent U.S. worker; and attest that they have sufficient resources and trained personnel to train the student appropriately. *See* 8 C.F.R. § 214.2 (f)(10)(ii)(C) (5)–(11) (2022).

72 Extending Period of Optional Practical Training by 17 Months for F-1 Nonimmigrant Students with STEM Degrees and Expanding Cap-Gap Relief for All F-1 Students with Pending H-1B Petitions, 73 Fed. Reg. 18944 (Apr. 8, 2008).

73 Improving and Expanding Training Opportunities for F-1 Nonimmigrant Students with STEM Degrees and Cap-Gap Relief for All Eligible F-1 Students, 81 Fed. Reg. 13040 (Mar. 11, 2016).

74 U.S. CITIZENSHIP AND IMMIGRATION SERVS. OMBUDSMAN, DEP’T OF HOMELAND SEC., ANNUAL REPORT TO CONGRESS 65 (2020).

75 *Id.*

d. Off-Campus Employment Based on Severe Economic Hardship.

Regulations for F-1 visas allow international students to work off campus if they experience a "severe economic hardship caused by unforeseen circumstances beyond the student's control."⁷⁶ The regulations list several such circumstances, including "loss of financial aid or on-campus employment without fault on the part of the student, substantial fluctuations in the value of currency or exchange rate, inordinate increases in tuition and/or living costs, unexpected changes in the financial condition of the student's source of support," plus medical bills and "other substantial and unexpected expenses."⁷⁷

Severe economic hardship is determined on a case-by-case basis by an institution's designated school official (DSO).⁷⁸ The DSO is a regularly employed member of an institution's administration "whose office is located at the school and whose compensation does not come from commissions for recruitment of foreign students."⁷⁹ Individuals who principally "recruit foreign students for compensation" do not qualify as a DSO. The president or head of a school must appoint DSOs.⁸⁰

A DSO at a student's institution may recommend the student for work off campus for intervals of one year if the DSO certifies to four criteria:

- (1) The student has been in F-1 status for one full academic year;
- (2) The student is in good standing as a student and is carrying a full course of study;
- (3) The student has demonstrated that acceptance of employment will not interfere with the student's carrying a full course of study; and
- (4) The student has demonstrated that the employment is necessary to avoid severe economic hardship due to unforeseen circumstances beyond the student's control ... and has demonstrated that [on-campus] employment ... is unavailable or otherwise insufficient to meet the needs that have arisen as a result of the unforeseen circumstances.⁸¹

The U.S. Citizenship and Immigration Services (USCIS) adjudicates applications for severe economic hardship.⁸² Applicants submit specific forms along with their

76 8 C.F.R. § 214.2(f)(9)(ii)(C) (2022).

77 *Id.*

78 8 C.F.R. § 214.3(l)(1) (2022).

79 *Id.*

80 *Id.*

81 8 C.F.R. § 214.2(f)(9)(ii)(D) (2022).

82 The regulation ambiguously states, "The Service shall adjudicate the application for work authorization based upon severe economic hardship." *Id.* § 214.2(f)(9)(ii)(F)(2). "The Services" is in turn defined as "U.S. Citizenship and Immigration Services, U.S. Customs and Border Protection, and/or U.S. Immigration and Customs Enforcement, as appropriate in the context in which the term appears." *Id.* § 1.2 (2022). USCIS operates the Student and Exchange Visitors Program. See U.S. CITIZENSHIP AND IMMIGRATION SERVS., DEP'T OF HOMELAND SEC. [USCIS], STUDENTS AND EXCH. VISITORS, <https://www.uscis.gov/working-in-the-united->

DSO's certification to the USCIS service center that has jurisdiction over their place of residence. The adjudicating officer issues an Employment Authorization Document if employment is authorized.⁸³ The director of USCIS notifies the student of the decision, and, if the application is denied, the student is also informed of the reason for the denial.⁸⁴ Students cannot appeal a denied request.⁸⁵

Students may continue to receive employment authorization one year at a time "up to the expected date of completion of the student's current course of study."⁸⁶ USCIS may renew authorization for off-campus employment only if the student maintains their nonimmigrant status and good academic standing, which is determined by the DSO.⁸⁷ The employment authorization is automatically terminated whenever the student fails to maintain their nonimmigrant status.⁸⁸

3. *Special Student Relief*

Beyond "severe economic hardship" for individual students, the regulations for F-1 visas give the Department of Homeland Security itself significant discretion to suspend regulations for F-1 students "from parts of the world that are experiencing emergent circumstances."⁸⁹ Emergent circumstances include natural disasters, wars or military conflicts, and national or international financial crises.⁹⁰ Collectively, the discretionary benefits—encompassing duration of status, full course of study, and employment eligibility—are called "special student relief."⁹¹

Special student relief can be provided for on-campus and off-campus employment. On-campus employment usually cannot exceed twenty hours a week while school is in session,

[states/students-and-exchange-visitors](#) (last visited Aug. 1, 2022).

83 8 C.F.R. § 214.2(f)(9)(ii)(F)(2) (2022).

84 *Id.*

85 *Id.*

86 *Id.*

87 *Id.* § 214.2(f)(9)(ii)(A).

88 *Id.* § 214.2(f)(9)(ii)(F)(2).

89 U.S. DEP'T OF HOMELAND SEC., SPECIAL STUDENT RELIEF, <https://studyinthestates.dhs.gov/students/special-student-relief> (last visited Aug. 1, 2022); 8 C.F.R. § 214.2(f)(5)(v) (2022). The regulations refer to "the Commissioner," which is defined to mean, after March 1, 2003, "the Director of U.S. Citizenship and Immigration Services, the Commissioner of U.S. Customs and Border Protection, and the Director of U.S. Immigration and Customs Enforcement, as appropriate in the context in which the term appears." 8 C.F.R. § 1.2 (2022). As a practical matter, when special student relief is invoked, it is promulgated by the Department of Homeland Security through the *Federal Register*. See, e.g., Employment Authorization for Sudanese F-1 Nonimmigrant Students Experiencing Severe Economic Hardship as a Direct Result of the Current Crisis in Sudan, 87 Fed. Reg. 23195 (Apr. 19, 2022).

90 U.S. Dep't of Homeland Sec., Emergent Circumstance Versus Temporary Protected Status: What Is the Difference? (2017), <https://studyinthestates.dhs.gov/2017/11/emergent-circumstances-versus-temporary-protected-status-what-difference>.

91 U.S. Dep't of Homeland Sec., *supra* note 89; NAFSA, 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>.

unless the Commissioner suspends the applicability of this limitation due to emergent circumstances, as determined by the Commissioner, by means of notice in the Federal Register, the student demonstrates to the DSO that the employment is necessary to avoid severe economic hardship resulting from the emergent circumstances, and the DSO notates the Form I-20 [Certificate of Eligibility for Nonimmigrant Student Status]⁹² in accordance with the Federal Register document.⁹³

As noted in Part I.E.2, off-campus employment for F-1 students has specific time limits and required connections to academic studies. "In emergent circumstances," however, "as determined by the Commissioner, the Commissioner may suspend the applicability of any or all of the requirements of [off-campus work authorization] by notice in the Federal Register."⁹⁴

The intricacies of the regulations governing international students studying in the United States belie their practical effects when those students' lives are upended by worldwide medical emergencies and hostilities in their home countries. The coronavirus pandemic and the 2022 war in Ukraine provide meaningful lessons on how best to support these stranded students and how politics can change the rules.

II. The Coronavirus Pandemic and Stranded Students

In response to the spread of COVID-19 at the beginning of 2020, the Centers for Disease Control and Prevention (CDC) first advised colleges and universities to scale back student-exchange programs, and then advised campuses to close after some institutions had already done so and switched to online learning. On March 1, 2020, the CDC issued guidance that institutions of higher education "should consider postponing or canceling upcoming student foreign exchange programs" and "consider asking current program participants to return to their home country."⁹⁵ It also suggested that institutions "should consider asking students participating in study abroad programs to return to the United States."⁹⁶ By March 9, the CDC released interim guidance for colleges and universities to plan and prepare for COVID-19,⁹⁷ and many institutions required students to leave campus and announced they would offer all instruction online after spring break.⁹⁸

92 U.S. DEP'T OF HOMELAND SEC., STUDENTS AND THE FORM I-20, <https://studyinthestates.dhs.gov/students/prepare/students-and-the-form-i-20> (last visited Aug. 1, 2022).

93 8 C.F.R. § 214.2(f)(9)(i) (2022).

94 *Id.* § 214.2(f)(9)(ii)(A). See *supra* note 89 for definition of "Commissioner."

95 Elizabeth Redden, *DC to Colleges: 'Consider' Canceling Exchange Programs*, INSIDE HIGHER ED, Mar. 2, 2020, <https://www.insidehighered.com/news/2020/03/03/cdc-tells-colleges-consider-canceling-foreign-exchange-programs-because-coronavirus>.

96 *Id.*

97 STATE HIGHER EDUC. EXEC. OFFICERS, UPDATE ON COVID-19 (2020), <https://sheeo.org/update-on-covid-19/>.

98 Elizabeth Redden, *Spring Break Conundrum: Stay Home or Travel?* INSIDE HIGHER ED, Mar. 11, 2020, <https://www.insidehighered.com/news/2020/03/11/students-faculty-dispersing-personal-spring-break-travel-create-new-challenges>; Elizabeth Redden, *Colleges Ask Students to Leave Campuses*,

A. *Stranded by Restrictions over Modes of Instruction*

As mentioned in Part I.D.1, students on an F-1 visa must enroll in a “full course of study,” which for undergraduates is generally twelve credit hours per semester,⁹⁹ with a limit of one course or three credits per semester taken online.¹⁰⁰ In the spring semester of 2020, when over 1300 institutions of higher education in all fifty states canceled in-person classes or shifted to online instruction only,¹⁰¹ students on F-1 visas faced a dilemma that U.S. Immigration and Customs Enforcement (ICE) initially addressed favorably. The agency issued guidance on March 9, 2020, expressing that it was focused on “ensuring that nonimmigrant students are able to continue to make normal progress in a full course of study as required by federal regulations” and intended “to be flexible with temporary adaptations.”¹⁰² More detailed guidance on March 13, 2020, advised that F-1 and M-1 students could “temporarily count online classes towards a full course of study in excess of the limits” under the regulations.¹⁰³ This flexibility applied to F-1 and M-1 students “even if they have left the United States and are taking the online classes from elsewhere.”¹⁰⁴

Four months later, the Department of Homeland Security reversed its policy and threatened F-1 students enrolled entirely in online courses with deportation. On July 6, 2020, ICE announced that for the fall of 2020 semester

Nonimmigrant F-1 and M-1 students attending schools operating entirely online may not take a full online course load and remain in the United States. The U.S. Department of State will not issue visas to students enrolled in schools and/or programs that are fully online for the fall semester nor will U.S. Customs and Border Protection permit these students to enter the United States. Active students currently in the United States enrolled in such programs must depart the country or take other measures, such as transferring to a school with in-person instruction to remain in lawful status. If not, they may face immigration consequences including, but not limited to, the initiation of removal proceedings.¹⁰⁵

INSIDE HIGHER ED, Mar. 11, 2020, <https://www.insidehighered.com/news/2020/03/11/harvard-cornell-mit-and-others-ask-students-leave-campus-due-coronavirus>.

99 8 U.S.C. § 1101(a)(15)(F)(i) (2018).

100 8 C.F.R. § 214.2(f)(6)(i)(G) (2022).

101 ANDREW SMALLEY, NATIONAL CONFERENCE OF STATE LEGISLATURES HIGHER EDUCATION RESPONSES TO CORONAVIRUS (COVID-19) (2021), <https://www.ncsl.org/research/education/higher-education-responses-to-coronavirus-covid-19.aspx>.

102 ICE, BROADCAST MESSAGE: CORONAVIRUS DISEASE 2019 (COVID-19) AND POTENTIAL PROCEDURAL ADAPTATIONS FOR F AND M NONIMMIGRANT STUDENTS (Mar. 9, 2020), <https://www.ice.gov/doclib/sevis/pdf/bcm2003-01.pdf>.

103 ICE, COVID-19: GUIDANCE FOR SEVP STAKEHOLDERS (Mar. 13, 2020), https://www.ice.gov/sites/default/files/documents/Document/2020/Coronavirus%20Guidance_3.13.20.pdf; See 8 C.F.R. § 214.2(f)(6)(i)(G), (m)(9)(v) (2022).

