RESOLVED, That the American Bar Association urges the Department of Homeland Security (DHS) to maintain the Student and Exchange Visitor Program’s (SEVP) temporary exemption for continuing, incoming, and future nonimmigrant student visa holders taking any combination of in-person, hybrid, and online classes (whether synchronous or asynchronous) for the duration of the COVID-19 pandemic, permitting F-1 and M-1 nonimmigrant student visa holders to take a full schedule of hybrid or online courses while maintaining their visa status;

FURTHER RESOLVED, That the American Bar Association urges DHS to publish a temporary final rule, in accordance with the requirements of the Administrative Procedure Act, establishing procedures and responsibilities to allow continuing, incoming, and future nonimmigrant student visa holders (1) to remain in active status in DHS’s Student and Exchange Visitor Information System in the event the student’s school closes temporarily without online instruction or other alternative learning procedures, but the student intends to resume her or his course of study when the school reopens when conditions permit; and (2) to participate in online or other alternative learning procedures and count such online or alternative towards a full course of study in excess of the limits stated in 8 CFR 214.2(f)(6)(i)(G) and 8 CFR 214.2(m)(9)(v), even if she or he has left the United States and is taking the online classes from elsewhere;

FURTHER RESOLVED, That the American Bar Association urges DHS to not rescind, limit or otherwise adversely impact the availability of optional practical training (OPT) programs for continuing, incoming, and future nonimmigrant student visa holders by: (1) imposing more restrictive eligibility standards on nonimmigrant student visa holders seeking 12-month OPT or 24-month OPT for Science, Technology, Engineering, and Mathematics students (STEM OPT); (2) placing additional compliance obligations on students and OPT or STEM OPT employers; (3) further restricting or eliminating the extension STEM OPT; or (4) imposing new compliance obligations on students, schools, and employers with respect to curricular practical training;
FURTHER RESOLVED, That the American Bar Association urges the Department of State to amend the Foreign Affairs Manual at 9 FAM 402.5-5(C) to conform such subsection consistent with the above; and

FURTHER RESOLVED, That the American Bar Association urges DHS and the U.S. Department of State to act to allow continuing, incoming, and future nonimmigrant student visa holders studying in the United States as part of the Fulbright Foreign Student Program to take a full schedule of hybrid or online courses while maintaining their visa status, consistent with the above.
I. Introduction

More than 1,500,000 international students attended U.S. high schools, colleges, universities, and graduate programs in 2018, across 8,936 educational institutions. International students contribute much to U.S. academic communities, and their participation enhances the educational experience for all. These students also make significant economic contributions to their schools and the communities in which their schools are located. International students, especially those enrolled in J.D., LL.M. or similar programs at U.S. law schools, take their experience in the U.S. and return to their home jurisdictions to act as ambassadors for the rule of law. These international students must obtain a relevant nonimmigrant student visa, and meet and maintain relevant eligibility requirements in order to study in the United States. The COVID-19 pandemic, coupled with the Trump Administration’s hostile immigration policies and actions, have placed international students in a new and impossible situation that necessitates this report with resolution.

The resolution supported by this report is as timely and urgent as it is germane because, as will be discussed below, the U.S. Department of Homeland Security (DHS) has acted in bad faith by not fully restoring temporary exemptions issued in March 2020 that would allow nonimmigrant student visa holders to take a full schedule of hybrid or online courses while maintaining their visa status, even though DHS committed to do so in connection with an agreement that settled the plaintiffs’ Motion for a Preliminary Injunction in litigation brought against DHS by Harvard University (Harvard) and the Massachusetts Institute of Technology (MIT). More specifically, the resolution urges DHS to:

- Maintain the temporary exemption, originally issued in March 2020, that allows nonimmigrant student visa holders to take a full schedule of hybrid or online courses and maintain their visa status;

