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for purposes of identification.*

Submitted via [regulations.gov](https://www.regulations.gov)

October 26, 2020

Sharon Hageman

Acting Regulatory Unit Chief, Office of Policy and Planning

U.S. Immigration and Customs Enforcement

Department of Homeland Security

500 12th Street SW

Washington, DC 20536

Re: Proposed Revision to the I Visa Program for Representatives of Foreign Media, RIN 1653-AA78/Docket No. ICEB-2019-006.

Dear Ms. Hageman:

The Reporters Committee for Freedom of the Press (the “Reporters Committee”) and the 37 news media organizations listed below (together the “Commenters”) respectfully submit these comments on the proposed revisions to the I visa program for “bona fide representative[s] of foreign press.” 8 U.S.C. § 1101(a)(15)(I); *see* Establishing a Fixed Time Period of Admission and an Extension of Stay Procedure for Nonimmigrant Academic Students, Exchange Visitors, and Representatives of Foreign Information Media, 85 Fed. Reg. 60,526 (Sept. 25, 2020) [hereinafter Proposed Rule].

Commenters only address the proposed revisions to the regulations governing I visas for foreign information media representatives, and take no position on portions of the Proposed Rule addressing other visa categories.

The proposed revisions raise press freedom considerations. By shortening the visa term to eight months and requiring that the Department of Homeland Security (the “Department” or “DHS”) review “the content that the foreign information media representative is covering in the United States” to determine eligibility for an extension, *id.* at 60,556, the Proposed Rule may entangle DHS in the supervision of journalism. Further, the new framework may chill reporting on the United States, especially reporting critical of government elements responsible for extension approvals; may invite other nations to retaliate against U.S. journalists; and lacks adequate justification.

I. The Proposed Rule may chill newsgathering and reporting.

As the Department itself recently emphasized, “The United States has for decades permitted individuals who are representatives of foreign information media outlets to remain in the United States for the entirety of the period that the individual is engaged in that activity.” Period of Admission and Extensions of Stay for Representatives of Foreign Information Media Seeking to Enter the United States, 85 Fed. Reg. 27,645, 27,646 (May 11, 2020) [hereinafter May Rule]. By reducing the need for recurring encounters

between reporters and the Department, the existing approach avoids undue involvement of the government in the inspection or supervision of journalism.

By contrast, “shorter durations of stay, as well as increasing uncertainty during the visa renewal process,” can more easily be manipulated to muzzle reporting. *Id.* at 27,647 (alleging that the People’s Republic of China has shortened visas for U.S. reporters for this reason). The proposed revisions present a similar risk.

By shortening the initial length of an I visa to eight months, the Proposed Rule involves DHS in reviewing “the content that the foreign information media representative is covering in the United States” on a more regular basis.¹ Proposed Rule, 85 Fed. Reg. at 60,556. That renewal process creates the risk that visas could be denied on retaliatory grounds. *Cf.* Gabe Rottman, *Reports of Visa Non-Renewals at Voice of America Again Raise Concerns over Editorial Independence*, Reporters Comm. for Freedom of the Press (July 15, 2020), <https://bit.ly/3kmfTii>.

Further, the reapplication process itself could chill legitimate reporting. Border authorities have increasingly been used to pry into the content of journalists’ work. *See, e.g.*, Kirstin McCuddin, *Tracking Journalist Stoppages at the U.S. Border*, Colum. Journalism Rev. (Oct. 21, 2019), <https://bit.ly/2Hib9Mu> (documenting an increase in questioning of reporters at the border); Complaint, *Guan v. Wolf*, 1:19-cv-6570 (E.D.N.Y. Nov. 20, 2019) (alleging that plaintiffs were questioned about their reporting and sources without a valid basis, in violation of the First Amendment). The proposed revisions would similarly expose foreign journalists’ work to examination when their initial visa term expires, and the threat of that scrutiny may encourage reporters to avoid engaging in critical reporting in the first place. *See* Ian Williams, *Homeland Security Hits Foreign Press*, Overseas Press Club (Oct. 15, 2020), <https://bit.ly/3jxSnhf> (“Being scrutinized by Homeland Security every 240 days is bound to have a dampening effect on reporters’ objectivity[.]”).

At a minimum, the Department should adopt safeguards to prevent the misuse of information obtained via the extension application process, such as a provision for prompt expungement of any information gained about the subject matter of an applicant’s reporting. The Department should also carefully limit the scope of any inquiry into “the content that the foreign information media representative is covering in the United States.” Proposed Rule, 85 Fed. Reg. at 60,556. In many cases, such an inquiry would be unnecessary to demonstrate eligibility if the applicant can produce evidence of an employment contract in a journalistic role with a qualifying foreign news organization. There would be no serious question, for instance, that a person hired as the Washington bureau chief of a Canadian daily newspaper is engaged in “journalism” rather than

¹ Commenters note that, as drafted, it is somewhat unclear whether the Proposed Rule allows only a single extension or whether an I visa-holder who receives an initial extension of stay remains an “Alien[] in I status [who] may be eligible for an extension of stay.” Proposed Rule, 85 Fed. Reg. at 60,595 (proposed 8 C.F.R. § 214.2(i)(5)(i)). Both would be problematic for the reasons offered in these comments.