104 ICE, *supra* note 103.

105 ICE, SEVP MODIFIES TEMPORARY EXEMPTIONS FOR NONIMMIGRANT STUDENTS TAKING ONLINE COURSES DURING FALL 2020 SEMESTER (July 6, 2020), <https://www.ice.gov/news/releases/sevp-modifies-temporary-exemptions-nonimmigrant-students-taking-online-courses-during>.

Advocates for international students pushed back against the directive,¹⁰⁶ and Harvard University and the Massachusetts Institute of Technology filed suit against the Department of Homeland Security on July 8, 2020 in the U.S. District Court in Massachusetts, seeking injunctive relief preventing the department from enforcing the new policy.¹⁰⁷ Harvard and MIT’s complaint charged that the policy was “arbitrary and capricious” under the Administrative Procedures Act,¹⁰⁸ among other reasons because it

entirely fails to consider the significant effects that it will have on universities that have invested considerable time and effort in developing plans for the 2020-2021 academic year—plans that carefully balance the health and safety of faculty, students, and staff, with their core mission of educating students. The July 6 Directive likewise fails to consider the devastating effects that it will have on international students who will be forced to leave the United States or will be unable to enter to take classes, or those who will not be able to return to their home—or any—country.¹⁰⁹

The Department of Homeland Security quickly rescinded the policy. “[L]ess than five minutes” into a hearing on the case on July 14, 2020,¹¹⁰ the parties reached a resolution: the policy was withdrawn and ICE agreed to “return to the status quo,” meaning the guidance it had issued in March 2020.¹¹¹ ICE memorialized this agreement through a broadcast message to all users of the Student and Exchange Visitor Information System (SEVIS) on July 24, 2020.¹¹² ICE continued the March 2020 guidance for the 2021–22 and 2022–23 academic years,¹¹³ with clarification

106 See, e.g., AM. COUNCIL ON EDUC., DHS-ICE JULY 6, 2020 DIRECTIVE ON INTERNATIONAL STUDENTS FOR FALL 2020 TALKING POINTS, <https://www.acenet.edu/Documents/Talking-Points-ICE-International-Students-Directive.pdf> (last visited Aug. 1, 2022); NAFSA, ICE’S GUIDANCE LIMITS DECISION-MAKING AUTHORITY OF HIGHER EDUCATION LEADERS (2020), <https://www.nafsa.org/about/about-nafsa/ices-guidance-limits-decision-making-authority-higher-education-leaders>.

107 President and Fellows of Harvard Coll. v. U.S. Dep’t of Homeland Sec., No. 1:20-cv-11283 (D. Mass. July 8, 2020).

108 5 U.S.C. § 706(2)(A) (2018).

109 Complaint for Declaratory and Injunctive Relief at 20–21, President and Fellows of Harvard Coll. v. U.S. Dep’t of Homeland Sec., No. 1:20-cv-11283 (D. Mass. July 8, 2020), <https://s3.documentcloud.org/documents/6982801/1-Main.pdf>.

110 Camille G. Caldera & Michelle G. Kurilla, *DHS and ICE Rescind Policy Barring International Students Taking Online Courses*, HARVARD CRIMSON, July 15, 2020, <https://www.thecrimson.com/article/2020/7/15/ice-lawsuit-policy-rescinded/>.

111 Collin Binkley, *Trump Administration Rescinds Rule on International Students*, PBS NEWS HOUR, July 14, 2020, <https://www.pbs.org/newshour/nation/judge-to-hear-arguments-in-challenge-to-foreign-student-rule>.

112 ICE, BROADCAST MESSAGE: FOLLOW-UP: ICE CONTINUES MARCH GUIDANCE FOR FALL SCHOOL TERM (July 24, 2020), <https://www.ice.gov/doclib/sevis/pdf/bcmFall2020guidance.pdf>. SEVIS is the Department of Homeland Security’s web-based system to maintain information on schools certified for the Student and Exchange Visitor Program, F-1 and M-1 students coming to the United States to attend those schools, U.S. Department of State-designated Exchange Visitor Program sponsors, and J-1 visa Exchange Visitor Program participants. ICE, STUDENT AND EXCH. VISITOR INFO. SYS. (2021), <https://www.ice.gov/sevis/overview>.

113 ICE, BROADCAST MESSAGE: ICE CONTINUES MARCH 2020 GUIDANCE FOR THE 2021–22 ACADEMIC YEAR (Apr. 26, 2021), <https://www.ice.gov/doclib/sevis/pdf/bcm2104-05.pdf> [hereinafter ICE, 2021–22

that the flexibility regarding online classes extended to continuing students, while “new or Initial F and M students who were not previously enrolled in a program of study on March 9, 2020, will not be able to enter the United States as a nonimmigrant student ... if their course of study is 100 percent online.”¹¹⁴

B. Stranded by Work Restrictions

By the end of April 2020, many international students were “watching their financial lives fall apart.”¹¹⁵ With on-campus jobs closed along with the campuses themselves and without authority to work off-campus,¹¹⁶ many international students saw their “bank accounts dwindle” while they sought housing to replace their shuttered residence halls and, in some cases, while they still owed a portion of their semester’s tuition.¹¹⁷

Recognizing these difficult situations for international students in the United States, USCIS issued a news alert on April 13, 2020, acknowledging “that there are immigration-related challenges as a direct result of the coronavirus (COVID-19) pandemic” and “that nonimmigrants may unexpectedly remain in the United States beyond their authorized period of stay due to COVID-19.”¹¹⁸ The news alert referenced USCIS’s “Special Situations” page, which included information on how F-1 students could request employment authorization to work off-campus if they “experience severe economic hardship because of unforeseen circumstances beyond [their] control.”¹¹⁹

With the pandemic persisting into 2022,¹²⁰ ICE published more explicit guidance on a range of issues for international students on April 18, 2022.¹²¹ With regard to employment, the guidance clarified, among other issues, that

- students on F visas can engage in remote work for on-campus employment if the on-campus job “has transitioned to remote work or the employment can be done through remote means”;

GUIDANCE]; ICE, BROADCAST MESSAGE: ICE CONTINUES MARCH 2020 GUIDANCE FOR THE 2022–23 ACADEMIC YEAR (Apr. 18, 2022), <https://www.ice.gov/doclib/sevis/pdf/bcm2204-04a.pdf> [hereinafter ICE, 2022–23 GUIDANCE].

114 ICE, 2021–22 GUIDANCE, *supra* note 113; ICE, 2022–23 GUIDANCE, *supra* note 113.

115 Dickerson, *supra* note 3.

116 See *supra* text accompanying notes 65–88.

117 Dickerson, *supra* note 3.

118 USCIS, COVID-19 DELAYS IN EXTENSION/CHANGE OF STATUS FILINGS (Apr. 13, 2020), <https://www.uscis.gov/news/alerts/covid-19-delays-in-extensionchange-of-status-filings>.

119 USCIS, SPECIAL SITUATIONS (Oct. 25, 2019), <https://www.uscis.gov/humanitarian/special-situations>.

120 WHO, WHO CORONAVIRUS (COVID-19) DASHBOARD (May 27, 2022), <https://covid19.who.int/>. Beyond this worldwide health emergency, domestic politics within the United States played a role in the more expansive approach to the needs of international students between 2020 and 2022. See *infra* text accompanying notes 163–83.

121 ICE, FREQUENTLY ASKED QUESTIONS FOR SEVP STAKEHOLDERS ABOUT COVID-19 (Apr. 18, 2022), <https://www.ice.gov/doclib/coronavirus/covid19faq.pdf>.

- students participating in OPT, including STEM OPT, “may work remotely if their employer has an office outside of the United States or the employer can assess student engagement using electronic means”; and
- “[f]or the duration of the COVID-19 emergency,” students “who are working in their OPT opportunities fewer than 20 hours a week” will be considered “as engaged in OPT.”¹²²

C. Stranded by Initial Legal Restrictions on Federal Emergency Relief Funds to International Students

In response to the health and economic challenges posed by the coronavirus pandemic, Congress passed several funding packages totaling \$5.1 trillion between 2020 and 2021.¹²³ Three of the initiatives—the Coronavirus Aid, Relief, and Economic Security (CARES) Act,¹²⁴ the Coronavirus Response and Relief Supplement Appropriations (CRRSA) Act,¹²⁵ and the American Rescue Plan (ARP)¹²⁶—included major provisions to support colleges and universities and their students, with the majority of funding flowing from the U.S. Department of Education to institutions of higher education “through multiple iterations” of the Higher Education Emergency Relief Fund (HEERF).¹²⁷ HEERF provided about \$75 billion in funding to institutions of higher education and their students.¹²⁸

Each iteration of HEERF required institutions to use at least half of their funding for financial aid grants to students.¹²⁹ The parameters for the uses and recipients of financial aid grants broadened between the CARES Act and the CRRSA Act. Under the CARES Act, institutions were required to “provide emergency financial aid grants to students for expenses related to the disruption of campus operations due to coronavirus (including eligible expenses under a student’s cost

122 *Id.*

123 CTR. ON BUDGET & POL’Y PRIORITIES, ROBUST COVID RELIEF ACHIEVED HISTORIC GAINS AGAINST POVERTY AND HARDSHIP, BOLSTERED ECONOMY (Feb. 24, 2022), https://www.cbpp.org/sites/default/files/2-24-2022pov_1.pdf.

124 Coronavirus Aid, Relief, and Economic Security (CARES) Act, Pub. L. No. 116-136, 134 Stat. 281 (2020).

125 Coronavirus Response and Relief Supplement Appropriations (CRRSA) Act, Pub. L. No. 116-260, 134 Stat. 1182 (2020).

126 American Rescue Plan, Pub. L. No. 117-2, 135 Stat. 4 (2021).

127 SOPHIA LADERMAN & TOM HARNISCH, STATE HIGHER EDUC. EXEC. OFFICERS ASS’N, ANALYSIS OF FEDERAL STIMULUS FUNDING TO STATES AND PUBLIC INSTITUTIONS OF HIGHER EDUCATION 5 (2021), https://shef.sheeo.org/wp-content/uploads/2021/05/SHEEO_SHEF_FY20_IB_Federal_Stimulus.pdf. See CARES Act, *supra* note 124, at § 18004; CRRSA Act, *supra* note 125, at § 314; American Rescue Plan, *supra* note 126, at § 2003.

128 NAT’L ASS’N OF COLL. AND UNIV. BUDGET OFFICERS, HEERF RESOURCE CENTER: HIGHER EDUCATION EMERGENCY RELIEF FUND (HEERF) GRANT PROGRAM (2022), <https://www.nacubo.org/HEERF>.

129 CARES, *supra* note 124, at § 18004(c); CRRSA Act, *supra* note 125, at § 314(d)(5); American Rescue Plan, *supra* note 126, at § 2003(7).

of attendance, such as food, housing, course materials, technology, health care, and child care).¹³⁰ Under the CRRSA Act, an institution's "financial aid grants to students" could be used for "any component of the student's cost of attendance or for emergency costs that arise due to coronavirus, such as tuition, food, housing, health care (including mental health care), or child care."¹³¹ Moreover, the CRRSA Act required institutions to prioritize grants "to students with exceptional need, such as students who receive Pell Grants."¹³² The American Rescue Plan maintained the same definition of "financial aid grant" as in the CRRSA Act.¹³³

Initially, international students were ineligible for emergency financial aid grants. In an interim final rule, the Department of Education—citing, in part, several direct and indirect references to Title IV in the statutory language of the CARES Act¹³⁴—reasoned that "Congress intended the category of those eligible for 'emergency financial aid grants to students' in section 18004 of the CARES Act to be limited to those individuals eligible for title [sic] IV assistance."¹³⁵ Under Title IV, students are eligible for a grant, loan, or work assistance if, among other qualifications, they are "a citizen or national of the United States, a permanent resident of the United States, or able to provide evidence from the Immigration and Naturalization Service that [they are] in the United States for other than a temporary purpose with the intention of becoming a citizen or permanent resident."¹³⁶

Following a series of lawsuits against the interim final rule,¹³⁷ as well as thousands of public comments against it,¹³⁸ the Department of Education—after the transition from President Trump to President Biden—enabled nonimmigrant students in the United States to be eligible for the pandemic-relief financial aid appropriated by Congress. In May 2021, the department's final regulations revised "the definition of 'student' to make clear that any individual who is or was enrolled at an eligible institution on or after the date the national emergency was declared for COVID-19 may qualify for assistance under HEERF program requirements" and emphasized that individuals were "no longer required to be title [sic] IV eligible in order to

130 CARES Act, *supra* note 124, at § 18004(c).

131 CRRSA Act, *supra* note 125, at § 314(c)(3).

132 *Id.*

133 American Rescue Plan, *supra* note 126, at § 2003.

134 Eligibility of Students at Institutions of Higher Education for Funds Under the Coronavirus Aid, Relief, and Economic Security (CARES) Act, 85 Fed. Reg. 36494, 36496–97 (June 17, 2020).