- Publish a temporary final rule, in accordance with the requirements of the Administrative Procedure Act, 5 U.S.C. § 500 et seq., (APA) establishing procedures and responsibilities to allow nonimmigrant student visa holders (1) to remain in active status in DHS’s Student and Exchange Visitor Information System in the event the student’s school closes temporarily without online instruction or other alternative learning procedures, but the student intends to resume her or his course of study when the school reopens when conditions permit; and (2) to participate in online or other alternative learning procedures and count such online or alternative towards

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2 “International students contribute to a diversity of thought, background, and experience that promotes learning outcomes, and better prepares students for an increasingly diverse workforce and society.” Fisher v. Univ. of Tex. at Austin, 136 S. Ct. 2198, 2210 (2016).
a full course of study in excess of the limits specified in 8 CFR 214.2(f)(6)(i)(G) and 8 CFR 214.2(m)(9)(v), even if she or he has left the United States and is taking the online classes from elsewhere;

- Not rescind, limit or otherwise adversely impact the availability of optional practical training (OPT) programs for continuing, incoming, and future nonimmigrant student visa holders; and

- Work with the U.S. Department of State to allow nonimmigrant student visa holders studying in the United States as part of the Fulbright Foreign Student Program to take a full schedule of online courses while maintaining their visa status.

The resolution also urges the U.S. Department of State to amend the Foreign Affairs Manual at 9 FAM 402.5-5(C) to conform such subsection with the temporary exemption set forth above and discussed herein.3

II. BACKGROUND: STUDENT VISAA REQUIREMENTS

In order to study at U.S. schools, including law schools, an international student must obtain a nonimmigrant student visa, and remain in compliance with the relevant visa’s rules and requirements during the term of her or his study in the United States.4 Once an international student obtains the relevant visa, she or he must enroll in a “full course of study,” and comply with other requirements.5 A “full course of study” means:

For F-1 students enrolled in classes for credit or classroom hours, no more than the equivalent of one class or three credits per session, term, semester, trimester, or quarter may be counted toward the full course of study requirement 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. An on-line or distance education course is a course that is offered principally through the use of television, audio, or computer transmission including

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3 The Foreign Affairs Manual is a comprehensive and authoritative source for the Department of State’s organization structures, policies, and procedures that govern the operations of the State Department, the Foreign Service and, when applicable, other federal agencies. 9 FAM 402.5-5(C) deals with F and M visas and would need to be updated should ICE develop a temporary final rule as envisaged by the resolution accompanying this report. This report will not devote space to 9 FAM 402.5-5(C) because its amendment should follow any temporary final rule.

4 F visas are for students attending university or college; high school; private elementary school; seminary; conservatory; or another academic institution, including a language training program. An M visa is for students attending vocational or other recognized nonacademic institution, other than a language training program. U.S. Department of State, Bureau of Consular Affairs, Student Visa Overview, available at https://travel.state.gov/content/travel/en/us-visas/study/student-visa.html (visited July 27, 2020).

open broadcast, closed circuit, cable, microwave, or satellite, audio conferencing, or computer conferencing...(emphasis added)⁶

The relevant regulations for M visa holders contains a more stringent restriction as to a “full course of study”:

_No on-line or distance education classes may be considered to count toward an M-1 student's full course of study requirement_ if such classes do not require the student's physical attendance for classes, examination or other purposes integral to completion of the class. An on-line or distance education course is a course that is offered principally through the use of television, audio, or computer transmission including open broadcast, closed circuit, cable, microwave, or satellite, audio conferencing, or computer conferencing. (emphasis added)⁷_

**III. COVID-19 CHANGES TO STUDENT VISA REQUIREMENTS**

In ordinary times, relevant F-1 and M-1 visa requirements can be complied with in a straightforward manner, but these are not ordinary times. As the COVID-19 pandemic accelerated in February and March 2020, U.S. schools, including law schools, scrambled to protect students, faculty and staff while continuing to educate students. Many U.S. schools closed, at least temporarily, in mid-March and began transitioning to online instruction. These closures placed nonimmigrant student visa holders at risk of being deemed to be not taking a “full course of study” and being out of compliance with relevant visa requirements.

