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JUDGE ISSUES NATIONWIDE PRELIMINARY INJUNCTION IN UNLAWFUL PRESENCE CASE: WHAT DOES THE INJUNCTION MEAN FOR CURRENT F, J, AND M NONIMMIGRANTS?

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In a promising development for F, J, and M nonimmigrants battling unlawful presence policy, a federal district court in North Carolina has granted a preliminary injunction preventing USCIS from enforcing its problematic August 9, 2018 policy memo. The August 2018 Policy would render students in F, J and M status unlawfully present thus subjecting them to 3 and 10 year bars from reentering the United States.

The May 3, 2019 *Guilford College et al v. Mcaleenan et al* opinion, issued by the Honorable Loretta C. Biggs, is an extraordinary nationwide injunction prohibiting USCIS and DHS from "enforcing the policy set forth in the August 2018 Policy Memorandum, in all its applications nationwide, pending resolution of this lawsuit."

As previously discussed on our blog, the August 2018 Policy changed over 20 years of established practice by recalculating how 'unlawful presence' time is accrued for foreign students and exchange visitors. In doing so, USCIS blurred the line between established concepts of 'unlawful presence' and 'unlawful status', and instead made the two terms synonymous as it related to F, J, and M nonimmigrants.

Prior to the August 2018 Policy, unlawful presence time would not begin to accrue until the day, or day after, a formal finding was found that the nonimmigrant was out of status. In contrast, under the new policy

nonimmigrants would begin accruing unlawful presence time the moment any violation of status occurred. Further, nonimmigrants would not receive any formal notice of a status violation, and any past violation that had been discovered would have begun accrual of unlawful presence. This drastic recalculation of unlawful presence time put many who would be unaware of any status violations at risk of being subject to 3-year or 10-year bars of admission should they accrue more than 180 days of unlawful presence. *See* INA §212(a)(9)(B)(i)&(II). Mistakes due to technicalities, human error, miscommunication, or ambiguity of rules would cause a nonimmigrant to fall out of status and accrue unlawful presence without their knowledge and without opportunity to cure the violation.

Plaintiffs in the *Guilford College* case sued DHS and USCIS alleging, among other things, that 1) USCIS had issued the August 2018 Policy in violation of the Administrative Procedure Act (APA) for failure to observe the APA's notice and comment procedures, and 2) the August 2018 Policy conflicted with statutory language of the Immigration and Nationality Act (INA).

The Court held that for the purposes of granting the Preliminary Injunction, the Plaintiffs had demonstrated a likelihood to succeed on their challenges to the policy, and found that the Plaintiffs were "likely to suffer irreparable harm absent entry of a preliminary injunction."

Promising decision for future litigation challenging USCIS policy memos

For immigration lawyers fighting harsh USCIS policies and denials of petitions on behalf of their clients, the possible ramifications of Judge Biggs Opinion and Order are promising.

The Court found the Plaintiffs likely to succeed in showing that the language, purpose, context, and effect of the USCIS policy rendered it a legislative rule. This is significant because "or a legislative rule to be valid … it must have been promulgated in compliance with the APA's notice and comment procedures ." So, in failing to publish notice of its proposed policy change in the Federal Register, USCIS violated the APA, thus invalidating the policy.

This may open the door for future litigation challenging other USCIS policy memos issued without proper APA notice and comment procedure. Attorneys can now look to challenge other USCIS changes to policy that have legislative rule characteristics, and similarly subject them to challenge for failing to follow

proper APA rulemaking procedure. These could include, for example, USCIS's October 23, 2017"Rescission of Guidance Regarding Deference to Prior Determinations of Eligibility in the Adjudication of Petitions for Extension of Nonimmigrant Status" and USCIS's February 23, 2018 "Contracts and Itineraries Requirements for H-1B Petitions Involving Third-Party Worksites". Both these policies, see blogs here and here, contradict existing regulations. In fact, the February 23, 2018 policy requiring petitioners who place H-1B workers at third party sites to impossibly rigid itinerary and documentary requirements is being challenged in federal court. At a recent hearing on plaintiff's motion for summary judgement, the judge sharply questioned the high rate of denials under this USCIS policy that plaintiffs allege was designed to kill the IT consulting industry business model.