135 *Id.* at 36496.

136 20 U.S.C. § 1091(a)(5) (2018); 34 C.F.R. § 668.33 (2022).

137 *Oakley v. DeVos*, No. 4:20-cv-03215-YGR, 2020 WL 3268661 (N.D. Cal. June 17, 2020) (enjoined Department of Education from enforcing eligibility requirement for students to receive HEERF emergency financial aid grant with regard to community colleges in California); *Washington v. DeVos*, 466 F. Supp. 3d 1151 (E.D. Wash. 2020) (similar preliminary injunction against enforcement of the rule with regard to institutions in the State of Washington); *Noerand v. DeVos*, 474 F. Supp. 3d 394, 399 (D. Mass. 2020) ("to read these provisions as limited to students eligible under Title IV would lead to absurd results").

138 Eligibility to Receive Emergency Financial Aid Grants to Students Under the Higher Education Emergency Relief Programs, 86 Fed. Reg. 26608, 26609 (May 14, 2021) (to be codified at 34 C.F.R. pt. 677).

receive a HEERF student grant."¹³⁹ The Department of Education indicated that the revised definition better met the intent of Congress. In the notice of its final rule, the department wrote, "Congress created a program that was designed to award emergency financial aid grants in the most expedient way possible without the establishment of unnecessary roadblocks that would slow down the ability of institutions to help students address added expenses stemming from the COVID-19 national emergency."¹⁴⁰

D. Stranded by Travel Restrictions

Prominently campaigning on an anti-immigration agenda before he was elected president in 2016,¹⁴¹ Donald Trump signed a series of executive orders and proclamations aimed at restricting migrants from selected countries—often Muslim majority—and limiting refugees.¹⁴² The chaotic disruption for international students, especially after the implementation of the first executive order during President Trump's second week in office,¹⁴³ has been well chronicled.¹⁴⁴ The constitutionality of many of these executive actions has also been well examined.¹⁴⁵

The U.S. Supreme Court ultimately upheld the president's authority to impose such travel constraints,¹⁴⁶ specifically those promulgated under a presidential proclamation issued in September 2017 that restricted entry for the nationals of eight foreign states that had systems for "identity-management and information-sharing protocols and practices" deemed "inadequate" by the Trump Administration.¹⁴⁷ The proclamation implemented a range of restrictions on entry

139 *Id.* at 26609.

140 *Id.*

141 Nick Corasaniti, *A Look at Trump's Immigration Plan, Then and Now*, N.Y. TIMES, Aug. 31, 2016, <https://www.nytimes.com/interactive/2016/08/31/us/politics/donald-trump-immigration-changes.html>.

142 See Exec. Order No. 13769, 82 Fed. Reg. 8977 (Feb. 1, 2017), *revoked by* Exec. Order No. 13780, 82 Fed. Reg. 13209 (Mar. 9, 2017); Proclamation No. 9645, 82 Fed. Reg. 45161 (Sept. 27, 2017); Proclamation No. 9983, 85 Fed. Reg. 6699 (Feb. 5, 2020).

143 Exec. Order No. 13769, *supra* note 142.

144 See, e.g., Anya Kamenetz, *Students Stranded Worldwide by Trump Order*, NPRED, Jan. 30, 2017, <https://www.npr.org/sections/ed/2017/01/30/512431112/students-stranded-worldwide-by-trump-order>; Karin Fischer, *Trump's Travel Ban Leaves Students Stranded—And Colleges Scrambling to Help*, CHRON. HIGHER EDUC., Jan. 29, 2017, <https://www.chronicle.com/article/trumps-travel-ban-leaves-students-stranded-and-colleges-scrambling-to-help>; Elizabeth Redden, *Stranded and Stuck*, INSIDE HIGHER ED, Jan. 30, 2017, <https://www.insidehighered.com/news/2017/01/30/students-and-scholars-are-stranded-after-trump-bars-travel-nationals-7-countries>.

145 See, e.g., Earl M. Maltz, *The Constitution and the Trump Travel Ban*, 22 LEWIS & CLARK L. REV. 391 (2018); Michele Waslin, *The Use of Executive Orders and Proclamations to Create Immigration Policy: Trump in Historical Perspective*, 8 J. MIGRATION & HUM. SOC'Y 54 (2020); Peter Margulies, *Bans, Borders, and Sovereignty: Judicial Review of Immigration Law in the Trump Administration*, 2018 MICH. ST. L. REV. 1 (2018); Shoba Sivaprasad Wadhia, *National Security, Immigration and the Muslim Bans*, 75 WASH. & LEE L. REV. 1475 (2018).

146 *Trump v. Hawaii*, 138 S. Ct. 2392 (2018).

147 Proclamation No. 9645, 82 Fed. Reg. 45161, 45164 (Sept. 27, 2017). The eight countries were Chad, Iran, Libya, North Korea, Somalia, Syria, Venezuela, and Yemen.

based on the “distinct circumstances” in each of the eight countries, exempted lawful permanent residents, and provided case-by-case waivers under certain circumstances.¹⁴⁸

The U.S. Supreme Court upheld the terms of the presidential proclamation, rejecting the arguments brought by the state of Hawaii that the proclamation violated the Immigration and Nationality Act and the Establishment Clause of the Constitution. With regard to immigration law, the Court stated,

By its plain language, § 1182(f) [of the Immigration and Nationality Act] grants the President broad discretion to suspend the entry of aliens into the United States. The President lawfully exercised that discretion based on his findings—following a worldwide, multi-agency review—that entry of the covered aliens would be detrimental to the national interest.¹⁴⁹

With regard to the Establishment Clause, Hawaii claimed that proclamation violated that clause of the First Amendment “because it was motivated not by concerns pertaining to national security but by animus toward Islam.”¹⁵⁰ The plaintiffs cited several statements made by Donald Trump during the campaign and after taking office. For example, during the campaign, Trump published a “Statement on Preventing Muslim Immigration” calling for a “total and complete shutdown of Muslims entering the United States until our country’s representatives can figure out what is going on.”¹⁵¹ The Court rejected this argument. It wrote, “The Proclamation is expressly premised on legitimate purposes: preventing entry of nationals who cannot be adequately vetted and inducing other nations to improve their practices. The text says nothing about religion.”¹⁵²

Presidential legal authority to limit travel based on national security was thus already well established when the coronavirus pandemic struck in January 2020, leaving international students little recourse against a series of presidential proclamations that were sometimes terminated only to be reestablished and terminated again. Between March 2020 and May 2020, President Trump suspended entry of immigrants and nonimmigrants who posed a risk of transmitting the novel coronavirus from China,¹⁵³ Iran,¹⁵⁴ the European Schengen Area,¹⁵⁵ the United

148 *Id.* at 45164, 45165–69.

149 *Hawaii*, 138 S. Ct. at 2400, 2423.

150 *Id.* at 2406.

151 *Id.* at 2417.

152 *Id.* at 2421.

153 Proclamation No. 9984, 85 Fed. Reg. 6709 (Feb. 5, 2020); *continued in effect by* Proclamation No. 10143, 86 Fed. Reg. 7467 (Jan. 28, 2021); *revoked*, Proclamation No. 10294, 86 Fed. Reg. 59603 (Oct. 28, 2021).

154 Proclamation No. 9992, 85 Fed. Reg. 12855 (Mar. 4, 2020); *continued in effect by* Proclamation No. 10143, *supra* note 153; *revoked*, Proclamation No. 10294, *supra* note 153.

155 Proclamation No. 9993, 85 Fed. Reg. 15045 (Mar. 16, 2020); *revoked*, Proclamation No. 10138, 86 Fed. Reg. 6799 (Jan. 22, 2021); *reestablished without interruption*, Proclamation 10143, *supra* note 153. The countries in this area are Austria, Belgium, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Iceland, Italy, Latvia, Liechtenstein, Lithuania, Luxembourg, Malta, Netherlands, Norway, Poland, Portugal, Slovakia, Slovenia, Spain, Sweden, and Switzerland.

Kingdom and the Republic of Ireland,¹⁵⁶ and Brazil.¹⁵⁷ Soon after assuming office, President Biden enacted a proclamation suspending entry of nationals from South Africa as immigrants and nonimmigrants as a means to mitigate transmission of the coronavirus.¹⁵⁸ President Biden later suspended but then quickly restored entry from Botswana, Eswatini, Lesotho, Malawi, Mozambique, Namibia, South Africa (the subject of earlier proclamations), and Zimbabwe.¹⁵⁹

The constantly changing travel restrictions, which caused confusion for international students over whether to leave the United States,¹⁶⁰ compounded the unintended incentive under U.S. immigration law for international students and others with nonimmigrant status to overstay their visas or otherwise remain in the United States without authorization. Under the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, individuals who remain in the United States unlawfully for at least 180 days but less than one year are barred from reentry for three years, and those who remain unlawfully for one year or longer are barred from reentry for ten years.¹⁶¹ The bars are "automatically imposed when the individual leaves the physical territory of the United States," creating a dilemma for them: either "maintain their precarious position as undocumented [immigrants] within the United States or leave the country and likely face a three- or 10-year ... bar to legal re-entry to the United States."¹⁶²

III. The 2021 Presidential Transition and Its Effect on International Students During the Pandemic

Soon into its term of office, the Biden Administration adopted policies and made statements to undo the so-called "Trump effect" on international education, described as the "combination of policies and rhetoric from the 45th president ... making international students reconsider coming to the United States amid a political climate hostile to globalism."¹⁶³ For example, on February 2, 2021, President Biden issued an executive order titled, "Restoring Faith in Our Legal

156 Proclamation No. 9984, *supra* note 153; *revoked*, Proclamation No. 10138, *supra* note 155; *reestablished without interruption*, Proclamation No. 10143, *supra* note 153.

157 Proclamation No. 10041, 85 Fed. Reg. 31933 (May 28, 2020); *revoked*, Proclamation No. 10138, *supra* note 155; *reestablished without interruption*, Proclamation No. 10143, *supra* note 153.

158 Proclamation No. 10143, *supra* note 153; *revoked*, Proclamation No. 10294, *supra* note 153.

159 Proclamation No. 10315, 86 Fed. Reg. 68385 (Dec. 1, 2021); *revoked*, Proclamation No. 10329, 87 Fed. Reg. 149 (Jan. 3, 2022).

160 Olivia Tucker & Tigerlily Hopson, 'I Just Want to Go Home': Omicron Variant Casts Doubt on International Students' Travel Plans, YALE DAILY NEWS, Dec. 7, 2021, <https://yaledailynews.com/blog/2021/12/07/i-just-want-to-go-home-omicron-variant-casts-doubt-on-international-students-travel-plans/>.

161 8 U.S.C. § 1182 (a)(9)(B)(i)I, II (2018).

162 Jane Lilly López, *Redefining American Families: The Disparate Effects of IIRIRA's Automatic Bars to Reentry and Sponsorship Requirements on Mixed-Citizenship Couples*. 5 J. MIGRATION & HUM. SEC. 236, 238, 239 (2017).

163 Vimal Patel, *Is the 'Trump Effect' Scaring Away Prospective International Students?* CHRON. HIGHER EDUC., Nov. 13, 2018, <https://www.chronicle.com/article/is-the-trump-effect-scaring-away-prospective-international-students/>.