On March 9 and March 13, 2020, the Department of Homeland Security’s Immigration and Customs Enforcement (ICE) Student and Exchange Visitor Program (SEVP) issued guidance that created temporary exemptions to the “full course of study” requirement applicable to nonimmigrant student visa holders. The guidance issued on March 9 (the March 9 Guidance), in the form of frequently asked questions, states, in relevant part:

_Nonimmigrant students may remain in the United States in a hybrid program of study, which consists of both in-person and online components beyond the limitations at 8 CFR 214.2(f)(6)(i)(G). Students will not face enforcement action or loss of their nonimmigrant status based on engaging in hybrid programs._⁸

The March 9 Guidance thus established a temporary exemption for nonimmigrant student visa holders, permitting them to take a full schedule of hybrid or online courses while

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⁶ 8 C.F.R. § 214.2(f)(5)(i) (2020) (full course of study); 8 C.F.R. § 214.2(f)(6)(i)(G) (2020) (no more than one class or three credits online). In general, eligibility to maintain F-1 status is governed by 8 C.F.R. § 214.2.


maintaining their visa status. This exemption was intended to extend for the duration of the COVID-19 pandemic.\textsuperscript{9} In announcing this exemption on March 9, ICE stated that it “intend[ed] to be flexible with temporary adaptations,” including “online instruction.”\textsuperscript{10} 

On March 13, ICE issued another guidance document expressly exempting F-1 visa holders from the requirements at 8 CFR §214.2(f)(6)(i)(G) and 8 CFR §214.2(m)(9)(v) (the March 13 Guidance).\textsuperscript{11} This guidance was issued by ICE to address “inquiries concerning the proper status” of nonimmigrant student visa holders in the United States on academic visas “who may have [to] face slightly different scenarios related to emergency procedures implemented by SEVP-certified learning institutions.”\textsuperscript{12} In relevant part, the March 13 Guidance stated:

If a school closes temporarily but offers online instruction or another alternative learning procedure, nonimmigrant students should participate in online or other alternate learning procedures and remain in active status in SEVIS. Schools must notify SEVP of COVID-19 procedural changes within 10 business days. Given the extraordinary nature of the COVID-19 emergency, SEVP will allow F-1 and/or M-1 students to temporarily count online classes towards a full course of study in excess of the limits stated in 8 CFR 214.2(f)(6)(i)(G) and 8 CFR 214.2(m)(9)(v). This temporary provision is only in effect \textit{for the duration of the emergency}. (emphasis added)\textsuperscript{13}

The March 9 Guidance and March 13 guidance established that nonimmigrant student visa holders could remain in compliance with the limits stated in 8 CFR 214.2(f)(6)(i)(G) and 8 CFR 214.2(m)(9)(v) in two ways: (1) if the student’s school closes temporarily without online instruction or other alternative learning procedures, but the student intends to resume her or his course of study when the school reopens when conditions permit; and (2) the student may participate in online or other alternative learning procedures and count such online or alternative towards a full course of even if she or he has left the United States and is taking the online classes from elsewhere.\textsuperscript{14} In sum, ICE temporarily permitted nonimmigrant student visa holders, during the COVID-19 pandemic, to take online or hybrid classes, up to their full schedule of classes in a given academic term and remain in compliance with relevant visa requirements. The March 13 Guidance specifically provided assurance that the stated exemptions would remain in force for the duration of the COVID-19 pandemic.

U.S. schools and graduate programs relied on the March 9 Guidance and March 13 Guidance and spent several months planning for the Fall 2020 academic session. Many schools decided that they would have online-only course offerings, and others would have

\textsuperscript{9} Id.  
\textsuperscript{10} Id.  
\textsuperscript{12} Id.  
\textsuperscript{13} Id. at 1.  
\textsuperscript{14} Id.; March 9 Guidance, supra note 6.
hybrid programs, providing access to both in-person and online courses. Schools also planned for the possibility of discontinuing in-person classes entirely during the middle of the term, and transitioning to online-only learning.

