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REINTERPRETING THE 90 DAY MISREPRESENTATION PROVISION IN THE FOREIGN AFFAIRS MANUAL

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As we previously blogged, the State Department abruptly amended the Foreign Affairs Manual in September 2017 to provide consular officers with 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.

To reiterate, 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. Although this provision is popularly known as the "90 Day Misrepresentation Rule ", the FAM is not codified law or regulation, but merely sub-regulatory guidance for consular officials abroad.

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

1. *Engaging in unauthorized employment;*

2. *Enrolling in a course of academic study, if such study is not authorized for that nonimmigrant classification (e.g. B status);*
3. *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*
4. *Undertaking any other activity for which a change of status or an adjustment of status would be required, without the benefit of such a change or adjustment.*

A literal reading of the four criteria seem to suggest that the inconsistent activity resulting in a presumption of misrepresentation must have occurred in the absence of filing an application for change of status or adjustment of status that would otherwise authorize such an activity. The way the FAM provision literally reads is contrary to how this has previously been understood, which is that if a foreign national filed an adjustment or change of status application within 90 days of entry, it created a rebuttable presumption that the person misrepresented his or her intentions upon initial entry. Prior to the introduction of the new FAM provision, it was similarly understood that filing a change of status or adjustment of status application within 30 days created a rebuttable presumption of fraud or willful misrepresentation. If such an application was filed more than 60 days later, there would be no such presumption.

Let's carefully start our analysis with the fourth criterion under 9 FAM 302.9-4(B)(3)(g)(2)(b)(iv):

Undertaking any other activity for which a change of status or an adjustment of status would be required, without the benefit of such a change or adjustment.

Assume that a person is admitted into the United States in B-2 status for purposes of tourism but who is also an exceptional violinist. Suppose this person begins to get paid for violin performances within 30 days of admission. Such an activity would likely be inconsistent with the purpose of the B-2 visa and she would probably be presumed to have misrepresented her intentions under the 90 day guidance. On the other hand, if this person's employer first files a change of status from B-2 to O-1B (a visa for people who can show extraordinary ability in the arts or extraordinary achievement in the motion pictures or television industry) on the 30th day, and she only begins to concertize as a violinist after the O-1B petition and request for change of status from B-2 to O-1B is approved, a literal reading of the fourth criterion suggests

that the 90 day rule has not been implicated. This person undertook the work activity "for which a change of status would be required" and should not be presumed to have misrepresented under INA § 212(a)(6)(C)(i) even though the change of status application was filed within 90 days.

It should be noted that this interpretation must be viewed from the State Department's perspective that resulted in this guidance in the FAM. The USCIS, which adjudicates visa petitions within the US, will not be bound and the DOS is not trying to ask other agencies to follow this interpretation. Thus, what the DOS is really saying is that if the USCIS approves such a change of status petition that was filed within 90 days, a consular official will not find a person inadmissible for misrepresentation, if the USCIS already approved it. According to the way 9 FAM 302.9-4(B)(3)(g)(2)(b)(iv) literally reads, which a DOS official confirmed recently at a conference, the 90 day guidance is not implicated if the foreign national files a change of status or adjustment of status application even within 90 days and *then* seeks to engage in conduct consistent with the new status. The guidance is implicated, rather, if the foreign national engages in conduct that is inconsistent with their present status such as working while in B-2 status without first filing and obtaining a change of status that would authorize such work activity. In other words, filing a change or adjustment of status application within 90 days of entry ought not create a presumption of willful misrepresentation for a consular officer especially if it was approved by the USCIS.

This interpretation, while at first blush appears not to square with the third criterion, 9 FAM 302.9-4(B)(3)(g)(2)(b)(iii) ("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") may be harmonized if it is read in conjunction with the fourth criterion at 9 FAM 302.9-4(B)(3)(g)(2)(b)(iv)("Undertaking any other activity for which a change of status or an adjustment of status would be required, without the benefit of such a change or adjustment").

This nuanced reading may run contrary to the way the presumption of misrepresentation has always been understood, which has meant that a nonimmigrant who entered on a B-2 visa, married a US citizen and applied for adjustment of status within 90 days would presumptively be found to have made a misrepresentation at the time of entry. Such a reading may not be universally accepted and obviously should not be relied upon until it gains

more acceptance by all the agencies. It may never gain acceptance since the same language in current 9 FAM 302.9-4(B)(3)(g)(2)(b)(iv) existed under the old version of the 30-60 day rule too and was never interpreted in this way previously. The USCIS has questioned adjustment applicants regarding their intention at the time of admission when they filed soon after entry into the US. Also, when one files a change of status from B-2 to F-1, the USCIS often questions when the applicant contacted the school from the time of admission in order to gage the applicant's true intention and whether it was contrary to the purpose under the B-2 visa. Still, the literal reading ought to be invoked as a defense to those who have been accused of misrepresentation, but never engaged in inconsistent activity prior to filing an application for change of status or adjustment of status.

This reading also makes perfect policy sense. It makes little sense to penalize a student who has been living lawfully for years in F-1 status, and who after travelling abroad on a brief vacation marries his fiancée and files an adjustment of status application within 90 days. Under a literal reading of the FAM guidance, the presumption of fraud or misrepresentation is not implicated, although under the way it has been traditionally understood, it would be because the student unfortunately took this vacation abroad prior to his marriage and the filing of the adjustment application within 90 days. Moreover, the literal reading does not totally eviscerate the presumption of fraud or misrepresentation. The 90 day guidance would still apply to those who violate immigration laws. Thus, a person who enters as a tourist and starts working within 90 days without filing for a change of status to a nonimmigrant work visa status would implicate the rule when she next visits the US Consulate for a new visa. The prior activity would have resulted in a rebuttable presumption of fraud or misrepresentation, and she may be found inadmissible under INA § 212(a)(6)(C)(i). However, if this same person, like the violinist in our prior example, followed the law and started working only after the O-1B request for a change of status was approved, the 90 day rule ought not be implicated.

Furthermore, a person would not be able to get away when there is obvious evidence of a misrepresentation at the time of applying for a visa or upon admission. For example, if a person applies for a business visa supported by documentation to further a business purpose in the US, and upon entry, does not conduct any business activities whatsoever but instead seeks admission at a school and applies for change of status to F-1, that person would most likely

be found inadmissible for misrepresenting that there was a business purpose to visit the US when there was none. A literal reading would only likely eliminate a presumption of misrepresentation where the person otherwise came to the US pursuant to the stated purpose and then applied for a change of status to perform another activity within 90 days.

The literal reading of the 90-day provision in the FAM also supports the dual intent doctrine. 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 upon the occurrence of certain conditions 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 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). Thus, persons should not be penalized if they wish to enter the US to engage in activities that may be inconsistent with their initial visa provided they pursued activities consistent with the initial purpose and then successfully file change of status or adjustment of status applications that would permit them to pursue those other activities.

While our blog by no means should serve as a green light for people to file applications to change status or adjust status within 90 days, its purpose is to at least create awareness of another way of reading the 90 day provision that makes perfect sense as it encourages lawful conduct and awareness of a potential defense to those who are found inadmissible when they filed applications within 90 days to seek permission to engage in activities that may have not been consistent with their original visa.