Immigration Systems and Strengthening Integration and Inclusion Efforts for New Americans.”¹⁶⁴ Among several other provisions, the executive order directed the Secretary of State, the Attorney General, and the Secretary of Homeland Security to “identify barriers that impede access to immigration benefits and fair, efficient adjudications of these benefits and make recommendations on how to remove these barriers, as appropriate and consistent with applicable law.”¹⁶⁵

Five months later, the Department of State and the Department of Education released a joint statement of principles entitled, “A Renewed U.S. Commitment to International Education.”¹⁶⁶ The document stated, “The robust exchange of students, researchers, scholars, and educators, along with broader international education efforts between the United States and other countries, strengthens relationships between current and future leaders. These relationships are necessary to address shared challenges, enhance American prosperity, and contribute to global peace and security.”¹⁶⁷ Pledging to “commit to undertaking actions to support a renewed focus on international education,” the departments listed as one of their principles, “Welcome international students, researchers, scholars, and educators to the United States in a safe and secure manner and encourage a diversity of participants, disciplines, and types of authorized schools and higher education institutions where they can choose to study, teach, or contribute to research.”¹⁶⁸

Following up on this rhetoric, the Biden Administration took several steps that eased the process for international students to study and remain in the United States. Part II.C describes the Department of Education’s final rules that enabled nonimmigrant students in the United States to be eligible for pandemic-relief-funding financial aid.¹⁶⁹ Two other policy changes are detailed below.

A. Evaluation of F-1 Visa Applicants’ Intent

Under the Immigration and Nationality Act, an alien “shall be presumed to be an immigrant until he establishes to the satisfaction of the consular officer, at the time of application for a visa, and the immigration officers, at the time of application for admission, that he is entitled to a nonimmigrant status.”¹⁷⁰ If students appear to want to stay in the United States long term, the consular officer could deny their nonimmigrant visas.

In a 2005 cable to all diplomatic and consular posts, Secretary of State Condoleezza Rice called for consular officers to be reasonable when evaluating the ability of an F-1 visa applicant

164 Exec. Order No. 14012, 86 Fed. Reg. 8277 (Feb. 5, 2021).

165 *Id.*

166 U.S. DEP’T OF STATE AND U.S. DEP’T OF EDUC., A RENEWED U.S. COMMITMENT TO INTERNATIONAL EDUCATION, (July 2021), https://educationusa.state.gov/sites/default/files/intl_ed_joint_statement.pdf.

167 *Id.*

168 *Id.*

169 86 Fed. Reg. 26608, *supra* note 138. See also *supra* text accompanying notes 137–40.

170 8 U.S.C. § 1184(b) (2018).

to satisfactorily demonstrate that s/he possesses a residence abroad that s/he has no intention of abandoning Consular officers adjudicating student visa applications should evaluate the applicant's requirement to maintain a residence abroad in the context of the student's present circumstances; they should focus on the student applicant's immediate and near-term intent.¹⁷¹

The Trump Administration in effect rescinded the Rice cable in 2017 by amending the section in the State Department's *Foreign Affairs Manual* pertaining to students and exchange visitors. The language stated, If you are not satisfied that the applicant's present intent is to depart the United States at the conclusion of his or her study or OPT, you must refuse the visa under INA 214(b). To evaluate this, you should assess the applicant's current plans following completion of his or her study or OPT. The hypothetical possibility that the applicant may apply to change or adjust status in the United States in the future is not a basis to refuse a visa application if you are satisfied that the applicant's present intent is to depart at the conclusion of his or her study or OPT.¹⁷²

The Biden Administration, on December 29, 2021, restored the approach of the Rice cable in evaluating the intent of international students to leave the United States after completing their academic program, and it extended this approach to M-1 visa applicants as well as F-1 applicants.¹⁷³ The new language stated that it "is natural that the student does not possess ties of property, employment, and continuity of life" because the student "is often single, unemployed, without property, and is at the stage in life of deciding and developing their plans for the future."¹⁷⁴ The language goes on to say,

Student visa adjudication is made more complex by the fact that students typically are expected to stay in the United States longer than do many other nonimmigrant visitors, to complete their program of studies. In these circumstances, it is important to keep in mind that the applicant's intent is to be adjudicated based on present intent - not on contingencies of what might happen in the future, after a lengthy period of study in the United States. Therefore, the residence abroad requirement for student applicants should be considered in the context of the usual limited ties that a student would have, and their immediate intent.¹⁷⁵

171 U.S. DEP'T OF STATE, CABLE ON EVALUATING RESIDENCE ABROAD FOR F-1 STUDENTS (Sept. 28, 2005), https://www.nafsa.org/_/file/_/amresource/DOScable_20050928.htm.

172 9 FOREIGN AFF. MANUAL § 402.5-5(E)(1)(b), *retracted* (cited in Dan Berger et al., *A Proposal to Bring Back Reasonableness: Resurrect the Rice Cable on Students and Temporary Intent, and Expand It to J-1 Exchange Visitors*, IMMIGRATION DAILY, Dec. 28, 2020, <https://discuss.ilw.com/articles/articles/396934-article-a-proposal-to-bring-back-reasonableness-resurrect-the-rice-cable-on-students-and-temporary-intent-and-expand-it-to-j-1-exchange-visitors-by-dan-berger-stephen-yale-loehr-emily-hindle-and-hun-lee>).

173 Lizbeth M. Chow, *State Department Updates Guidance on F-1/M-1 Student Intent to Depart and Residence Abroad Requirements*, NAT'L L. REV., Dec. 29, 2021, <https://www.natlawreview.com/article/state-department-updates-guidance-f-1m-1-student-intent-to-depart-and-residence>.

174 9 FOREIGN AFF. MAN. § 402.5-5(E)(1)b (Feb. 28, 2022), <https://fam.state.gov/fam/09FAM/09FAM040205.html>.

175 *Id.*

B. “Duration of Status” Rules

Rather than being admitted into the United States for a fixed time period, international students are admitted for the period of time during which they comply with the terms and conditions of their nonimmigrant status, called “duration of status.” For example, the duration of status for students on F-1 visas is “the time during which an F-1 student is pursuing a full course of study at an educational institution . . . , or engaging in authorized practical training following completion of studies”¹⁷⁶

In September of the Trump Administration’s fourth year in office, the Department of Homeland Security proposed to change the admission period from duration of status to a fixed time period for students under F and J visas, and international journalists under I visas.¹⁷⁷ Citing the growth in the number of recipients of F, J, and I visas, the department indicated a need to improve its monitoring of these visa holders. A duration-of-status admission period “does not afford immigration officers enough predetermined opportunities to directly verify that aliens granted such nonimmigrant statuses are engaging only in those activities their respective classifications authorize while they are in the United States,” which in turn “has undermined DHS’s ability to effectively enforce compliance with the statutory inadmissibility grounds related to unlawful presence and has created incentives for fraud and abuse.”¹⁷⁸

As a result of its concerns, the Department of Homeland Security proposed, among many other amendments, to set “the authorized admission and extension periods for F and J nonimmigrants (with limited exceptions) up to the program length, not to exceed a 2- or 4-year period.”¹⁷⁹ International students wishing to remain in the United States beyond their specifically authorized admission period would need to apply for an extension of stay directly with USCIS or depart the country and apply for admission with U.S. Customs and Border Protection at a port of entry.¹⁸⁰

The Biden Administration withdrew this proposed rulemaking in July 2021. In its notice to withdraw the proposal, the Department of Homeland Security noted during the thirty-day public comment period for the proposed rule, it had received more than 32,000 public comments, and “[m]ore than 99 percent of commenters opposed the proposed rule,” arguing that it was discriminatory, “would significantly burden the foreign students [and], exchange scholars . . . by requiring extension of stays in order to continue with their programs of study or work”,

176 8 C.F.R. § 214.2(f)(5)(i) (2022). For a discussion of “full course of study,” see *supra* text accompanying note 46.

177 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, 85 Fed. Reg. 60526 (Sept. 25, 2020). For duration of status for I visa holders, see 8 C.F.R. § 214.2(i) (2022).

178 85 Fed. Reg. *supra* note 177 at 60528.

179 *Id.* at 60529.

180 *Id.* at 60526.

and "would impose exorbitant costs and burdens on foreign students ... due to the direct cost of the extension of stay application fee."¹⁸¹ The department "believes some of the comments may be justified and is concerned that the changes proposed unnecessarily impede access to immigration benefits."¹⁸² The department withdrew the proposed rule with a caveat that it "may engage in a future rulemaking to protect the integrity of programs that admit nonimmigrants in the F, J, and I classifications."¹⁸³

IV. Russia's Invasion of Ukraine and the Rights of U.S., Ukrainian, and Other Students

After amassing 190,000 soldiers along its border with Ukraine, Russia invaded Ukraine on February 24, 2022,¹⁸⁴ igniting "one of the biggest exoduses in European history."¹⁸⁵ Between the start of the war and June 2022, more than fourteen million Ukrainians had evacuated their homes: nearly seven million leaving the country, and the remaining seven million displaced within Ukraine.¹⁸⁶ While American students studying in Ukraine and Russia were evacuated,¹⁸⁷ many Ukrainian citizens studying in the United States were stranded as their families fled their homes,¹⁸⁸ and thousands of the refugees themselves were students from around the world studying in Ukraine who needed to get home or relocate.¹⁸⁹

A. U.S. Students Studying Abroad

Courts have ruled that colleges and universities have a duty of reasonable care to protect students from reasonably foreseeable harm while participating in study abroad programs.¹⁹⁰ Institutions in the United States followed this standard of

181 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, 86 Fed. Reg. 35410 (July 6, 2021).

182 *Id.*

183 *Id.*

184 Troianovski & MacFarquhar, *supra* note 18.

185 Josh Zumbrun, *Ukraine Faces a Staggering Population Loss*, WALL ST. J., June 4–5, 2022, A2.

186 Ann M. Simmons & Courtney McBride, *100 Days of Death and Devastation in Ukraine*, WALL ST. J., June 3, 2022, <https://www.wsj.com/articles/100-days-of-death-and-devastation-in-ukraine-11654259204>.

187 Josh Moody, *Russia-Ukraine War Disrupts Study Abroad*, INSIDE HIGHER ED, Mar. 3, 2022, <https://www.insidehighered.com/news/2022/03/03/russia-ukraine-war-disrupts-study-abroad-programs>.

188 Josh Moody, *Ukrainian, Russian Students Face Financial Woes in U.S.*, INSIDE HIGHER ED, Mar. 30, 2022, <https://www.insidehighered.com/news/2022/03/30/war-creates-financial-woes-russian-ukrainian-students>.

189 Alexis Okeowo, *The Foreign Students Who Saw Ukraine as a Gateway to a Better Life*, NEW YORKER, Apr. 1, 2022, <https://www.newyorker.com/news/dispatch/the-foreign-students-displaced-by-war>.

190 See *Bloss v. Univ. of Minn.*, 590 N.W.2d 661, 665 (Minn. Ct. App. 1999) (in case brought by student sexually assaulted by a taxi driver while participating in a university-sponsored study-abroad program, university's decision to use host families to provide housing was discretionary policy-making conduct protected by statutory immunity, but court could "envision circumstances involving safety of students, particularly school children on school premises, that might not allow an

care after Russia ignited the conflict in Ukraine to protect their students attending classes in the region.

It was unclear how many U.S. students were studying in Ukraine when the war began. The most recent statistics, from 2019–20, indicated that only fifty-five U.S. students “studied abroad to Ukraine” in 2019–20.¹⁹¹

For students studying in Russia, U.S. colleges and universities quickly recalled their students who were enrolled at their Russian-based facilities. For example, Middlebury College helped to arrange the return of twelve students from the Middlebury School in Russia,¹⁹² which offers programs in Yaroslavl, Irkutsk, and Moscow.¹⁹³ In making this decision, Middlebury officials took into consideration “the limited number of international flights out of Russia, and the U.S. Department of State’s authorization for family members and nonessential embassy staff to return to the U.S.”¹⁹⁴

Other universities canceled study-abroad programs scheduled for the region later in 2022. For example, Harvard University had planned a study-abroad program in June 2022 in Tbilisi, Georgia.¹⁹⁵ An update on the program’s website advised, “The Tbilisi program is postponed to Summer 2023. Check back in Fall 2022 for more information.”¹⁹⁶

B. Ukrainian Students in the United States

The war had serious legal and financial consequences for Ukrainian students studying in the United States. According to 2020–21 statistics, 1739 students from Ukraine were studying at U.S. colleges and universities, including 877 undergraduates, 529 graduate students, 48 nondegree students, and 285 students participating in OPT.¹⁹⁷ Through March and April 2022, the U.S. government extended several forms of relief and protection to Ukrainians living in the United

exercise of ‘discretionary duty’”). *See also* *Mattingly v. Univ. of Louisville*, 2006 U.S. Dist. LEXIS 53259 (W.D. Ky. July 28, 2006) (in case brought by student raped during study abroad program, public university and its officer sued in his official capacity were immune from liability for the negligent performance of a public function).