The Council of the American Bar Association’s Section of Legal Education in May 2020 voted to approve a rule change that expands its ability to suspend specific accreditation standards in times of emergency, specifically contemplating that many law schools would move to online-only classes. This rule change will be voted on at the August 2020 House of Delegates meeting. As of the date of this report, Harvard Law School, Vermont Law School, the University of California-Berkeley School of Law, and numerous other law schools, have announced that they will only offer online classes for the Fall 2020 school term. Many others are offering hybrid instruction.

Nonimmigrant student visa holders also relied on the March 9 Guidance and the March 13 Guidance. Some took out loans to finance their travel to the United States and their education. Others secured approvals from their home government to study in the U.S. Still others entered leases and signed on for other significant financial obligations connected to their study in the U.S.

On July 6, 2020, ICE suddenly rescinded the March 9 Guidance and the March 13 Guidance by announcing that students on F-1 visas whose instruction would be entirely online due to COVID-19 must depart the country voluntarily or face deportation, and that those already outside the United States whose instruction would be entirely online may not reenter the United States (the July 6 Directive). This guidance also restored the former requirement that nonimmigrant F-1 students may take no more than one class or three credits online during the Fall 2020 semester. Further, the July 6 Directive stated that nonimmigrant student visa holders who begin the term taking in-person classes, but whose “school changes its operational stance mid-semester” to offer only online courses, “must leave the country” or transfer mid-semester “to a school with in-person instruction.” The July 6 Directive indicated that the “U.S. Department of Homeland Security plans to publish the procedures and responsibilities … in the near future as a Temporary Final Rule in the Federal Register.”

The July 6 Guidance triggered a flurry of litigation, beginning with a suit brought by Harvard and MIT, followed by California’s public colleges and later a coalition of 17 states, among other legal challenges. These actions focused on DHS’s noncompliance with the

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16 Id.
17 Id.
18 Id.
Administrative Procedure Act in developing and releasing the July 6 Directive. More specifically, Harvard and MIT alleged that the July 6 Directive was arbitrary and capricious because:

- it failed to consider the significant effects that it would have on universities that have invested considerable time and effort in developing plans for the 2020-2021 academic year, and it failed to address the serious reliance interests the March 9 Guidance and March 13 Guidance engendered;

- it did not cogently explain why DHS had exercised its discretion; and

- it violated the notice and comment rulemaking requirements of the APA.

However, on July 14, just prior to oral argument on a temporary restraining order and preliminary injunction requested by the plaintiffs in the Harvard and MIT case, ICE announced that it was rescinding the July 6 Directive and restoring the March 9 Guidance and the March 13 Guidance, on a nationwide basis. ICE further stated that it would take formal action to rescind the July 6 Guidance and make conforming revisions to the March 9 Guidance and the March 13 Guidance. To date, ICE has not done so, and has engaged in further bad-faith efforts to erode the exemptions provided in the March 9 Guidance and the March 13 Guidance.

IV. RECENT DEVELOPMENTS

On July 21, 2020, Harvard Dean Rakesh Khurana confirmed that ICE’s decision to reverse the July 6 Guidance seemingly does not apply to newly-admitted international

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20 Id. at 20. The Administrative Procedure Act (APA) directs courts to “set aside” agency action that is “arbitrary, capricious, [or] an abuse of discretion,” or that is taken “without observance of procedure required by law.” 5 U.S.C. § 706(2)(A), (D).

21 Id. at 20-21. More specifically, plaintiffs alleged that the July 6 Directive contained no evidence at all that ICE considered the significant harms that the July 6 Directive imposed on Plaintiffs and their students, faculty, and staff—or the fact that Plaintiffs and their students had relied on ICE’s own prior policy in formulating their fall plans.

22 Id. at 21-22. Indeed, a senior DHS official admitted that the July 6 Directive was not driven by public health concerns, as stated on its face, but was an attempt to force schools to reopen to in-person teaching. John Bowden, Cuccinelli Says Rule Forcing International Students To Return Home Will ‘Encourage Schools To Reopen,’ (July 7, 2020), available at https://thehill.com/homenews/administration/506248-cuccinelli-says-rule-forcing-international-students-to-return-home (visited July 27, 2020).