Perhaps even more promising is the effect Judge Biggs decision will have on curtailing USCIS power to alter statutory construction by way of policy changes and promulgating regulations. The decision noted that based on the statutory text of the INA, the Court found it likely that unlawful presence does not begin when one becomes out of status. Therefore, the August 2018 Policy, in altering unlawful presence accrual to commence when one becomes out of status, most likely conflicts with the existing law and is invalid.

The Court's decision on invalidating policy which conflicts with existing statute may be even more crucial for future challenges to USCIS policies. This is because without the ruling on statutory construction, the USCIS could essentially overcome a future policy challenge by simply engaging in notice and comment procedures beforehand. Attorney H. Ronald Klasko, who serves as co-counsel and immigration subject matter expert in the *Guilford College* litigation, thinks the Court's decision instead makes it harder for USCIS to get around policy challenges, because "if the interpretation of unlawful presence embodied in Memorandum conflicts with the INA as a matter of law, that defect could not be addressed even by properly promulgated regulations. Rather, it would require a statutory change from Congress."

So what does the preliminary injunction mean for current F, J and M nonimmigrants and the immigration lawyers who advise them?

Though certainly a victory, there now exists some doubt and uncertainty regarding how much reliance can be placed on the *Guilford College* preliminary injunction. The nationwide injunction, which will prohibit enforcement of the

unlawful presence policy by USCIS until the Court issues its final order, has left many unsure as to what the preliminary injunction means for currently at-risk nonimmigrants. Should the Court rule in favor of USCIS and the August 2018 Policy is reinstated, what would that mean for the nonimmigrants who were at risk of triggering bars to admission prior to the preliminary injunction? The following scenarios highlight this uncertainty:

Scenario 1: A PhD student on an F-1 visa travels out of the country after the May 3rd preliminary injunction is issued. Prior to the preliminary injunction, the student was at risk of triggering a 3-year-bar of admission for having accrued over 180 days of unlawful presence without his knowledge. This was due to a reporting mistake the school made in regards to his course load which caused him to inadvertently fall out of status. If the student returns to the country on an O-1 visa while the preliminary injunction is still in effect, and the Court then issues a final ruling upholding the August 2018 Policy shortly afterwards, will the student be found to be inadmissible under 212(a)(9)(B)(i)(I)or(II)?

Scenario 2: A research scholar on a J-1 visa discovers she inadvertently violated her status months prior causing her to unknowingly accrue unlawful presence under the August 2018 Policy. Though she had not yet accrued 180 of unlawful presence when the preliminary injunction was ordered on May 3rd, she was close. Today the research scholar visits her attorney and informs him that tomorrow marks 180 days since she has fallen out of status. The Court has yet to issue its final ruling and the preliminary injunction is still in place. She is unsure whether she should leave the country tomorrow out of precaution of triggering a 3-year-bar of inadmissibility. She has a lot to lose if she were to travel today, and would like to remain in the country. She wants to know, should the Court lift the injunction in the near future, whether the days in which the government was enjoined from enforcing the policy are considered void from unlawful presence calculation, or whether the upheld 2018 August Policy is effective retroactively?

In scenarios like these, it is unclear how the government would rule. It may be difficult for attorneys to best advise their at-risk nonimmigrant clients due to this ambiguity. Leaving or not leaving the country during the period where the preliminary injunction is in effect should be carefully considered and discussed with clients, all options carefully weighed. It may be best to exercise abundant caution and leave not leave the US in Scenario 1 and leave the US in Scenario 2
Even if the Court lifts the preliminary injunction, it will at least order that the

August 2018 Policy not be applicable while the preliminary injunction was in effect and takes effect prospectively. On the other hand, one can also be cautiously optimistic that the plaintiffs will prevail in their motion for summary judgment (expected in June 2019) and that the August 2018 Policy will effectively be rescinded by the Court. After all, a motion for preliminary injunction is only granted when there is a likelihood of success on the merits. There is also a risk that the Court of Appeals will overturn the lower court's decision even if the plaintiffs prevail on the merits. Nevertheless, despite the risks, the *Guilford College* preliminary injunction is cause for celebration, and as Facebook's founder Mark Zuckerberg once famously said, "The biggest risk is not taking any risk..."

(*This blog is for informational purposes only, and should not be considered as a substitute for legal advice*)

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