CYRUS D. MEHTA & PARTNERS PLLC
US IMMIGRATION & NATIONALITY LAW

# USCIS FINALIZES UNLAWFUL PRESENCE POLICY PUTTING F, J AND M NONIMMIGRANTS IN GREAT JEOPARDY

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The USCIS finalized its unlawful presence policy for F, J and M nonimmigrants on August 9, 2018. The final policy makes no significant changes from the draft policy of May 10, 2018. My earlier blog noted the flaws in the draft policy, which persist in the final policy. The final policy incorrectly breaks down the distinction between violating status and being unlawfully present in the US. As of August 9, 2018, F, J and M nonimmigrants who have failed to maintain nonimmigrant status will start accruing unlawful presence.

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).

Prior to August 9, 2018, 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.

This will no longer be the case. Under the new policy effective August 9, 2018, any status violation will start the accrual of unlawful presence. The nonimmigrant will not be provided with any formal notice of a status violation, and any violation from the past that has been discovered would have already started the accrual of unlawful presence. According to the policy memo, the USCIS officer should consider information relating to the alien's immigration history, including but not limited to:

- Information contained in the systems available to USCIS;
- Information contained in the alien's record; and
- Information obtained through a Request for Evidence (RFE) or Notice of Intent to Deny, if any.

The final policy purports to make one concession from the draft policy, which is that if a nonimmigrant in F, J or M nonimmigrant classification makes a timely filing for reinstatement of status, then unlawful presence will not accrue during the pendency of this request. In the case of students in F-1 status, a reinstatement application will be considered timely filed if the applicant has not been out of status for more than 5 months at the time of filing for a request for reinstatement under 8 CFR § 214.2(f)(16). If the reinstatement request is approved, then the period of time an F-1 nonimmigrant was out of status prior to filing the application, along with the period of time during the pendency of the request, will not be counted as unlawful presence. If the reinstatement application is denied, the accrual of unlawful presence resumes on the day after the denial. Whether or not the application for reinstatement is timely filed, USCIS said, an F, J, or M nonimmigrant "whose application for reinstatement is ultimately approved will generally not accrue unlawful presence while out of status."

USCIS also noted that the Department of State (DOS) administers the J-1 exchange visitor program, to include reinstatement requests. If DOS approves the reinstatement application of a J nonimmigrant, "the individual will generally not accrue unlawful presence from the time the J nonimmigrant fell out of status from the time he or she was reinstated," USCIS said.

Unfortunately, most students may never know that they fell out of status until it is too late and they may never have an opportunity to file for reinstatement. Students will also likely be found to have violated status if they pursued practical training that is perceived as not being consistent with the regulations.

Esteemed colleague and immigration law expert Stephen Yale-Loehr has compiled a list of 50 examples how an international student might inadvertently or unknowingly fall out of status and start to accrue unlawful presence under the new guidance. Many of these examples arise from mistakes by the school. For instance, a designated school officer (DSO) may mistakenly complete a record, which will indicate to a USCIS officer that the student has remained in the United States beyond the end date of the program, and may have also worked on campus in violation of F-1 status. Status violations can also result from inadvertent miscommunications between school officials. An undergraduate student receives permission from an academic advisor (but not the DSO) to drop a course. The student is now registered for 11 rather than 12 semester credit hours. Later, the USCIS deems her to be in violation of status and accruing unlawful presence.

The USCIS has already begun to lay traps in order to nab students who may have unwittingly violated status. Recent RFEs issued after the filing of a change of status request from F-1 to H-1B require a student to meticulously demonstrate that he or she maintained status during post-completion practical training, including proving that the student was not unemployed for more than the requisite amount of time. The student must also prove that the employment, including an unpaid internship, was related to the major field of study. Here is one example inquiring whether a student maintained status during a routine period of optional practical training:

*F-1 OPT: Students engaging in initial F-1 post-completion Optional Practical Training (OPT) may not accrue an aggregate of more than 90 days off unemployment during the initial post-completion OPT period. Students granted the 17-month OPT extension may not accrue an aggregate of more than 120 days of unemployment during the total OPT period including any initial OPT and the 17-month OPT extension. Students granted the 24-month OPT extension may not accrue an aggregate of more than 150 days of unemployment during the total OPT period including any initial OPT and the 24-month OPT extension. Further, students engaging in F-1 post-completion must engage in at least 20 hours or more per week of employment that is directly related to the student's U.S. major of study. Lastly,*

*unpaid internships may meet the OPT employment requirements if the internship is directly related to the student's U.S. major of study and the internship complies with all labor laws. Please provide evidence that the beneficiary maintained the beneficiary's F-1 status during post-completion OPT. Evidence may include but is not limited to the following:*

*-A list of all employers the beneficiary has worked for under post-completion OPT and the periods the beneficiary worked for those employers;*

*-Copies of all pay records/stubs for the beneficiary from the starting date of post-completion OPT to the present time; and*

*-Evidence that the beneficiary worked at least 20 hours or more per week in a position is directly related to the beneficiary's U.S. major of study*.

