A Few Suggestions To Defend Oneself Against A Misrepresentation Finding Under The 90-Day Rule

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The State Department has abruptly amended the Foreign Affairs Manual to provide broader grounds to find that foreign nationals misrepresented their intentions when they came to the United States on nonimmigrant visas. A finding of fraud or misrepresentation under INA § 212(a)(6)(C)(i) can result in a permanent ground of inadmissibility.

The updated FAM provision at 9 FAM 302.9-4(B)(3)(g)(2) covers instances of conduct that may be inconsistent with representations that visa applicants made to consular officers when applying for nonimmigrant visas or to DHS officers at US ports of entry at the time of admission. The inconsistent conduct must have occurred within 90 days of entry, and the FAM instructs consular officers to presume that the applicant's representations about engaging in status compliant activity were willful misrepresentations of his or her intention to seek a visa or entry into the United States. If the foreign national engaged in conduct inconsistent with his or her nonimmigrant status more than 90 days after entry, no presumption of willful misrepresentation arises, although consular officers may still find facts that provide a reasonable belief that the foreign national misrepresented his or her purpose of travel at the time of applying for a visa or admission into the US.

The FAM cites the following examples of inconsistent conduct that can result in a presumption of willful misrepresentation:

> *Engaging in unauthorized employment;*
> *Enrolling in a course of academic study, if such study is not authorized for that nonimmigrant classification (e.g. B status);*
> *A nonimmigrant in B or F status, or any other status prohibiting immigrant intent, marrying a United States citizen or lawful permanent resident and taking up residence in the United States; or*
> *Undertaking any other activity for which a change of status or an adjustment of status would be requied, without the benefit of such a change or adjustment.*

This amendment replaces the former 30/60 day rule, which still exists in the USCIS policy manual, but is likely to be replaced. Under the 30/60 day rule, if a foreign national filed an adjustment or change of status application within 30 days of entry, it created a rebuttable presumption that the person misrepresented his or her intentions. If the conduct happened more than 30 days but less than 60 days after entry, no presumption of misrepresentation arose, although the government could infer from the facts that there was an intent to misrepresent. If the conduct occurred more than 60 days after entry, there was no basis for a misrepresentation finding.

The new 90-day rule that replaces the 30/60 rule is clearly harsher as the presumption that the person misrepresented his or her intentions is for a 90-day period as opposed to a 30-day period. Still, like under the old guidance, the key issue is what the intention of the person was at the time of issuance of the visa or at the time of admission into the United States. If they were inconsistent at those points in time under the applicable visa, then it does not make a difference whether there

is a 30-day or a 90-day rule. The applicant must also be given an opportunity to rebut the presumption of willful misrepresentation by presentation of evidence to overcome it. The new 90-day rule will admittedly greatly affect people entering under the Visa Waiver Program that admits visitors for a 90-day period. If such a person is admitted into the United States and gets married to a US citizen, that conduct in itself should not be inconsistent with one's admission into the United States as a visitor. But if this person files an application for adjustment of status within the 90-day period, it could be presumed that this person misrepresented his or her intentions at the time of admission into the United States. The same reasoning would apply to someone who is admitted on a B-2 visa for six months, and if within 90 days, this person contacts a school, gains admission and files a change of status from B-2 to F-1.

Even if there was allegedly inconsistent conduct within the 90 days, there are ways to rebut the presumption. Both practitioners and applicants should not reflexively take extreme actions such as withdrawing an already filed adjustment application and switch to consular processing, or refrain from filing such an application within 90 days. Rather, they should deploy the following analysis to determine whether there could be defense to a potential allegation of misrepresentation. While it is not clear whether the 90-day rule will be applied retroactively, applicants can take a deep breath and use the same analysis even if it is applied retroactively.

The FAM guidance at 9 FAM 302.9-4(B)(3)(h) insists that "there must be evidence that, at the time of the visa application, admission into the United States or in a filing for an immigration benefit (e.g., an application to change or extend stay in nonimmigrant status), the alien stated orally or in writing to a consular or immigration officer that the purpose of the visit or the immigration benefit was inconsistent with intended nonimmigrant visa classification." If the government is unable to establish that there is evidence of an admission to a consular or immigration officer that was made orally or in writing, then that would be grounds to argue that there was no misrepresentation.

The FAM guidance also explicitly instructs the consular officer that "[y]ou must give the alien the opportunity to rebut the presumption of willful misrepresentation by presentation of evidence to overcome it." Thus, if the applicant can demonstrate that it was not her intention to apply for adjustment of status at the time of her admission to the United States, but she changed her mind after her entry, that could be a basis to rebut the presumption. A good example is an elderly parent of a US citizen who genuinely comes to the United States to visit, but then has a medical emergency that impedes her ability to travel, which renders adjustment of status more convenient than consular processing. Another example is someone who is dating a US citizen, and visits the United States to pursue that romantic interest. There is no intention of getting married at the time of her entry in the United States. After several weeks, they decide to get married and apply for adjustment of status. Even though this conduct occurred within 90 days from the entry, it can be demonstrated that there was never an intent at the time of admission to apply for adjustment of status in the US.