191 INST. OF INT’L EDUC., OPENDOORS, U.S. STUDY ABOARD: ALL DESTINATIONS (2021), <https://opendoorsdata.org/data/us-study-abroad/all-destinations/>.

192 Moody, *supra* note 187.

193 MIDDLEBURY C.V. STARR SCHOOLS ABROAD, STUDY ABROAD IN RUSSIA, <https://www.middlebury.edu/schools-abroad/schools/russia> (last visited Aug. 1, 2022)

194 Moody, *supra* note 187. *See* U.S. EMBASSY AND CONSULATES IN RUSSIA, DEP’T OF STATE, TRAVEL ADVISORY: DEPARTURE OF NON-EMERGENCY U.S. GOVERNMENT EMPLOYEES AND FAMILY MEMBERS (Feb. 28, 2022), <https://ru.usembassy.gov/travel-advisory-departure-of-non-emergency-u-s-government-employees-and-family-members-february-28-2022/>.

195 Moody, *supra* note 187.

196 HARVARD SUMMER SCHOOL, HARVARD SUMMER PROGRAM IN TBILISI, GEORGIA (2022), <https://summer.harvard.edu/study-abroad/tbilisi-georgia/>.

197 INST. OF INT’L EDUC., OPENDOORS, ACADEMIC LEVEL AND PLACES OF ORIGIN (2021), <https://opendoorsdata.org/data/international-students/academic-level-and-places-of-origin/>.

States. Some of the programs directly benefitted students, while other programs specifically excluded them, and some initiatives overlapped.

1. *Special Student Relief*

As the war in Ukraine extended week by week after Russia's expected dominant forces met fierce Ukrainian resistance and stalled,¹⁹⁸ financial hardships mounted for Ukrainian students in the United States. As their families back home fled and lost their homes and businesses, students ran out of money for tuition, food, and rent.¹⁹⁹ To assist these students, the Department of Homeland Security offered special student relief for eighteen months beginning April 19, 2022.²⁰⁰ Among other eligibility requirements, students had to be citizens of Ukraine, present in the United States in F-1 nonimmigrant status on the date of the notice (April 19, 2022), and "experiencing severe economic hardship as a direct result of the ongoing armed conflict in Ukraine."²⁰¹

Under this special relief, Ukrainian students could reduce their course load while maintaining their F-1 nonimmigrant student status. Course-load requirements were cut in half, from the usual twelve hours per semester to "a minimum of six semester or quarter hours of instruction per academic term" for undergraduates, and "a minimum of three semester or quarter hours of instruction per academic term" for graduate students.²⁰² For students granted employment authorization, a single class or three credits per semester "of online or distance education" would satisfy the minimum course requirement.²⁰³

Ukrainian students could also request authorization for employment and to work for an increased number of hours while their institution was in session if they were experiencing severe economic hardship. For on-campus work, students could work longer than twenty hours per week while school is in session.²⁰⁴ For off-campus work, students no longer needed one full academic year of F-1 status nor the need to demonstrate working off campus would interfere with their studies, and they could work more than twenty hours per week while school was in session.²⁰⁵

In the same volume of the *Federal Register* with this notice providing special student relief, the Department of Homeland Security also published a notice designating

198 Joseph M. Donato, *Bad Math: The Root of Russian Miscalculation in Ukraine*, MOD. WAR INST. AT WEST POINT, May 10, 2022, <https://mwi.usma.edu/putins-bad-math-the-root-of-russian-miscalculation-in-ukraine/>.

199 Moody, *supra* note 188.

200 Employment Authorization for Ukrainian F-1 Nonimmigrant Students Experiencing Severe Economic Hardship as a Direct Result of the Ongoing Armed Conflict in Ukraine, 87 Fed. Reg. 23189 (Apr. 19, 2022).

201 *Id.*

202 *Id.* See 8 C.F.R. § 214.2(f)(6)(i) (2022).

203 87 Fed. Reg. 23189, *supra* note 200, at 23189.

204 *Id.* at 23192. See 8 C.F.R. § 214.2(f)(9)(i) (2022).

205 87 Fed. Reg. 23189, *supra* note 200, at 23193. See 8 C.F.R. § 214.2(f)(9)(ii)(A) (2022).

Ukraine for temporary protected status (TPS),²⁰⁶ which provided an additional layer of security for Ukrainian students.

2. *Temporary Protected Status*

Under the Immigration Act of 1990,²⁰⁷ the Secretary of Homeland Security can designate a foreign country experiencing a crisis for TPS and provide nationals from those countries who are in the United States with the legal authority to live and work here for a limited time. The secretary can designate a foreign state for TPS if the secretary makes one of three findings: there is “an ongoing armed conflict within the state and, due to such conflict, requiring the return of aliens who are nationals of that state to that state ... would pose a serious threat to their personal safety”; there has been an environmental disaster like an earthquake, flood, drought, or epidemic “resulting in a substantial, but temporary, disruption of living conditions in the area affected”; or “there exist extraordinary and temporary conditions in the foreign state that prevent aliens who are nationals of the state from returning to the state in safety.”²⁰⁸ After making this designation, the secretary may then grant TPS to eligible nationals of that foreign state.²⁰⁹

While TPS does not lead to lawful permanent resident status or provide any immigration status, individuals granted TPS enjoy several benefits. They are not removable from the United States, can obtain an employment authorization document, and may be granted travel authorization.²¹⁰ The Department of Homeland Security cannot detain individuals with TPS on the basis of their immigration status in the United States.²¹¹

Under a notice filed April 19, 2022, the Secretary of Homeland Security declared that “ongoing armed conflict and extraordinary and temporary conditions” met the statutory conditions to support designating Ukraine for TPS.²¹² The designation was for a time period of eighteen months, from April 19, 2022 to October 19, 2023.²¹³ Ukrainian nationals must have continuously resided in the United States since April 11, 2022 and have been continuously physically present in the United States since April 19, 2022, to apply for TPS.²¹⁴

206 Designation of Ukraine for Temporary Protected Status, 87 Fed. Reg. 23211 (Apr. 19, 2022).

207 Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 4978 (1990).

208 8 U.S.C. § 1254a(b) (2018). The Immigration and Nationality Act technically ascribes this authority to the Attorney General, but Congress transferred it to the Secretary of Homeland Security. See Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2135.

209 8 U.S.C. § 1254a(a)(1)(A) (2018).

210 *Id.* § 1254a. See also USCIS, TEMPORARY PROTECTED STATUS, May 20, 2022, <https://www.uscis.gov/humanitarian/temporary-protected-status>.

211 8 U.S.C. § 1254a (2018). See also USCIS, *supra* note 210.

212 87 Fed. Reg. 23211, *supra* note 206.

213 *Id.* at 23215.

214 *Id.* at 23211.

Generally, it appears that students on F-1 visas may simultaneously hold TPS. According to a set of Frequently Asked Questions provided by USCIS on August 12, 2015, to NAFSA: Association of International Educators but never posted on USCIS's website, "a person with F-1 ... or any other nonimmigrant status may apply for and receive TPS."²¹⁵ Furthermore, "The individual can continue to hold both statuses, as long as he or she remains eligible for both."²¹⁶ As an example,

if an F-1 (student) applies for and obtains TPS, but he or she continues to abide by all of the F-1 eligibility requirements, he/she can continue to maintain F-1 status and simultaneously hold TPS. Any individual who applies for and is granted TPS must continue to comply with the separate eligibility requirements of all other statuses (e.g., F-1, H-1B) that he or she seeks to maintain.²¹⁷

Specifically regarding Ukrainian students on F-1 visas, the Department of Homeland Security—in the notice providing special student relief—indicated that F-1 nonimmigrant students from Ukraine "may file the TPS application according to the instructions in the USCIS notice announcing the designation of Ukraine for TPS."²¹⁸ Ukrainian students could maintain F-1 nonimmigrant status and TPS concurrently if they maintained a minimum course load as provided under the Special Student Relief, did not violate their nonimmigrant status, and maintained their TPS.²¹⁹

3. *Humanitarian Parole*

Under the Immigration and Nationality Act, the Secretary of Homeland Security has the discretion to "parole into the United States temporarily under such

215 NAFSA, BASICS OF TEMPORARY PROTECTED STATUS (TPS), <https://www.nafsa.org/regulatory-information/basics-temporary-protected-status-tps>. See USCIS FAQ: STATELESSNESS AND THE ABILITY TO WORK FOR JOINT F-1/TPS [hereinafter USCIS FAQ], https://www.nafsa.org/_/File/_/amresource/WorkForJointF1TPS.pdf.

216 See USCIS FAQ, *supra* note 215.

217 *Id.*

218 87 Fed. Reg. *supra* note 200, at 23194. The notices for Special Student Relief and Temporary Protected Status were published in the same volume of the *Federal Register*.

219 *Id.* Similar accommodations have not been made for the more than 4800 Russian students studying in the United States. See INST. OF INT'L EDUC., *supra* note 197. In fact, early political sentiment ran against students from Russia, with some members of Congress suggesting removing them from the United States. Fiona Harrigan, *Don't Kick Russian Students Out of the U.S.*, REASON, Mar. 1, 2022, <https://reason.com/2022/03/01/dont-kick-russian-students-out-of-the-u-s/>. A White House proposal included within an emergency supplemental appropriation for Ukraine in April 2022 would have authorized an unlimited number of green cards—which allow for legal permanent residence and work authorization—to Russians with an advanced STEM degree for four years. H.R. Doc. No. 117-115, 117th Cong., 2d Sess. (2022). See also WHITE HOUSE, Apr. 28, 2022, https://www.whitehouse.gov/wp-content/uploads/2022/04/FY_2022_emergency_supplemental_assistance-to-ukraine_4.28.2022.pdf. The proposal would have eliminated the requirement under section 203(b)(2) of the Immigration and Nationality Act (8 U.S.C. § 1153(b)(2) (2018)) that the services of an immigrant must be "sought by an employer." Instead, Russians with advanced STEM degrees needed only to be "seeking admission to engage in work in the United States in an endeavor related to science, technology, engineering, or mathematics." WHITE HOUSE, *supra*, at 33. The proposal aimed to "help the United States attract and retain Russian STEM talent and undercut Russia's innovative potential, benefitting U.S. national security." *Id.* at 33–34. This language was not included in the final version of the bill. Pub. Law No. 117-128, 136 Stat. 1212 (2022).

conditions as he may prescribe only on a case-by-case basis for urgent humanitarian reasons or significant public benefit any alien applying for admission to the United States.”²²⁰ The phrase “urgent humanitarian reasons” is not defined in statute or regulation, leading USCIS officers to “look at all of the circumstances, taking into account factors such as (but not limited to)

- “Whether or not the circumstances are pressing;
- The effect of the circumstances on the individual’s welfare and wellbeing; and
- The degree of suffering that may result if parole is not authorized.”²²¹

Similarly, neither statutes nor regulations define “significant public benefit.” As a result, “Parole based on significant public benefit includes, but is not limited to, law enforcement and national security reasons or foreign or domestic policy considerations. USCIS officers look at all of the circumstances presented in the case.”²²²

a. Uniting for Ukraine Program

The Biden Administration pledged to accept up to 100,000 Ukrainian refugees fleeing from the war with Russia.²²³ Toward that end, the Department of Homeland Security established the Uniting for Ukraine program on April 21, 2022, to provide “a pathway for Ukrainian citizens and their immediate family members who are outside the United States to come to the United States and stay temporarily in a two-year period of parole.”²²⁴ To be considered for parole under Uniting for Ukraine, an individual generally must be a Ukrainian citizen with a Ukrainian passport; must have resided in Ukraine immediately before the Russian invasion through February 11, 2022, and were displaced as a result of the invasion; and must have a supporter “in the United States who agrees to provide them with financial support for the duration of their stay in the United States.”²²⁵ After applicants are paroled into the United States, they are “eligible to apply for discretionary employment authorization from USCIS.”²²⁶

Seeking asylum would preclude entry through the Uniting for Ukraine program. The Department of Homeland Security, in its press release announcing the program, warned,

Ukrainians should not travel to Mexico to pursue entry into the United States. Following the launch of Uniting for Ukraine, Ukrainians who present at land U.S. ports of entry without a valid visa or without pre-

220 8 U.S.C. §1182(d)(5)(A) (2018).