Similarly, maintaining status through Curricular Practical Training (CPT) is frequently challenged in RFEs by asking for evidence that the CPT was an integral part of the beneficiary's degree program. The regulation at 8 CFR § 214.2(f)(1)(i) leaves undefined "curricular practical training program that is an integral part of an established curriculum" thus leaving it open for a subjective interpretation. Also, where the CPT commenced immediately upon the student's enrolment in the program, the USCIS questions whether immediate participation in CPT was required for the beneficiary's studies.

A student can also be found to have violated status due to an ambiguity in the rules providing for the maximum amount of time in practical training. 8 CFR § 214.2(f)(10) provides that a student may be authorized a total of 12 months of practical training, and becomes eligible for another 12 months when the student changes to a higher educational level. 8 CFR § 214.2(f)(10)(i) further provides that "students who have received one year or more of full time curricular practical training are ineligible for post-completion academic training." This could be interpreted to mean that a student can receive more than one year of CPT, and such CPT is routinely granted by DSOs through the SEVIS system that is administered by ICE. But USCIS is now interpreting this to mean that the total time that a student is entitled in any sort of practical training is 12 months even though ICE, its sister agency, authorized more than 12 months of CPT. USCIS is disregarding the suggestion in 8 CFR § 214.2(f)(10)(i) that a student may be entitled to more than 12 months of CPT.

Upon receiving such an RFE, it is important to submit evidence to overcome

USCIS's doubts. Still, it may be difficult to challenge USCIS's interpretation that the regulation at 8 CFR § 214.2(f)(10) only authorizes a total of 12 months of practical training, even though 8 CFR § 214.2(f)(10)(i) appears to suggest that CPT can be granted in excess of 1 year. It may also be difficult to demonstrate to the USCIS's satisfaction that the CPT was an integral part of an established curriculum. If the request for a change of status is not granted, the F-1 nonimmigrant would have started accruing unlawful presence as of August 9, 2018. In the event of the student departing later than February 5, 2020, he or she will be barred from entering the US for 3 years. After February 5, 2020, there will be no such grace period, and prior status violations that were in excess of 180 days will result in 3 year or 10 year bars to reentry upon the student departing the United States. The student may not be able to change or adjust status in the United States, and thus will be caught in a federally imposed Catch-22 situation.

The unlawful presence policy compounds the plight of the nonimmigrant who may also receive a Notice to Appear and be placed in removal proceedings under yet another USCIS policy designed to make life more difficult for law abiding nonimmigrants. Some are deciding to withdraw the request for change of status, upon receiving difficult to overcome RFEs, and leave the United States, prior to February 5, 2020, so that they can process their H-1B visas at a US consulate abroad. While such a strategy may allow the applicant to escape being issued a Notice to Appear, it could cause issues at the US consulate where a consul may still want the applicant to justify whether the CPT program was bona fide. On the other hand, if the applicant is placed in removal proceedings, and if voluntary departure is issued by an Immigration Judge prior to the accrual of unlawful presence of one year or more, then there is an escape hatch pursuant to INA § 212(a)(9)(B)(i)(I). The 3 year bar does not apply to those who departed after the commencement of proceedings and before the accrual of 1 year of unlawful presence (as there is explicit language to this effect in the provision). If the voluntary departure order is issued after 1 year of unlawful presence, then the ten-year bar would trigger under INA § 212(a)(9)(B)(i)(II) would apply. There is no escape hatch to the 10 year bar as there is to the 3 year bar whilst in removal proceedings. Further ethical and strategic considerations regarding representing beneficiaries of denied requests in removal proceedings can be found in my blog here.

The final policy will not just cause havoc to nonimmigrants snared with

technical or perceived violations of status, but schools will also face liability for errors by DSOs. Challenging the policy in federal court is indeed the need of the hour, and there is an urgent need for universities, hospitals and research institutions to come forward as plaintiffs! The 3 and 10 year bars, or the permanent bar under INA § 212(a)(9)C), 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 INA § 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, and thus violates INA § 212(a)(9)(B)(ii). If the USCIS wanted to so radically change its prior interpretation of unlawful presence for F, J and M nonimmigrants, it ought to have promulgated a rule through a more formal notice and comment under the Administrative Procedure Act. Finally, the policy violates the due process rights of these nonimmigrants as it imposes draconian penalties, 3 and 10 year bars, for status violations for which they never received formal warning and notice. All these are ripe grounds, among many others, for a successful challenge to this flawed policy in federal court!