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

TO LEAVE OR NOT TO LEAVE: THE DEVASTATING IMPACT OF USCIS'S UNLAWFUL PRESENCE POLICY ON FOREIGN STUDENTS

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The new USCIS Policy on Unlawful Presence for F, J and M Nonimmigrants took effect on August 9, 2018. This policy has had the effect of rendering nonimmigrants in F, J and M status, mainly students, unlawfully present upon being found to have violated their status.

Under the new policy, unlawful presence started accruing on August 9, 2018 based upon a prior finding of a violation of status. 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).

February 5, 2019, will be the 180th day from August 9, 2018 according to a web based date calculator. If the USCIS has determined that the foreign student violated status at some point in the past, even prior to August 9, 2018, this individual who does not depart on or before February 5, 2019, will face a 3-year bar from re-entering the US. In order to play safe, the individual should leave the US even before February 5 to avoid risks with flight delays or a difference of opinion with a consular official regarding the exact date and time of departure from the US. Those who violated their status after August 9, 2018 should start counting the 180 days from the date of the status violation, which will now be after February 5, 2019.

Individuals have been found to have been in violation of their status for a number of reasons, and at times the reason may not be so readily obvious. The determination is often even erroneous, but since August 9, 2018, the student

would have begun to accrue unlawful presence and will face a 3 -year bar upon departure from the US after February 5, 2019. It is one thing when a student drops out of school and engages in unauthorized unemployment. This is an obvious violation of F-1 status. One instance of a less obvious violation is when an F-1 student who has received more than 12 months of Curricular Practical Training (CPT) may be found by USCIS to have violated F-1 status and thus ineligible to be granted a change of status in the US. 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. Under 8 CFR § 214.2(f)(10)(i), however, "students who have received one year or more of full time curricular practical training are ineligible for post-completion academic training." Note that the inclusion of "academic training" appears to be an obvious typographical error, and it ought to have been "practical training" when the rule was last promulgated on 12/11/2002.

This supposed finding of a status violation is erroneous as 8 CFR § 214.2(f)(10)(i) clearly contemplates a student to be authorized to receive more than 1 year of CPT. The school authorizes it, and this authorization is entered in the student's SEVIS, which in turn is administered by ICE. If ICE authorizes more than 12 months of CPT, it is clearly erroneous and contradictory on the part of the USCIS to find that the student violated status.

Still, if one's change of status request from F-1 to H-1B has already been denied, this student should leave the US by February 5, 2019. A departure after February 5, 2019, would likely result in a 3 year bar to reentry to the US. If an applicant for change of status has received a Request for Evidence (RFE) accusing him or her for not maintaining status for exceeding one year of practical training, then the dilemma to leave or not to leave becomes more acute. Not all allegations of violation of status based on being issued more than 1 year of CPT result in denials. Many have been able to overcome this finding in the RFE and successfully obtain a change of status from F-1 to H-1B. Thus, one who decides to remain in the US must carefully evaluate the risk in the likelihood of success or failure in overcoming an RFE of this sort. As there is some risk that the request for change of status may be denied, the student may feel that it is safer to leave the US by February 5 rather than take a chance and overcome the objection. If the student cannot overcome the objection, and leaves after February 5, the 3 year bar would have triggered. However, this is a

decision that each individual must make with his or her immigration attorney.

Others face different challenges. A student in F-1 Optional Practical Training may have been thought to have been unemployed for more than 90 days. Such an individual who is unemployed for more than 90 days ceases to be in F-1 OPT status (and if in STEM OPT more than 150 days). See 8 CFR 214.2(f)(10)(ii)(E). However, whether one is employed or unemployed may not be so readily obvious. The individual may be treated as an employee by the employer listed on the I-20, but the employer may not have paid her because there was no work during the 90 day period. But the student could have still been viewed as an employee by the employer. Again, one who faces an allegation of not maintaining status due to unemployment for more than 90 days has to make a risk assessment whether to stay in the US beyond February 5, 2019 or whether to leave by February 5.

Those who have found to have violated their status can salvage the situation by leaving the US by February 5, 2019. They still have time to do this. They can return again on another visa, such as the H-1B visa. If one wants to return again in F-1 status, and on the existing F-1 visa, care should be taken as the student may start accruing a new period of unlawful presence if he or she was not properly admitted into the US. If the student received a new I-20 to correct the violation prior to departure, then arguably the student would have been properly admitted and may not start accruing unlawful presence again. However, after February 5, those who were found to have violated their status prior to August 9, 2018 will be trapped. If they leave after February 5, 2019, they will face a 3-year bar. If they leave after August 9, 2019, and if the violation occurred on or prior to August 8, 2018, they will face a 10-year bar. The USCIS unlawful policy memo's devastating impact on foreign students has already begun to unfold, and will become more acute after February 5.

The only silver lining in the horizon is a lawsuit, Guildford College et al v. Nielson, that has been filed to challenge the unlawful presence policy. The plaintiffs have also subsequently moved for a preliminary injunction on December 14, 2018 to take effect on February 4, 2019. If the preliminary injunction is granted by February 4, 2019, students who have been accused of violating their status, especially those contesting erroneous allegations, can breathe easy for now as they do not have to make plans to depart by February 5.

Update - January 28, 2019: The court in Guildford College v. Nielson granted a temporary restraining order in favor of the two individual plaintiffs who would otherwise be impacted by the unlawful presence policy. This is a positive development. Thus far, the the TRO only positively impacts the two plaintiffs and does not apply globally to all students who may be adversely impacted by the policy. The court has granted a date on March 26, 2019 on the motion for preliminary hearing. If plaintiffs win on the merits at this hearing, that relief should provided global protection.

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