Also, a misrepresentation must be both willful and material. INA § 212(a)(6)(C)(i). A misrepresentation is material under INA § 212(a)(6)(C)(i) when it tends to shut off a line of inquiry that is relevant to the alien's inadmissibility and that would predictably have disclosed other facts relevant to his or her eligibility for a visa or other benefit. *See* *Matter of D-R-*, 27 I&N Dec. 105 (BIA 2017). If the applicant can establish that the misrepresentation was not material, then that too would be a defense against a misrepresentation finding. Such an instance may include an Applicant who works for ABC Company in their home country but misrepresents that he works for XYZ Company, because ABC Company is not willing to issue him a letter, and so he obtains a

false letter from XYZ. Such a misrepresentation is not material as the Applicant was in any event working in the home country and can show ties. Moreover, if the misrepresentation is not willful, but an innocent misrepresentation, it should not result in a finding of inadmissibility under INA § 212(a)(6)(C)(i). *Cf.* *In re Guang Li FU*, 23 I&N Dec. 985 (BIA 2006).

The 90-day rule will clearly not apply to people who enter the United States under visas that allow for dual intent. Therefore, one who enters the United States in H-1B or L classification would not be implicated if he files an application for adjustment of status within 90 days as there is a clear carve out for H and L visa applicants in INA § 214(b). Dual intent is also recognized by regulation for the O, P and E visa categories. *See* 9 FAM 402.13-10(B) citing to 9 FAM 402.13-5(C) ("'dual intent' is permissible for O-1 visa holders"); 9 FAM 402.14-10(C) ("the approval of a permanent labor certification or the filing of an immigrant visa petition for an alien shall not be a basis for denying a P petition"); and 9 FAM 402.9-4(C) ("an [E visa] applicant might be a beneficiary of an immigrant visa petition filed on his or her behalf.") However, in the O, P, and E visa categories, while there is no requirement that they maintain a foreign residence, the intent to file an adjustment of status application at the time of entry may still not be contemplated.

Notwithstanding the codification of dual intent in statute and regulation, there is a recognition of inherent dual intent in all nonimmigrant visa categories. In *Matter of Hosseinpour*, 15 I&N Dec. 191 (BIA 1975), the Board of Immigration Appeals following earlier precedents held that "a desire to remain in this country permanently in accordance with the law, should the opportunity to do so present itself, is not necessarily inconsistent with lawful nonimmigrant status." Thus, conflating a desire to remain in the United States is not inconsistent with any nonimmigrant visa classification at the time of applying for the visa or admission. *See e.g. Garavito v. INS*, 901 F.2d 173 (1st Cir. 1990) (the filing of an immigrant visa petition on behalf of a foreign national does not negate nonimmigrant intent). Even to the most recent change in the F-1 nonimmigrant standard implicitly allows dual intent, specifically stating that "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." 9 FAM 402.505(E)(1).

Finally, with respect to preconceived intent being a discretionary ground for granting or denying adjustment of status, the BIA has held that an application for adjustment of status as an immediate relative should generally be granted in the exercise of discretion notwithstanding the fact that the applicant entered the United States as a nonimmigrant with a preconceived intent to remain. *Matter of Ibrahim*, 18 I&N Dec. 59 (BIA 1981); *Matter of Cavazos*, 17 I&N Dec. 215 (1980).

The FAM does not have the force of a statute or a regulation. It is sub-regulatory guidance and is not binding. An inadmissibility finding based on an arbitrary 90-day rule in the FAM, or if adopted by the USCIS in its policy manual, will not be binding upon an immigration judge and will not receive *Chevron* deference in federal court, but the lower deference under *Skidmore v. Swift & Co*., 323 U.S. 134 (1944). Under *Skidmore*, the weight given to the new 90-day rule in the FAM "will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control." An abrupt and arbitrary change from 30 to 90 days, without regard to other countervailing factors that militate against misrepresentation, may not even get *Skidmore* deference in federal court. While it is always advisable to be cautious and avoid risks that would result in an inadmissibility finding based on misrepresentation, it is incumbent upon the immigration practitioner and applicants to analyze whether such an inadmissibility finding could be imposed if there was a change in intention after the fact or if no oral or written representation was

made to a governmental official. This analysis is more crucial than buckling to an arbitrary 90-day presumption of misrepresentation period.

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