23 Id. Plaintiffs alleged that the July 6 was issued in contravention of the APA’s procedural requirements and should be set aside on that basis. Plaintiffs stated that the July 6 Directive is a “rule” within the meaning of the APA, as it is “an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy.” (5 U.S.C. § 551(4)) In general, the “agency process for formulating, amending, or repealing [such] a rule” (5 U.S.C. § 551(5)) must comply with the APA’s requirements for notice-and-comment rulemaking. (5 U.S.C. § 553).

students who require F-1 sponsorship. In fact, ICE updated the March 9 Guidance on
July 24 (as revised, the July 24 Guidance) to specifically state that:

Nonimmigrant students in New or Initial status after March 9 will not be able to
enter the United States to enroll in a U.S. school as a nonimmigrant student for the
fall term to pursue a full course of study that is 100 percent online…

In other words, on July 24, ICE expressly limited the benefit of the exemptions so as to
apply only to nonimmigrant student visa holders in the U.S. on or prior to March 9. Any
incoming or new student cannot benefit from the temporary exemptions established in the
March 9 Guidance and the March 13 Guidance. The revisions reflected in the July 24
Guidance seem to run afoul of the APA, just as the July 6 guidance did; further, ICE’s
actions in releasing the July 24 Guidance violate the spirit, if not the letter, of its agreement
with Harvard and MIT. Several hundred thousand international are now effectively barred
from studying in the U.S. during the Fall 2020 academic term, despite ICE’s prior
representations and commitments. Further, it would appear that certain nonimmigrant
student visa holders who entered the U.S. after March 9 may be at risk of losing their visa
status if their schools only offer online classes in Fall 2020, notwithstanding ICE’s prior
commitments and the students’ reliance thereon.

V. DOWNSTREAM IMPACT OF RECENT DEVELOPMENTS

Losing F-1 status would have considerable downstream effects for international students.
Many such students pursue employment opportunities in conjunction with their course of
study, using the OPT program, which allows eligible students to receive up to 12 months
of employment authorization before and/or after completing their academic studies, or
STEM OPT, which allows students who have earned a degree in certain science,
technology, engineering, and math fields to apply for a 24-month extension of their post-
completion OPT employment authorization if certain other criteria are satisfied. Students
must be lawfully enrolled on a full-time basis for one full academic year prior to
requesting OPT status. Students who lose their F-1 status must reestablish F-1 status
and accrue the full academic year in F-1 status from the date it was reinitiated. Thus,
students who intended to start the clock on OPT’s or STEM OPT’s ‘one full academic
year’ requirement during the Fall 2020 semester are now at significant risk of having their
relevant start dates pushed back to Fall 2021, given the July 24 Guidance.

The pressure brought to bear on the OPT and STEM OPT programs by the July 24
Guidance should not come as a surprise. An estimated 223,085 international students

25 Stuart Anderson, No New International Students At Harvard Due To Immigration Rules (July 22, 2020),
available at https://www.forbes.com/sites/stuartanderson/2020/07/22/no-new-international-students-at-
26 March 9, 2020 Broadcast Message: Coronavirus Disease 2019 (COVID-19) and Potential Procedural
Adaptations for F and M Nonimmigrant Students as modified on July 24, 2020, available at
27 U.S. Citizenship & Immigr. Servs., Optional Practical Training (OPT) for F-1 Students, available at
participated in OPT and STEM OPT in the 2018-19 academic year. These students contributed almost $41 billion to the U.S. economy in the 2018-2019 academic year. Nonetheless, the COVID-19 pandemic has caused the Administration to examine these programs with a critical eye, and potentially seek to limit significantly or terminate them. The Administration believes, without evidence, that participants in the OPT and STEM OPT programs take jobs from U.S. nationals. Doing away with either the OPT or STEM OPT programs, or otherwise curtailing participation at this time, deliberately ignores the fact that potential participants in these programs relied on ICE’s original March 9 Guidance and March 13 Guidance as to when they could start the clock on the ‘one full academic year’ requirement. Given this Administration’s penchant for ignoring the APA, it is reasonable to think that any action as to the OPT and STEM OPT programs could be construed as arbitrary and capricious.