“entertainment.” *Id.* at 60,555. In any case, it is difficult to imagine any scenario in which it would be necessary for an applicant to submit more than a high-level description of a beat or assignment to demonstrate that their reporting satisfies the statutory criteria. The Department should make these limitations explicit.

The Department should also make clear that under *no* circumstances may an applicant be asked to discuss sources they have spoken to or expect to speak to in the course of their reporting. As the Supreme Court explained in a different context, “Official harassment of the press undertaken not for purposes of law enforcement but to disrupt a reporter’s relationship with his news sources would have no justification.” *Branzburg v. Hayes*, 408 U.S. 665, 707-08 (1972).

II. The proposed I visa duration is too short and the Proposed Rule’s revisions to the I visa program are inadequately justified.

Commenters agree with others who have submitted comments in this rulemaking that the proposed revisions are flawed because eight months may not be an “appropriate” measure of the time it takes foreign reporters to do their work. Proposed Rule, 85 Fed. Reg. at 60,556. The only reason the Department gives for asserting that the term *is* appropriate is that it mirrors the automatic extension provided to I visa-holders whose current visa would otherwise expire because they intend to change mediums or employers. *See* Proposed Rule, 85 Fed. Reg. at 60,556; 8 CFR § 274a.12(b)(20). This is a non-sequitur. There is no reason to think a period calibrated to give the government time to determine whether an applicant is eligible for a visa is also enough time for the applicant to complete the activities the visa is intended to support. The proposal is also inconsistent with the Department’s previous view that visa terms of less than a year, coupled with the specter of non-renewal, can amount to “hostile measures targeting a free press” because of their disruptive effect on journalists’ work. May Rule, 85 Fed. Reg. at 27,646. The Department should maintain the existing duration-of-status framework or, at a minimum, lengthen the revised visa term to ensure that it is adequate to support the reporting activities for which I visas are intended.

Commenters also agree that the proposed revisions create the risk that other nations will react by restricting the ability of U.S. journalists to work abroad. The Immigration and Nationality Act contemplates that the admission of journalists will be governed on “a basis of reciprocity.” 8 U.S.C. § 1101(a)(15)(I); *see also* H.R. Rep. No. 82-1365, at 45. On that basis, the Department resolved to shorten the stays available to Chinese journalists because of the use of short visa terms to “suppress[] . . . independent journalism in the PRC.” May Rule, 85 Fed. Reg. at 27,646.

The Department’s proposed revisions, by restricting the ability of foreign journalists to report from the United States, now threaten to trigger retaliation by other countries against U.S.-based news organizations, which would impair international newsgathering and reporting by domestic members of the news media. Indeed, it could lead to further retaliation by other countries against Congressionally funded international broadcasting networks administered by the U.S. Agency for Global Media. *Cf.* Press

Statement, Secretary of State Michael R. Pompeo, Russian Decree Targeting RFE/RL and Voice of America in Russia (Aug. 10, 2020), <https://perma.cc/YAA3-82MY>.

Finally, Commenters agree with other commenters in this rulemaking that the revisions are inadequately justified. The Department acknowledges that “there is no data on prevalence of fraud and abuse by F, J, and I nonimmigrants,” Proposed Rule, 85 Fed. Reg. at 60,576, and—in contrast with the Department’s discussion of the F and J visa categories—fails to cite even anecdotal reasons to think that I visa-holders pose a risk to national security, *id.* at 60,536. The only evidence-based claim the Department makes to justify changes to the I visa program is that “the number of representatives of foreign information media has more than doubled” since 1985, when the existing framework was introduced. *Id.* at 60,532. But resources available to vet them have far more than doubled in the same period, and media organizations already make great efforts to ensure their journalists comply with their visa requirements.²

Accordingly, the cited interests for the proposed changes to the I visa program are speculative, and Commenters urge the Department to reconsider them. *See id.* at 60,576 (“DHS believes this proposed rule *could* result in reduced fraud, abuse, and national security risks for these nonimmigrant programs, but whether the rule will in fact result in a reduction will be borne out when the final rule is implemented.”) (emphasis added).

III. Conclusion

Commenters urge the Department to eliminate the proposed changes to the I visa regulations. At a minimum, Commenters urge the Department to revise the Proposed Rule with respect to I visas, to ensure that the I visa program cannot be used to retaliate against foreign journalists or chill newsgathering and reporting; to ensure that the visa term is long enough to support the reporting activities for which I visas are intended; and to ensure that it will not be cited by other countries to impair the international operations of domestic news organizations.

Please feel free to contact Grayson Clary, the Stanton Foundation National Security/Free Press Fellow at the Reporters Committee, with any questions about these comments. He can be reached at gclary@rcfp.org.

Sincerely,

The Reporters Committee
For Freedom of the Press

² Compare, e.g., U.S. Dep’t of Homeland Security, FY 2020 Budget in Brief 27, 59 (2019) (reflecting an enacted 2018 budget of more than \$7 billion for Immigration and Customs Enforcement, as well as an enacted budget of more than \$4 billion for U.S. Citizenship and Immigration Services), with U.S. Dep’t of Justice, Department of Justice Budget Trend Data from 1975 through the President’s 2003 Request to Congress 105 (2002) (reflecting Immigration and Naturalization Service 1985 budget of \$585 million).

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