

## USCIS Changes Policy on Accrual of Unlawful Presence for F, J and M Nonimmigrants

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September 28, 2018

U.S. Citizenship and Immigration Services (USCIS) has published a revised final policy memorandum, "Accrual of Unlawful Presence and F, J, and M Nonimmigrants," with an immediate effective date of August 9, 2018. With the implementation of this new memo, USCIS is abandoning its 20 years of consistent policy in favor of a retroactive approach to unlawful presence, which raises serious questions regarding fundamental fairness and which will have a significant impact on student, vocational and exchange visitor communities.

The final policy memo establishes a new USCIS policy regarding the determination as to when certain nonimmigrant students in F, M or J status begin accruing "unlawful presence" in the U.S. It also provides guidance on how unlawful presence will be counted for students in F or M status who have timely filed or approved reinstatement applications, as well as for students in J status who have an approved reinstatement application.

### **What is Unlawful Presence and Why Does it Matter?**

A foreign national is unlawfully present if he or she is present in the U.S. after the expiration of the authorized period of stay, or is in the U.S. without being admitted or paroled. The accrual of unlawful presence is of great concern, because it can impact a foreign national's eligibility for future immigration benefits, or possible bars from reentry to the US.

- Foreign nationals who accrue **more than 180 days but less than one year** of unlawful presence will trigger a three-year bar from re-entering the U.S.
- Foreign nationals who accrue **more than one year** of unlawful presence will trigger a 10-year bar from re-entering the U.S.
- Other ramifications of these bars include ineligibility for visas, reentry to the U.S., or applying for a green card, unless a waiver can be obtained.

### **What Was the USCIS Policy Prior to This New Memo?**

Prior to the implementation of this new policy, students in F, M or J status generally did not accrue unlawful presence. This is because they are not given a specific expiration date upon their admission to the U.S. and are admitted for the duration of their status ("D/S"). This means they can remain in the U.S. as long as they maintain their nonimmigrant status (*i.e. maintain a full course of study, remain in the exchange program, only engage in authorized employment, and complete the academic or exchange program in a timely manner or obtain an extension from the school official or exchange program*). An F, M or J student would only accrue unlawful presence if there was a formal determination by either an immigration judge or USCIS, that the student violated their status.

### **What are the Changes Under the New Memo?**

Effective August 9, 2018, under the new policy memo, F, M and J students who fail to maintain their status begin accruing unlawful presence *the day after* they engage in an activity that violates the terms of their status. For example, a student who drops a class to become a part-time student could have a status violation and begin accruing unlawful presence the day after they stop attending classes full-time. The calculation of when a student begins accruing unlawful

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presence will not be applied retroactively, and will only be counted from August 9, 2018, going forward.

### **Reinstatement of Status**

F, M and J students who fail to maintain their status can apply to "reinstatement" their status back to lawful nonimmigrant status if certain conditions are met. Under the new policy memo, USCIS confirms that once a reinstatement application or request filed by an F, M or J student **is approved**, the previous unlawful presence record will be erased. The policy memorandum also sets forth other timelines which govern when the unlawful presence calculation will start accruing if the application **is not approved**. For F and M students, these timelines depend on the date the reinstatement application is filed.

### **Recommendations**

The new USCIS policy memo only addresses the calculation of unlawful presence for F, J and M students. It also applies to dependent spouses of the F, M or J student. Other immigration policies remain unchanged.

The determination as to whether an individual has violated status is complex and nuanced. F, J and M students should communicate with the designated school official (DSO) at their schools to ensure that they comply with all school requirements to maintain their status.

Clients should contact the immigration team at Miller Canfield for proactive strategy discussions with any questions regarding possible status violations in light of this policy memorandum.