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USCIS IMPROPERLY BLURS DISTINCTION BETWEEN VIOLATION OF STATUS AND UNLAWFUL PRESENCE FOR F, J AND M NONIMMIGRANTS

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U.S. Citizenship and Immigration Services (USCIS) issued a policy memorandum on May 10, 2018, "Accrual of Unlawful Presence and F, J, and M Nonimmigrants." The memo abruptly revises previous policy guidance in the USCIS Adjudicator's Field Manual relating to this issue. The new guidance is effective August 9, 2018, and after reading this blog, it is hoped that readers are sufficiently shocked and motivated to submit comments as the radical departure from previous policy will jeopardize the ability of many nonimmigrants, mainly foreign students, from returning to the United States for unwitting or inadvertent status violations.

There has always been a strict distinction between violating status and being unlawfully present in the United States. One can be in violation of status without being unlawfully present. Even if an F, J and M student dropped out of school or engaged in unauthorized work, he or she would be considered to have been in violation of status but not accruing unlawful presence. This is because an F, M and J nonimmigrant is usually admitted for a Duration of Status (D/S) rather than up to a certain date. An F, M or J can maintain status so long as they remain enrolled in the educational institution or participate in activities pursuant to that status, which is why they are admitted under D/S. On the other hand, one who is the beneficiary of an approved H-1B or L nonimmigrant petition is admitted only up to the validity date of the petition. F, M and J nonimmigrants are not beneficiaries of prior approved petitions filed by sponsors.

The new policy states various ways in which F, J, and M nonimmigrants and their dependents begin accruing unlawful presence. For example, F, J, and M

nonimmigrants who failed to maintain nonimmigrant status before August 9, 2018, will start accruing unlawful presence based on that failure on August 9, 2018, unless the nonimmigrant had already started accruing unlawful presence based on several scenarios under the prior policy discussed below.

Individuals who have accrued more than 180 days of unlawful presence during a single stay, and then depart, may be subject to 3-year or 10-year bars to admission, depending on how much unlawful presence they accrued before they departed the United States. See INA 212(a)(9)(B)(i)(I) & (II). Individuals who have accrued a total period of more than one year of unlawful presence, whether in a single stay or during multiple stays in the United States, and who then reenter or attempt to reenter the United States without being admitted or paroled, are permanently inadmissible. See INA 212(a)(9)(C)(i)(1).

The new policy supersedes existing policy, which is that foreign students (F nonimmigrants) and exchange visitors (J nonimmigrants) who were admitted for, or present in the United States in, Duration of Status started accruing unlawful presence on the day after USCIS formally found a nonimmigrant status violation while adjudicating a request for another immigrant benefit or on the day after an immigration judge ordered the applicant excluded, deported, or removed (whether or not the decision was appealed), whichever came first. F and J nonimmigrants, and foreign vocational students (M nonimmigrants), who were admitted until a specific date certain accrued unlawful presence on the day after their Form I-94 expired, on the day after USCIS formally found a nonimmigrant status violation while adjudicating a request for another immigration benefit, or on the day after an immigration judge ordered the applicant excluded, deported, or removed (whether or not the decision was appealed), whichever came first.

By contrast, one admitted under an approved H-1B or L visa petition up to a certain date starts accruing unlawful presence after remaining beyond that date while a student who was admitted under D/S did not unless there was a violation of status finding by the USCIS or by an immigration judge. This holds true even with respect to a nonimmigrant admitted under a date certain visa. If the H-1B or L nonimmigrant violates status during the validity period of the admission, he or she will be in violation of status but will not accrue unlawful presence unless there is a formal finding by the USICS or an immigration judge.

The prior policy made more sense, and maintained the important distinction

between maintenance of status and lawful or unlawful presence. The 3 and 10 year bars, or the permanent bar, are extremely draconian and should only be triggered when the nonimmigrant goes beyond a date certain expiration date. This is consistent with the statutory definition of unlawful presence under 212(a)(9)(B)(ii), which provides:

"....an alien is deemed to be unlawfully present in the United States if the alien is present in the United States if the alien is present in the United States after the expiration of the period of stay authorized by the Attorney General or is present in the United States without being admitted or paroled"

The new policy blurs the difference between being out of status and unlawfully present. Unlawful presence ought to only trigger when one goes beyond an expiration date and not when there is a contestable violation of status. If a student in F status is in violation of that status, he or she can be placed in removal proceeding and may contest the allegation in the proceeding. If the Immigration Judge orders the person removed based on the violation, then the unlawful presence period may commence upon the order. Similarly, when one who is in F status applies for a change of status, and the USCIS finds that the applicant violated status, which the applicant may have been able to contest, unlawful presence may commence after such a finding.

Under the new policy, a nonimmigrant in F, J or M status may have unwittingly violated that status by not pursuing a full course of study or engaging in an unauthorized activity, and may never get notice of it until much later. Even F-1 students in post-completion practical training could potentially be deemed later to have engaged in unauthorized activity, such as not working in an area consistent with their field of study or a STEM trainee being placed at a third party client site, which USCIS has without notice abruptly disfavored, or if a school's curricular practical training does not meet the USCIS's subjective interpretation of whether the school was in compliance when it authorized such training. In the meantime, this person would have started accruing unlawful presence and triggered the 10 year bar to reentry upon departing the United States. The dependent spouse would also unfairly accrue unlawful presence as a result of a status violation by the principal spouse. This individual may never get a chance to contest the violation of status after the fact. Unlawful presence should only trigger when there is clear notice of remaining beyond an expiration date of authorized stay in the United States and not when there is a contestable allegation of violation of status. An F, J or M

nonimmigrant is now in a worse off position than say an H-1B nonimmigrant admitted under a date certain validity period. A violation of status by the H-1B nonimmigrant during the period of authorized stay would not trigger unlawful presence. Even after 9/11, when immigration policies concerning students were tightened, we did not see such a cynical change in policy for students as now under the Trump administration where they may not know in time of a status violation only to later realize they have unwittingly accrued unlawful presence triggering the 10 year bar.

This is my preliminary reaction to the new unlawful presence policy relating to F, M and J nonimmigrants. There will be many other good arguments that will be developed and interested persons, along with those who will be potentially affected by 3 and 10 year bars, are strongly urged to send in comments before June 11, 2018. The memo will take effect on August 9, 2018, but the abrupt change in policy without any proper rationale or justification also potentially makes it ripe for litigation.