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POSITIVE CHANGES TO 90-DAY MISREPRESENTATION GUIDANCE IN THE FOREIGN AFFAIRS MANUAL - ESPECIALLY FOR FOREIGN STUDENTS

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In September 2017, the State Department abruptly amended the Foreign Affairs Manual 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. I previously blogged on this development here and here, I am blogging yet again because I am pleased to report on further recent changes, which are more positive this time especially for foreign students.

In order to presume fraud or misrepresentation, the applicant must have engaged in conduct inconsistent with representations made to consular officers or DHS officers within 90 days of applying for a visa, admission or other immigration benefit. If the foreign national engaged in inconsistent conduct 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. Thus, I prefer to call it guidance rather than a rule.

The latest modification at 9 FAM 302.9-4(B)(3)(g)(2) cites the following examples of inconsistent conduct that can result in a presumption of willful misrepresentation:

(i)Engaging in unauthorized employment;

(ii) Enrolling in a course of academic study, if such study is not authorized for that nonimmigrant classification (e.g. B status);

(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; or

(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.

The big change is in (iii) where the words "or F status, or any other" have been stricken. The omission of these few words provides welcome relief to students in F status who study in the US as well as other nonimmigrants in status prohibiting immigrant intent such as J status. A student who travels abroad for vacation, but has planned to get married to a US citizen shortly after the vacation, no longer needs to fear being found to have willfully misrepresented his or her intentions at the time of admission. Although (iii) contemplates marriage to a US citizen and taking up residence in the United States thereafter, it could encompass other scenarios, such as a student filing an adjustment of status application, based on an approved I-140 petition with a current priority date, after returning from a brief trip overseas.

This welcome change appears to acknowledge an 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).

Such inherent dual intent as established in *Matter of Hosseinpour* is also applicable to one who enters the United States in B status too, but the B nonimmigrant still seems vulnerable to a charge of fraud or misrepresentation based on conduct inconsistent with what was represented to the consular or DHS officer. Still, there are other positive and sensible changes in the FAM that apply to all nonimmigrants, especially in the preceding section at 9 FAM

302.9-4(B)(3)(g)(1). For ease of reference, the entire section is reproduced below with the changes reflected in Red Italics.

(U) Activities that *May* Indicate *A Possible* Violation of Status or Conduct Inconsistent with Status

1. **(U) In General:**
    1. **(U)** In determining whether a misrepresentation has been made, some questions may arise from cases involving aliens in the United States who have performed activities that are inconsistent with representations they made to consular officers or DHS officers when applying for admission to the United States, for a visa, or for another immigration benefit. Such cases occur most frequently with respect to aliens who, *after* being admitted to the United States*, engage in activities for which a change of status or an adjustment of status would be required, without the benefit of such a change or adjustment of status.*
    2. **(U)** In determining whether a misrepresentation has been made, some questions may arise from cases involving aliens in the United States who have performed activities that are inconsistent with representations they made to consular officers or DHS officers when applying for admission to the United States, for a visa, or for another immigration benefit. Such cases occur most frequently with respect to aliens who, *after* being admitted to the United States*, engage in activities for which a change of status or an adjustment of status would be required, without the benefit of such a change or adjustment of status.*
    3. ***(U)** The fact that an alien's subsequent actions are inconsistent with what was represented at the time of visa application, admission to the United States, or in a filing for another type of benefit does not automatically mean that the alien's intentions were misrepresented at the time of either the visa application or application for admission to the United States. To conclude there was a misrepresentation, you must make a finding that there is direct or circumstantial evidence sufficient to meet the "reason to believe" standard, which requires more than mere suspicion and is akin to probable cause. See In re Jose Manuel Isabel Diaz (BIA Dec. 30, 2013). If the activities happened within 90 days after the visa application and/or application for admission to the United*

States, please see paragraph (2) below.

***(U) Note:** The case notes must reflect that, when applying for admission into the U.S. or for a visa, the alien stated either orally or in writing to a consular or immigration officer that the purpose of travel was consistent with the nonimmigrant visa class sought. (For example: "The officer finds that the applicant told the officer at the port of entry that his purpose of travel was consistent with the visa class held.")*

The heading of 9 FAM 302.9-4(B)(3)(g)(1) now reads "Activities that **May** Indicate A **Possible** Violation of Status or Conduct Inconsistent with Status" thus suggesting more discretion and leeway before a consular officer jumps to the conclusion that the application misrepresented his or her intention. Notwithstanding the 90 day period, so long as one initially entered the United States with the intention that was consistent with the visa status, such as to visit the US for tourism, in B-2 status, but then genuinely changed one's mind and got married to a US citizen within 90 days, the presumption of misrepresentation can be rebutted if it can be demonstration that the intent at the time of admission was consistent with the B-2 status. The guidance goes onto further state that even if the conduct was inconsistent to what was previously represented to the consular or DHS officer, there should not be an automatic presumption of fraud or misrepresentation. Consular officers are not permitted to go along with a hunch or mere suspicion, the FAM cautions. Rather, consular officers must adopt the reason to believe standard: "To conclude there was a misrepresentation, you must make a finding that there is direct or circumstantial evidence sufficient to meet the "reason to believe" standard, which requires more than mere suspicion and is akin to probable cause. *See In re Jose Manuel Isabel Diaz* (BIA Dec. 30, 2013)." "Probable cause" is generally associated with a reasonable ground to believe that the accused is guilty, *see e.g. Ludecke v. United States Marshall*, 15 F.3d 496 (5th Cir. 1994). Thus, the implementation of "probable cause" gives more room for an applicant to rebut an accusation of misrepresentation.

Finally, the insertion of "engage in activities for which a change of status or an adjustment of status would be required, without the benefit of such a change or adjustment of status" appears to be in harmony with prong (iv) of 9 FAM 302.9-4(B)(3)(g)(2). Prong (iv) says the same thing: "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." As I had suggested in the prior prior blog, the applicant should only be penalized if he or she engaged in activities without applying for a change of status or adjustment of status. 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 prong (iv) 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. Also, since the salutary change for students in the FAM guidance is for consular officers, a Customs and Border Protection (CBP) officer at the airport may not be guided by it, and may not even know about it. Thus, a foreign student who has resided in the United States for several years coming back from a brief weekend trip from Canada could still be suspected for misrepresenting his or her intentions as a nonimmigrant if there is a plan to marry a US citizen and adjust status in the US.

It is hoped that the change in the FAM guidance benefitting foreign nonimmigrant students will guide USCIS and CBP too. It makes little sense to penalize a bona fide foreign student who plans to marry and adjust status just

because of a short vacation overseas. The inherent dual intent wisely recognized by the Board of Immigration Appeals in all nonimmigrant visa categories in *Matter of Hosseinpour* ought to be part of guiding policy for all the agencies administering the Immigration and Nationality Act. One who enters the United States as a nonimmigrant to pursue the objectives of the visa, but who also desires to immigrate, should not be viewed in the same way as one who commits blatant fraud. Nonimmigrants should be allowed to follow their destiny as it naturally unfolds in the United States without having to worry about being accused of engaging in inconsistent actions within 90 days of their admission.