The July 24 Guidance also places significant pressure on the Fulbright Foreign Student Program. The Fulbright Foreign Student Program enables graduate students, young professionals, and artists from outside the U.S. to research and study in the United States for one year or longer at U.S. universities or other appropriate institutions. Applicants must have at least a bachelors’ degree or equivalent in order to participate in the program; applicants must also obtain an F-1 visa to participate in the program. Since many, if not most, participants in the Fulbright Foreign Student Program in any given year would be on ‘new’ or ‘initial’ status as to their F-1 visa, the July 24 Guidance seems to shut the door on many deserving students who had relied on previous ICE guidance.

32 See, e.g., Dep’t of Homeland Sec. v. Regents of the Univ. of California, No. 18-587, 2020 WL 3271746 (U.S. June 18, 2020) (the Supreme Court held the government’s attempted rescission of the DACA program arbitrary and capricious because the government had failed to address the effect of its actions on numerous stakeholders, including DACA recipients, their families, their employers, and their colleges and universities).
33 U.S. Department of State, Bureau of Educational and Cultural Affairs, Exchange Programs, available at https://exchanges.state.gov/non-us-program/fulbright-foreign-student-program#text=The%20Fulbright%20Foreign%20Student%20Program.universities%20or%20other%20appropriate%20institutions (visited July 27, 2020).
Since 2008, more than 1600 international students have studied at U.S. law schools as part of the Fulbright Foreign Students Program. Anecdotal evidence demonstrates that these participants return to their home jurisdictions as powerful advocates for the rule of law. The July 24 Guidance imperils promotion of such values.

VI. CONCLUSION

The resolution accompanying this report asks DHS to keep its word as to the temporary exemptions set forth in the March 9 Guidance and March 13 Guidance. It asks DHS to maintain the temporary exemption for continuing, incoming, and future nonimmigrant student visa holders taking any combination of in-person, hybrid, and online classes (whether synchronous or asynchronous) classes for the duration of the COVID-19 pandemic. This would permit existing and new or initial F-1 and M-1 nonimmigrant student visa holders to take a full schedule of hybrid or online courses while maintaining their visa status, and would reverse the July 24 Guidance. The resolution asks DHS to engage in an APA-complaint rule-making process to issue a temporary final rule focused on such exemptions. It also urges DHS to protect the OPT and STEM OPT programs, as well as the Fulbright Foreign Student Program including by allowing participants in the latter program to avail themselves of the relevant temporary exemptions. Finally, the resolution asks the State Department to amend the Foreign Affairs Manual at 9 FAM 402.5-5(C) to conform such subsection with the above resolution.

Adoption of this resolution is necessary to address the reliance placed on the March 9 Guidance and the March 13 Guidance by all affected stakeholders, including students, schools, communities, and employers. Adoption of this resolution is necessary to push back on DHS’s rulemaking process that has ignored the APA. Fairness and good judgment require that DHS allow schools to plan their COVID-affected academic terms in a way that balances public health and safety needs with effective educational models. Fairness also requires that DHS honor both the letter and the spirit of the commitments it made in the Harvard/MIT litigation. Lastly, adoption of this resolution is necessary to protect programs, OPT and STEM OPT and the Fulbright Foreign Students Program, from the arbitrary actions of the DHS. Such programs provide not just a robust education, but tangible economic benefits and support for the rule of law.

Respectfully submitted,

John J. Morrissey, President,
Massachusetts Bar Association

August 2020

GENERAL INFORMATION FORM

Submitting Entity: Massachusetts Bar Association; Co-Sponsored by New York City Bar and the International Law Section

Submitted By: John J. Morrissey, President, Massachusetts Bar Association

1. **Summary of the Resolution(s).** This resolution urges the Department of Homeland Security (DHS) to maintain the Student and Exchange Visitor Program’s temporary exemption for continuing, incoming, and future nonimmigrant student visa holders taking any combination of in-person, hybrid, and online classes for the duration of the COVID-19 pandemic. This resolution also urges that DHS abide by its commitment to the exemption issued in March 2020, issue a temporary final rule on such exemption, protect the optional practical training program offered to nonimmigrant student visa holders, protect the Fulbright Foreign Student Program, and make a conforming change to the U.S. Department of State’s Foreign Affairs Manual.