221 USCIS, HUMANITARIAN OR SIGNIFICANT PUBLIC BENEFIT PAROLE FOR INDIVIDUALS OUTSIDE THE UNITED STATES, <https://www.uscis.gov/humanitarian/humanitarianpublicbenefitparoleindividualsoutsideUS>.

222 *Id.*

223 Miriam Jordan et al., *U.S. to Admit Up to 100,000 Refugees as Ukraine Exodus Floods Europe*, N.Y. TIMES, Mar. 25, 2022, A12.

224 USCIS, UNITING FOR UKRAINE, <https://www.uscis.gov/ukraine> (last visited Aug. 1, 2022).

225 *Id.*

226 *Id.*

authorization to travel to the United States through Uniting for Ukraine will be denied entry and referred to apply through this program.²²⁷

b. Ukrainian Students in the United States Exempt from Uniting for Ukraine

Ukrainian students in the United States were exempt from the Uniting for Ukraine parole program. The program guidelines states, "Ukrainian citizens who are present in the United States will not be considered for parole under Uniting for Ukraine. However, Ukrainian citizens present in the United States may be eligible for Temporary Protected Status (TPS)."²²⁸ Therefore, Ukrainian students holding F-1 visas could, in fact, apply for TPS.²²⁹

4. Lautenberg Amendment for Religious Minorities from the Former Soviet Union

For a subset of Ukrainian students who are specific religious minorities, the reauthorization of the Lautenberg Amendment in March 2022 could help them qualify as refugees, but they would need to apply outside the United States. Named after former U.S. Senator Frank Lautenberg from New Jersey and originally enacted as part of the Fiscal Year 1990 Foreign Operations Appropriations Act,²³⁰ the Lautenberg Amendment requires the U.S. Attorney General to establish "one or more categories of aliens who are or were nationals and residents of the Soviet Union and who share common characteristics that identify them as targets of persecution in the Soviet Union on account of race, religion, nationality, membership in a particular social group, or political opinion."²³¹ The act required the new categories to include nationals and residents of the former Soviet Union—including Ukraine—who were Jews and Evangelical Christians, and members of the Ukrainian Catholic Church or the Ukrainian Orthodox Church.²³²

Nationals of the former Soviet Union who fall under these categories "may establish, for purposes of admission as a refugee" that they have "a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion by asserting such a fear and asserting a credible basis for concern about the possibility of such persecution."²³³ By contrast, the Immigration and Nationality Act requires prospective refugees to establish

227 U.S. DEP'T OF HOMELAND SEC., PRESIDENT BIDEN TO ANNOUNCE UNITING FOR UKRAINE, A NEW STREAMLINED PROCESS TO WELCOME UKRAINIANS FLEEING RUSSIA'S INVASION OF UKRAINE (Apr. 21, 2022), <https://www.dhs.gov/news/2022/04/21/president-biden-announce-uniting-ukraine-new-streamlined-process-welcome-ukrainians>.

228 *Id.*

229 87 Fed. Reg. *supra* note 200 at 23194.

230 Foreign Operations, Export Financing, and Related Program Appropriations Act of 1990, Pub. L. No. 101-167, § 599D(a), 103 Stat. 1195, 1261–62 (1989).

231 *Id.* at § 599D(b)(1)(A), 103 Stat. 1262.

232 *Id.* at § 599D(b)(2)(A)(B), 103 Stat. 1262. The former members of the Soviet Union include Russia, Ukraine, Belarus, Moldova, Kazakhstan, Estonia, Latvia, Lithuania, Kyrgyzstan, Tajikistan, Turkmenistan, Uzbekistan, Armenia, Azerbaijan, and Georgia.

233 *Id.* at § 599D(a), 103 Stat. 1261–62.

a “well-founded fear of future persecution” on an individual basis.²³⁴ Finally, to be eligible to apply for refugee status under the Lautenberg Amendment, an individual must have close family in the United States.²³⁵

The Lautenberg Amendment was most recently extended through the Consolidated Appropriations Act of 2022.²³⁶ The application period started March 15, 2022, and it was set to end on September 23, 2022. Applications could only be submitted by resettlement agencies such as the International Rescue Committee.²³⁷ A U.S. relative must start the application process by applying through a resettlement agency near where they live.²³⁸

The requirement for applications to be submitted by resettlement agencies prevents Ukrainian students already in the United States, including those with F-1 visas, from securing refugee status under the Lautenberg Amendment. The U.S. Department of State specifically advised that “Ukrainians should not attempt to apply for visas in order to travel to the United States as refugees.”²³⁹ Seeking asylum would also likely prevent a Ukrainian student’s access to the Lautenberg process, based on the Department of Homeland Security’s caution to Ukrainians from entering the United States through Mexico regarding the Uniting for Ukraine program.²⁴⁰

As of July 2022, the status of applications through the Lautenberg Amendment process remained uncertain. There were “at least several thousand Ukrainians in the Lautenberg pipeline” who had submitted applications or were at some stage of processing.²⁴¹ If Lautenberg Amendment applicants “decide to come through the [Uniting for Ukraine] parole program rather than waiting for Lautenberg processing,” the consequences were unknown.²⁴²

C. *International Students Stranded in Ukraine*

While this article focuses on U.S. students studying abroad and international students studying in the United States, the significant number of international students in Ukraine compels a brief examination of the effect that Russia’s invasion

234 8 C.F.R. § 1208.13(b) (2022).

235 Pub. L. No. 101-167, *supra* note 230, § 599E(c), 103 Stat. 126. The Attorney General may waive certain grounds for inadmissibility “to assure family unity.”

236 Consolidated Appropriations Act, 2022, H.R. 2471, 117th Cong. § 7034 (1)(5) (2022).

237 INTERNATIONAL RESCUE COMMITTEE, LAUTENBERG PROGRAM FOR FORMER SOVIET UNION (Mar. 30, 2022), <https://www.rescue.org/announcement/lautenberg-program-former-soviet-union>.

238 HEBREW IMMIGRATION AID SOCIETY [HIAS], HIAS UKRAINE CRISIS FREQUENTLY ASKED QUESTIONS 4 (2022), https://www.hias.org/sites/default/files/hias_ukraine_faq_-_april_25_.pdf.

239 U.S. DEP’T OF STATE, BUREAU OF CONSULAR AFFAIRS, INFORMATION FOR NATIONALS OF UKRAINE (May 27, 2022), <https://travel.state.gov/content/travel/en/News/visas-news/information-for-nationals-of-Ukraine.html>.

240 *See supra* text accompanying note 227.

241 Reuven Blau, *Ukrainian Refugee Groups Decry Trickle of U.S. Help*, BROOKLYN EAGLE, July 8, 2022, <https://brooklyneagle.com/articles/2022/07/08/ukrainian-refugee-groups-decry-trickle-of-u-s-help/>.

242 HIAS, *supra* note 238, at 4.

of Ukraine had on the foreign students studying there, and lessons that can be learned, particularly regarding students of color. According to the Ukrainian State Center for International Education, there were 76,548 international students in Ukraine from 155 countries in 2020, the most current data available.²⁴³ Within ten days of the Russian invasion of Ukraine, more than eight hundred medical students studying at Sumy State University were stranded in the city of Sumy in northeastern Ukraine, about forty miles from the Russian border, as Russia's military blocked access to roads and trains. Most of the students were from India and Africa.²⁴⁴ During Russian shelling of the city of Kharkiv, at least one student from India was killed on March 1, 2022.²⁴⁵

1. *Indian Students*

In 2020, India—with 18,095 students—represented the top country of origin of international students in Ukraine.²⁴⁶ The majority of these students studied medicine.²⁴⁷ Ukrainian universities have been actively recruiting Indian students since 2014.²⁴⁸ Agencies paid to recruit students to institutions in countries like Ukraine have taken advantage of the stiff competition for enrollment at public medical universities in India and the relatively lower entrance requirements and tuition costs in Eastern Europe.²⁴⁹ Poland, Armenia, and Hungary offered seats in their universities to Indian medical students rescued from Ukraine.²⁵⁰

2. *African Students*

Three African countries ranked among the top ten countries of origin of international students in Ukraine in 2020: Morocco (8832 students), Nigeria (4227), and Egypt (3048).²⁵¹ These students decided to attend college in Ukraine for several reasons. University fees were lower than in destinations like the United Kingdom and France, "but the quality of instruction in fields, including medicine, computer science, and international law, was high. They could take classes in English, and

243 UKRAINIAN STATE CENTER FOR INT'L EDUC., INTERNATIONAL STUDENTS IN UKRAINE, <https://studyinukraine.gov.ua/en/life-in-ukraine/international-students-in-ukraine/> (last visited Aug. 1, 2022).

244 Alexandra Eaton et al., *More Than 800 Medical Students, Most African or Indian, Are Stranded in Northeastern Ukraine*, N.Y. TIMES, Mar. 3, 2022, <https://www.nytimes.com/live/2022/03/03/world/russia-ukraine/medical-students-stranded-ukraine>.

245 Shuriah Niazi, *Indian Student Dies as Russia Shells University City*, UNIV. WORLD NEWS, Mar. 1, 2022, <https://www.universityworldnews.com/post.php?story=20220301150937921>.

246 UKRAINIAN STATE CENTER FOR INT'L EDUC., *supra* note 243.

247 Shuriah Niazi, *Indian Medical Students Fleeing Ukraine Demand Study Places*, UNIV. WORLD NEWS, Mar. 11, 2022, <https://www.universityworldnews.com/post.php?story=20220311110031864>.

248 *Id.*

249 Pola Lem, *War in Ukraine Disrupts Medical Education in India*, INSIDE HIGHER ED, Mar. 24, 2022, <https://www.insidehighered.com/news/2022/03/24/war-ukraine-creates-crisis-medical-education-india>.

250 Niazi, *supra* note 245.

251 UKRAINIAN STATE CENTER FOR INT'L EDUC., *supra* note 243.

they were still attending college in Europe.”²⁵² Ultimately, these students hope for a better life than they anticipate at home. For example, “Nigeria, like many former colonies of the richest nations in Europe, is a country full of young, ambitious people looking to get out, for a better education, better jobs, a better start.”²⁵³

Some home governments of African students who escaped Ukraine sought placements for them elsewhere. For example, the Nigerian government held discussions with the governments of Greece, Hungary, Poland, and Romania “to enable Nigerian students in their fifth and sixth years of medical studies to complete their studies at universities in these countries.”²⁵⁴ Several other Eastern European countries, including Bulgaria and Serbia, indicated they would allow students previously studying in Ukraine, including African students, to complete their education at their institutions of higher education.²⁵⁵

3. *Discrimination Against Students of Color*

In the chaos of the mass evacuation of refugees from Ukraine early in the war, many international students of color experienced discrimination while trying to cross the Ukrainian border. In the first week of Russia’s invasion, hundreds of thousands of people evacuated Ukraine for the European Union through Ukraine’s border with the city of Medyka, Poland.²⁵⁶ Ukrainian border guards prioritized processing their fellow Ukrainian citizens over refugees from Africa, South Asia, and the Middle East—mostly students attending Ukraine’s medical and business schools—who were held aside and forced to wait in wintry weather for over forty-eight hours.²⁵⁷ Even worse, some students were reportedly beaten by Ukrainian, Polish, and Belarussian border guards.²⁵⁸

The situation repeated itself at other border crossings. At the crossing between Ukraine and the Romanian town of Siret, there appeared to be “one rule for Ukrainians and another for everyone else.”²⁵⁹ Border guards reserved one gate for Ukrainians “and people flowed through,” while thousands of international refugees from countries like India, Morocco, Namibia, Pakistan, and Zambia “were directed to one gate that was mostly closed.”²⁶⁰

252 Okeowo, *supra* note 189.

253 *Id.*

254 Wagdy Sawahel, *Universities Reach Out to African Students Who Escaped Ukraine*, UNIV. WORLD NEWS, Mar. 15, 2022, <https://www.universityworldnews.com/post.php?story=20220315065736746>.

255 *Id.*

256 Drew Hinshaw, *Foreign Refugees Fleeing Ukraine Say They Were Held for Days at Border*, WALL ST. J., Mar. 2, 2022, <https://www.wsj.com/articles/foreign-refugees-fleeing-ukraine-say-they-were-held-for-days-at-border-11646218800>.

257 *Id.*

258 *Id.*; Jeffrey Gettleman & Monika Pronczuk, *Two Refugees Cross Poland’s Border, and Enter Different Worlds*, N.Y. TIMES, Mar. 14, 2022, A1.

259 Monika Pronczuk & Ruth Maclean, *Africans Fleeing Ukraine Say Racist Authorities Hindered Their Escape*, N.Y. TIMES, Mar. 2, 2022, A10.

260 *Id.*

African governments responded, and there were hints of an investigation. The governments of Gabon, Ghana, Kenya, Nigeria, and South Africa condemned how their citizens were treated at the Ukrainian border.²⁶¹ The African Union said, "Reports that Africans are singled out for unacceptable dissimilar treatment would be shockingly racist" and violate international law.²⁶² The European Commission Against Racism and Intolerance said in a statement condemning Russia's invasion that it "trusts that reports about unjustified differential treatment of Roma and people of African or Asian descent coming from Ukraine will be effectively investigated and that the authorities will ensure that there is no discrimination against any of the people who should be offered protection and assistance."²⁶³

It has been suggested that African governments apply to intervene in the case brought by Ukraine against Russia before the International Court of Justice²⁶⁴ to help highlight how the war has affected African nationals.²⁶⁵ By intervening, "African governments would be doing the world a favour if they chose to apply to the ICJ to claim diplomatic protection on behalf of their nationals suffering racist discrimination in the midst of this war."²⁶⁶

V. How to Broaden Assistance for Stranded Students in the United States

A. Distinguishing "Refugee" from "Asylum Seeker"

When considering which policy levers to pull to improve protections for stranded international students, it is important to consider the legal distinctions between refugees and individuals seeking asylum. Refugees and asylum seekers are each defined as "any person who is outside any country of such person's nationality ... who is unable or unwilling to return to ... that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion."²⁶⁷ While refugees

261 Hinshaw, *supra* note 256.

262 Pronczuk & Maclean, *supra* note 259.

263 EUROPEAN COMM'N AGAINST RACISM AND INTOLERANCE, STATEMENT OF THE EUROPEAN COMMISSION AGAINST RACISM AND INTOLERANCE (ECRI) ON THE CONSEQUENCES OF THE AGGRESSION OF THE RUSSIAN FEDERATION AGAINST UKRAINE (Apr. 5, 2022), <https://www.coe.int/en/web/european-commission-against-racism-and-intolerance/-/statement-of-the-european-commission-against-racism-and-intolerance-ecri-on-the-consequences-of-the-aggression-of-the-russian-federation-against-ukrai>.

264 Allegations of Genocide Under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v. Russian Federation), 2022 I.C.J. 182 (Mar. 16).

265 Chepkorir Sambu, *African Governments Must Do More to Protect Citizens Caught Up in Ukraine's War*, NEW HUMANITARIAN, May 18, 2022, <https://www.thenewhumanitarian.org/opinion/2022/05/18/African-governments-citizens-Ukraine-war>.

266 *Id.*

267 8 U.S.C. §§ 1101(a)(42)(A), 1158 (b)(1)(A)–(B) (2018). A "refugee" may also be a person "in such special circumstances as the President . . . may specify" who is within their country of nationality" who is "persecuted or who has a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion." 8 U.S.C. § 1101(a)(42)(B) (2018).

and asylum seekers fit the same definition, the distinction is whether they are in the United States: individuals who are outside the United States are considered for refugee status,²⁶⁸ while those who are physically present in the United States or who are seeking admission at a port of entry are considered for asylum status.²⁶⁹

Gaining asylum is notoriously difficult.²⁷⁰ Almost all noncitizens seeking to enter the United States at a port of entry or near the border have faced “expedited removal,” unless they indicate either an intent to apply for asylum or a fear of persecution.²⁷¹ Asylum seekers are interviewed by an asylum officer to determine if they have a “credible fear” of persecution.²⁷² If the asylum officer determines that the asylum seeker has a credible fear of persecution, there is a “significant possibility” of establishing eligibility for asylum, and the individual is referred to immigration court to proceed with the asylum application process.²⁷³ If the asylum officer determines the person does not have a credible fear, the individual is ordered removed.²⁷⁴ Before removal, the individual may appeal for a review of the negative finding of credible fear of persecution by an immigration judge.²⁷⁵ If the immigration judge overturns the negative finding, the individual is placed in removal proceedings through which they can seek protection from removal, including asylum.²⁷⁶ If the immigration judge upholds the asylum officer’s negative finding, the individual is removed from the United States.²⁷⁷

The asylum process is as time consuming as it is complex. As of December 31, 2021, USCIS had 438,500 pending asylum cases,²⁷⁸ and it could take up to two

268 8 U.S.C. § 1157 (2018).

269 8 U.S.C. § 1158 (2018).

270 In general, asylum seekers “must navigate a difficult and complex process that can involve multiple government agencies.” AM. IMMIGRATION COUNCIL, *ASYLUM IN THE UNITED STATES 1* (2020), https://www.americanimmigrationcouncil.org/sites/default/files/research/asylum_in_the_united_states.pdf. In the wake of the Trump Administration, “It has never been a more difficult time to gain entry into the United States to pursue an asylum claim. Likewise, it has never been more challenging to actually access that system by filing an application once here, to survive while that application is pending adjudication, and ultimately to be granted asylum.” Lindsay M. Harris, *Asylum Under Attack: Restoring Asylum Protection in the United States*, 67 *LOY. L. REV.* 121, 127 (2021).

271 8 U.S.C. § 1225 (2018). *See also* AM. IMMIGRATION COUNCIL, *A PRIMER ON EXPEDITED REMOVAL* (2019), https://www.americanimmigrationcouncil.org/sites/default/files/research/primer_on_expedited_removal.pdf.

272 8 U.S.C. § 1225 (b)(1)(B)(ii) (2018).

273 *Id.* § 1225 (b)(1)(B)(v).

274 *Id.* § 1225 (b)(1)(B)(iii)(I).

275 *Id.* § 1225(b)(1)(B)(iii)(III); 8 C.F.R. § 208.30(g) (2022).

276 8 C.F.R. § 1208.30(g)(2)(iv)(B)–(C) (2022).

277 *Id.* at §§ 1003.42(f), 1208.30(g)(2)(iv)(A). Under a rule adopted in May 2022 that was designed to expedite the processing of asylum claims, asylum officers were authorized to consider the asylum applications of individuals subject to expedited removal who assert a fear of persecution or torture and pass the required credible fear screening. Previously, only immigration judges could decide such cases. *Procedures for Credible Fear Screening and Consideration of Asylum, Withholding of Removal, and CAT Protection Claims by Asylum Officers*, 87 *Fed. Reg.* 18078 (2022).

278 USCIS, *I-589 AFFIRMATIVE ASYLUM SUMMARY OVERVIEW FY2022 Q1 (OCT 1, 2021–DEC 31, 2021)* 12

to four years to schedule an initial interview with applicants.²⁷⁹ As of May 2022, there was a backlog of over 1.8 million cases before immigration courts.²⁸⁰ These daunting statistics have real-world implications for asylum seekers. They are separated from their families, which may face dangerous situations abroad, and they may be unable to retain counsel who can maintain representation for the duration of the asylum seeker's extended case.

Given the procedural and substantive difficulties inherent in the asylum process, some experts suggest that reform would be a Sisyphean task. "[T]he forces that generate inconsistent adjudicative outcomes are not easy to constrain, at least not without costly trade-offs," one expert wrote:

Among the determinants the number of decisional units; the size of the decisional units; the caseload; the criteria and procedures for appointing adjudicators; the and policy guidance they receive; their degree of decisional independence; amount of deference and the scope of review on appeal; the prevalence written reasoned opinions and the accompanying use of stare decisis; the resources devoted to the process; the procedural resources; the degree specialization; and such subject-matter attributes as the degrees of complexity, dynamism, emotional or ideological content, and determinacy.²⁸¹

With these complexities regarding asylum in mind, the suggested reforms below focus on refugees.

B. Private Sponsorship of Refugees

For international students who find themselves stranded in the United States, the F-1 visa process that gained them entry into the country does not provide a "a durable solution," that is, a permanent resolution that would "enable them to live normal lives with full access to rights and freedoms."²⁸² Student visas are temporary: "the student must prove that they are entering the U.S. in non-immigrant status and do not have an intent to immigrate."²⁸³ Moreover, students on an F-1 visa must demonstrate that they can pay for their educational and living expenses for the length of their stay; if circumstances change back home and they want to remain

(2022), https://www.uscis.gov/sites/default/files/document/data/Asylum_Division_Quarterly_Statistics_Report_FY22_Q1_V4.pdf.

279 AM. IMMIGRATION LAWS. ASS'N ASYLUM AND REFUGEE COMM., PRACTICE POINTER: AILA FREQUENTLY ASKED QUESTIONS (FAQs) ON CHANGES TO THE ASYLUM OFFICE AFFIRMATIVE SCHEDULING SYSTEM 1 (2018), <https://www.aila.org/File/DownloadEmbeddedFile/74796>.

280 TRANSACTIONAL RECORDS ACCESS CLEARINGHOUSE [TRAC], BACKLOG OF PENDING CASES IN IMMIGRATION COURTS AS OF MAY 2022, https://trac.syr.edu/phptools/immigration/court_backlog/apprep_backlog.php.

281 Stephen H. Legomsky, *Learning to Live with Unequal Justice: Asylum and the Limits to Consistency*, 60 STAN. L. REV. 413, 473 (2007).

282 COORDINATING TEAM FOR THE INITIATIVE ON U.S. EDUC. PATHWAYS FOR REFUGEE STUDENTS, UNIVERSITY SPONSORSHIP OF REFUGEE STUDENTS: INITIATIVE ON INCREASING U.S. EDUCATION PATHWAYS FOR REFUGEE STUDENTS 7, 9 (2021), https://www.higheredimmigrationportal.org/wp-content/uploads/2021/11/UniversitySponsorshipofRefugeeStudents_v1a.pdf.

283 *Id.* at 9.

in the United States, “the F-1 visa does not, as currently designed, provide durable protection.”²⁸⁴ One possible solution to address the limitations of F-1 visas for stranded students is the creation of a private sponsorship program for refugees as an additional category of priority admission under U.S. refugee admissions and resettlement policy.

1. *Three Current Priorities for Admission of Refugees*

Under the Immigration and Nationality Act as amended by the Refugee Act of 1980, the president, after consultation with Congress, sets the annual number of refugee admissions and the allocation of those numbers by global region.²⁸⁵ The Bureau of Population, Refugees, and Migration within the Department of State administers the processing of refugee cases through the U.S. Refugee Admissions Program (USRAP).²⁸⁶ The USCIS adjudicates refugee processing according to a system of three priorities for admission:

- Priority 1 (P-1): cases identified by the UNHCR, a U.S. embassy, or a specially trained nongovernmental organization, “including persons facing compelling security concerns, women-at-risk, victims of torture or violence, and others in need of resettlement”;
- Priority 2 (P-2): groups of special humanitarian concern identified by USRAP “such as certain Congolese in Rwanda”; and
- Priority 3 (P-3): Family reunification cases, including spouses, unmarried children under twenty-one, and parents of “persons lawfully admitted to the U.S. as refugees or asylees or persons who are lawful permanent residents or U.S. citizens who previously had refugee or asylum status.”²⁸⁷

2. *Biden Initiative to Create Fourth Priority for Refugee Admission*

Under an executive order signed February 4, 2021, President Biden ordered that “USRAP should be rebuilt and expanded, commensurate with global need.”²⁸⁸ The executive order more specifically stated, “To meet the challenges of restoring and expanding USRAP, the United States must innovate, including by effectively employing technology and capitalizing on community and private sponsorship of refugees, while continuing to partner with resettlement agencies for reception and placement.”²⁸⁹

284 *Id.*

285 8 U.S.C. § 1157 (2018); Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102 (1980). *See, e.g.*, Presidential Determination No. 2022-02, 86 Fed. Reg. 57525 (Oct. 18, 2021), under which 125,000 refugees would be admitted.

286 U.S. BUREAU OF POPULATION, REFUGEES, AND MIGRATION, ABOUT REFUGEE ADMISSIONS, <https://www.state.gov/refugee-admissions/about/>.

287 USCIS, REFUGEE SECURITY SCREENING FACT SHEET 3 (June 3, 2020), https://www.uscis.gov/sites/default/files/document/fact-sheets/Refugee_Screening_and_Vetting_Fact_Sheet.pdf.