2. **Approval by Submitting Entity.** Massachusetts State Bar approved sponsorship of this resolution on July 23, 2020.

3. **Has this or a similar resolution been submitted to the House or Board previously?** No

4. **What existing Association policies are relevant to this Resolution and how would they be affected by its adoption?**

   There is no ABA policy on this specific issue, and the policy position will allow the Association to speak on this important issue.

5. **If this is a late report, what urgency exists which requires action at this meeting of the House?** N/A.

6. **Status of Legislation.** None

7. **Brief explanation regarding plans for implementation of the policy, if adopted by the House of Delegates.**

   Continue programming, presidential statements and lobbying efforts for development of a DHS temporary final rule on the above-mentioned temporary exemptions.

8. **Cost to the Association.** (Both direct and indirect costs) None.

9. **Disclosure of Interest.** (If applicable) N/A
10. **Referrals.** This resolution and report has been referred to date to:

- Section of International Law
- Massachusetts Bar Association
- New York City Bar Association
- Section of Civil Rights and Social Justice
- Section of Administrative Law
- Criminal Justice Section
- Commission on Immigration
- Section of Legal Education
- Law Student Division

11. **Name and Contact Information** (Prior to the Meeting. Please include name, telephone number and e-mail address). *Be aware that this information will be available to anyone who views the House of Delegates agenda online.*

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12. **Name and Contact Information.** (Who will present the Resolution with Report to the House?) Please include best contact information to use when on-site at the meeting. *Be aware that this information will be available to anyone who views the House of Delegates agenda online.*

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EXECUTIVE SUMMARY

1. Summary of the Resolution.

This resolution urges the Department of Homeland Security (DHS) to maintain the Student and Exchange Visitor Program’s temporary exemption for continuing, incoming, and future nonimmigrant student visa holders taking any combination of in-person, hybrid, and online classes for the duration of the COVID-19 pandemic. This resolution urges that DHS abide by its commitment to the exemption issued in March 2020, issue a temporary final rule on such exemption, protect the optional practical training program offered to nonimmigrant student visa holders, protect the Fulbright Foreign Student Program, and make a conforming change to the U.S. Department of State’s Foreign Affairs Manual.

2. Summary of the issue that the resolution addresses.

DHS, in March 2020, issued a temporary exemption for continuing, incoming, and future nonimmigrant student visa holders taking any combination of in-person, hybrid, and online classes for the duration of the COVID-19 pandemic, allowing such students to take online or hybrid classes and remain in compliance with relevant visa requirements. Students and schools relied on the exemption in planning for the Fall 2020 academic term. On July 6, 2020, without notice and without consideration of the requirements of the Administrative Procedure Act, DHS terminated such exemption. In the face of litigation, DHS, on July 14, 2020 stated that it would terminate the guidance issued on July 6 and reinstate the exemption issued in March. On July 24, 2020, DHS revised its March guidance to provide that new or incoming nonimmigrant student visa holders would not be allowed in to the U.S. for the Fall 2020 academic term, if their school was offering online or hybrid instruction, wherein the student would have to take more than one class or three credits online or remotely. The resolution urges DHS to abide by its commitment to the exemption issued in March 2020, issue a temporary final rule on such exemption, protect the optional practical training program offered to nonimmigrant student visa holders, protect the Fulbright Foreign Student Program, and make a conforming change to the U.S. Department of State’s Foreign Affairs Manual.

3. Please explain how the proposed policy position will address the issue.

There is no ABA policy on this specific issue, and the policy position will allow the Association to speak on this important issue.

4. Summary of any minority views or opposition internal and/or external to the ABA which have been identified.

None known.