288 Exec. Order No. 14013, 86 Fed. Reg. 8839 (Feb. 9, 2021).

289 *Id.*

In a report to Congress in September 2021,²⁹⁰ the Biden Administration outlined a new private-sponsorship pilot program described as "a major initiative in FY 2022" under which community members would assume "the primary responsibility of welcoming and providing initial support to newly arrived refugees, helping facilitate their successful integration."²⁹¹ Private sponsorship has been described as teaming up refugees "with groups of individuals, such as local clubs, businesses, university communities, or faith groups, who commit to providing financial, logistical, and integration support for refugees accepted through resettlement programs."²⁹² Private groups could also "nominate, or name, the individual refugees they wish to sponsor."²⁹³

The Department of State, in coordination with the Department of Health and Human Services, was developing the private sponsorship program and linking it to a new "Priority 4 (P-4) category."²⁹⁴ The proposed P-4 priority category would "cover refugees supported by private sponsors who accept primary responsibility for funding and providing core resettlement services."²⁹⁵ The private sponsorship pilot program would include a matching component under which "private sponsors will be matched with refugees who already have access to USRAP through another priority category," and upon approval for resettlement, "these refugees would be re-assigned to the P-4 category to distinguish them from the typical P-1, P-2, and P-3 categories."²⁹⁶ The pilot program would also include an identification component, under which "private sponsors who meet certain criteria will be permitted to identify and refer refugees to the P-4 category and apply to sponsor their resettlement."²⁹⁷

3. Role for Colleges and Universities in Proposed P-4 Priority

An alliance of college and university presidents has suggested that institutions of higher education "have the potential to play a leadership role in the development of private sponsorship in the United States," given "the significant interest and

290 U.S. DEP'TS OF STATE, HOMELAND SEC., & HEALTH AND HUM. SERVS., PROPOSED REFUGEE ADMISSIONS FOR FISCAL YEAR 2022: REPORT TO CONGRESS (Sept. 20, 2021), <https://www.state.gov/wp-content/uploads/2021/09/Proposed-Refugee-Admissions-for-FY22-Report-to-Congress.pdf/>.

291 *Id.* at 7. The United States has a history of private-sector sponsorship of refugees, most recently the Private Sector Initiative established by the Reagan Administration in 1987 (Presidential Determination No. 87-1, 51 Fed. Reg. 39637 (Oct. 30, 1986)), which lapsed under the Clinton Administration in 1995. See generally DAVID BIER & MATTHEW LA CORTE, NISKANEN CENTER, PRIVATE REFUGEE RESETTLEMENT IN U.S. HISTORY (2016), https://www.niskanencenter.org/wp-content/uploads/old_uploads/2016/04/PrivateRefugeeHistory.pdf.

292 COORDINATING TEAM FOR THE INITIATIVE ON U.S. EDUC. PATHWAYS FOR REFUGEE STUDENTS, *supra* note 282, at 13.

293 *Id.*

294 U.S. DEP'TS OF STATE, HOMELAND SEC., & HEALTH AND HUM. SERVS., *supra* note 290, at 18.

295 *Id.*

296 *Id.*

297 *Id.*

capacity of U.S. campuses to support refugee students.”²⁹⁸ College and university sponsorship for refugees “would remove the legal barriers currently preventing talented refugees residing in a first country of asylum from attending U.S. colleges and universities and provide them with a path to permanent residency and citizenship.”²⁹⁹

To achieve this goal, the federal government could enable institutions of higher education “or an implementing organization representing them” to nominate directly, or at least identify, students who would be sponsored privately and resettled to the United States.³⁰⁰ This role would fill “the identification mechanism” outlined in the Biden Administration’s proposal.³⁰¹ To enable the proposed private sponsorship program to increase the number of refugee students, the U.S. government could “formally and explicitly create additional places for sponsored refugees each year, distinct from its annual government-assisted resettlement target.”³⁰²

This policy proposal aligns with a policy recommendation in a 2022 report published by the UNHCR and UNESCO detailing how host countries can support refugees’ access to their national systems of higher education.³⁰³ Among over a dozen recommendations, the report suggested the creation of university networks “that engage collectively to support refugee students.” Creating such networks would facilitate the ability of “officers in charge of university refugee admission and integration [to] meet and exchange on issues and approaches.”³⁰⁴

C. “Dual Intent” and a Pathway to Residency

The United States has been criticized for lacking a comprehensive “international education policy” like those in countries like Australia, Canada, and the United Kingdom that “offer clearer pathways to work opportunities and a professional future.”³⁰⁵ Canada, for example, has a “national strategy to attract international students [that] is underpinned with pathways, not only to jobs, but to citizenship” that helped increase the number of international students studying in Canada by 119% between 2010 and 2017.³⁰⁶

298 COORDINATING TEAM FOR THE INITIATIVE ON U.S. EDUC. PATHWAYS FOR REFUGEE STUDENTS, *supra* note 282, at 13.

299 *Id.* at 11.

300 *Id.* at 4.

301 *Id.* at 14. See U.S. DEP’TS OF STATE, HOMELAND SEC., & HEALTH AND HUM. SERVS., *supra* note 290, at 18.

302 *Id.*

303 REFUGEES’ ACCESS TO HIGHER EDUCATION IN THEIR HOST COUNTRIES: OVERCOMING THE ‘SUPER-DISADVANTAGE’ (Michaela Martin & Manal Stulgaitis eds., 2022).

304 *Id.* at 61.

305 Anna Esaki-Smith, *Do International Students Benefit from Their US Study-Abroad Experience?* 110 INT’L HIGHER EDUC. 31, 32 (2022), <https://www.internationalhighereducation.net/api-v1/article/!/action/getPdfOfArticle/articleID/3426/productID/29/fileName/article-id-3426.pdf>.

306 *Id.* at 32.

The requirement that students applying for an F-1 visa must prove that "they are entering the United States in non-immigrant status and do not have an intent to immigrate" to the United States has been called an "outdated immigration law."³⁰⁷ It has been suggested that international students applying for F-1 visas be allowed to express a "dual intent" to complete their degree and then transfer to another legal status, such as "lawful permanent resident" with the authorization to live and work in the United States on a permanent basis ("green card" holder).³⁰⁸

The U.S. Citizenship Act, introduced in the U.S. House of Representatives in February 2021, would allow applicants for F-1 visas to have a dual intent.³⁰⁹ Under the proposed amendments in the legislation,³¹⁰ the definition of a nonimmigrant alien seeking an F-1 visa would carve out an exception for "a student qualified to pursue a full course of study at an institution of higher education" from the intent not to abandon their "residence in a foreign country."³¹¹ The Presidents' Alliance on Higher Education and Immigration has endorsed this legislation.³¹²

VI. Conclusion

Stranded international students live in a state of limbo: during worldwide health emergencies like the COVID-19 pandemic and armed conflict like the war in Ukraine, stranded students are not sure if they can stay in their host country or if they will be able to return home. In the meantime, financial pressures mount, and they look to the host government for support. The immigration laws in the United States provide such assistance in certain circumstances, including authorization to work if the student can demonstrate "severe economic hardship,"³¹³ and—if the Department of Homeland Security finds they are from parts of the world experiencing "emergent circumstances"—a relaxation of the rules regarding duration of status, full course of study, and employment eligibility.³¹⁴ Further action by the Department of Homeland Security could enable international students on F-1 visas to simultaneously obtain TPS.³¹⁵

Unfortunately, and perhaps even cruelly, international students can see their rights and protections swing like a pendulum along the arc of presidential politics,

307 COORDINATING TEAM FOR THE INITIATIVE ON U.S. EDUC. PATHWAYS FOR REFUGEE STUDENTS, *supra* note 282, at 51. See 8 U.S.C. § 1101(a)(15)(F)(i) (2018).

308 Esaki-Smith, *supra* note 305, at 33; COORDINATING TEAM FOR THE INITIATIVE ON U.S. EDUC. PATHWAYS FOR REFUGEE STUDENTS, *supra* note 282, at 51. See 8 U.S.C. § 1101(a)(20) (2018) for the definition of "lawfully admitted for permanent residence."

309 U.S. Citizenship Act, H.R. 1177, 117th Cong. (1st Sess. 2021).

310 *Id.* at § 3408.

311 *Id.*

312 COORDINATING TEAM FOR THE INITIATIVE ON U.S. EDUC. PATHWAYS FOR REFUGEE STUDENTS, *supra* note 282, at 51.

313 8 C.F.R. § 214.2(f)(9)(ii)(C) (2022).

314 *Id.* § 214.2(f)(5)(v).

315 8 U.S.C. § 1254a(b) (2018).

placing them in an almost purgatorial state. In the roughly two years between the onset of the COVID-19 pandemic during the Trump Administration in January 2020 and the start of the Biden Administration in 2021:

- international students on F-1 visas were assured that taking an all-online course load would count as a full course of study after their institutions closed their campuses at the start of the pandemic, only to be threatened with deportation but soon protected again;³¹⁶
- international students were initially ineligible for emergency financial aid grants funded through the HEERF established and continued under several pandemic relief bills but then gained access to these funds;³¹⁷
- the level of scrutiny of the intent of F-1 visa applicants not to abandon their home residence and to depart the United States after finishing their studies was tightened and then restored to its long-standing, more lenient level;³¹⁸
- the admission period for students on F-1 visas was proposed to change from “duration of status”—meaning until they completed their studies—to a fixed time period no longer than four years, but the proposal was withdrawn;³¹⁹ and
- travel was suspended, and then restored, and sometimes suspended and restored again, between the United States and China, the European Schengen Area, the United Kingdom, Ireland, Brazil, and South Africa.³²⁰

Political shifts alone do not guarantee better treatment for international students: advocacy and litigation on behalf of students from abroad contributed significantly to the opposition against, and often the defeat of, unconstitutional and arbitrary rules. For example, the rule threatening students with deportation if they did not take a fully on-campus course load met resistance from organizations like the American Council on Education and a lawsuit brought jointly by Harvard and MIT.³²¹ States’ attorneys general often took the lead against restrictions affecting international students, including Hawaii’s attempt to enjoin the enforcement of the Trump Administration’s travel restrictions,³²² and the states of California and Washington filing law suits against the interim final rule that denied international students access to emergency financial aid under HEERF.³²³

The revolving-door rights of international students in the United States during the COVID-19 pandemic and the war in Ukraine demonstrate “the lack of

316 See *supra* text accompanying notes 99–114.

317 See *supra* text accompanying notes 123–40.

318 See *supra* text accompanying notes 170–75.

319 See *supra* text accompanying notes 176–83.

320 See *supra* text accompanying notes 153–59.

321 See *supra* text accompanying notes 106–14.

322 *Trump v. Hawaii*, 138 S. Ct. 2392, 2406 (2018) (“The State [of Hawaii] operates the University of Hawaii system, which recruits students and faculty from the designated countries”).

323 *Oakley v. DeVos*, No. 4:20-cv-03215-YGR, 2020 WL 3268661 (N.D. Cal. June 17, 2020); *Washington v. DeVos*, 466 F. Supp. 3d 1151 (E.D. Wash. 2020).

a national policy for higher education internationalization in the United States," which "leaves international education subject to dramatic changes from one administration to another, potentially putting the system in a precarious position to respond to crises."³²⁴ A policy opportunity has presented itself, and "[t]his is the moment for the U.S. to embark on the essential next step in expanding refugee access to higher education"³²⁵ and access for nonimmigrant students as well. "The need for additional legal pathways ... is vast, and the disparity in access to higher education, immense."³²⁶ Ukrainian President Volodymyr Zelensky, in his livestreamed address to the Association of American Universities on May 16, 2022, alluded to the importance of protecting the rights of international students: "We can't lose the power of youth, the power and energy of young people without which we can have no future and we cannot create anything."³²⁷

324 Esaki-Smith, *supra* note 305, at 32.

325 COORDINATING TEAM FOR THE INITIATIVE ON U.S. EDUC. PATHWAYS FOR REFUGEE STUDENTS, *supra* note 282, at 6.

326 *Id.*

327 Darryl Coote & Clyde Hughes, *Zelensky Addresses U.S. Universities on Rebuilding Higher Ed, Bringing Back Students*, UPI WORLD NEWS, May 16, 2022, https://www.upi.com/Top_News/World-News/2022/05/16/ukraine-President-Volodymyr-Zelensky-universities-speech/6191652688281/.