Recent Immigration Actions: USCIS & DOS Policies on Unlawful Presence for F/J/M

Fall 2018

Overview

- US Citizenship & Immigration Services (USCIS) published a new policy effective August 9, 2018
  - Officers able to determine that an applicant is “unlawfully present” – For F, J, & M categories, calculation may now reflect historical actions
- US Department of State (DOS) has updated their guidance to visa officers with similar language
- Critical to know and follow all immigration rules!

What is ‘Unlawful Presence’?

Legal Determination: When a person is present in the US without authorization
- Official action/notice from government agency
- Based upon limited & verified scenarios –
  - Overstay: Remaining beyond status expiration
  - Court Order: Immigration judge issues order for removal, deportation, or exclusion from US
  - USCIS Ruling: Denial, citing status violation

Accrual & Consequences

- Duration of Status (D/S): Overstay does not apply; For F/J, USCIS or judicial ruling has been required
- Once determined, Unlawful Presence is accrued for every day present in US without valid authorization
- Consequences for Unlawful Presence are severe!
  - Must apply in home country for any US visa
  - After 180 days, subject to 3-year bar on entry
  - After 1 year, subject to 10-year bar on entry

New USCIS Policy: Aug 9, 2018

- No changes to Unlawful Presence calculations for other nonimmigrant categories: Accrual begins day after USCIS ruling, judge's order, or status expires
- Broader scope for students & exchange visitors!
  - Unlawful Presence triggered by status violation
  - F-2 & J-2 dependents follow F/J determination

Accruals for F, J, & M

- USCIS may review government systems, applicant details, and statements to determine status validity
- If a violation is determined, accruals are now calculated based on timing of the event, not the determination date from USCIS
  - For violations prior to 8/9/18, accrual of unlawful presence begins from August 9th
  - For violations after 8/9/18, accrual begins from date of the violation, despite USCIS timing
New DOS Policy Guidance

- Foreign Affairs Manual, updated August 9, 2018: “Individuals Unlawfully Present – Grounds & Application” [9 FAM 302.11-3 (A) & (B)]
- Ineligibility for a US visa if the applicant has been “unlawfully present” for more than 180 days
- Similar provisions target previous F, J, or M status
  - 8/9/18: Accruals calculated from status violation
  - Prompts data comparison of SEVIS, I-94, etc.

Unlawful Presence NOT accrued:

- During qualified F-1 & J-1 grace periods
  - 30 days prior to program start date (F & J)
  - 30 days (J) or 60 days (F) after completion date
  - Reduced for LOA, withdrawal, separation, etc.
  - Enrolled full-time, or authorized for reduced load
  - Annual vacation periods, if enrolling next term
  - Between study, for Change of Level or Transfer
  - Authorized periods post-completion employment

Maintenance of F-1/J-1 Status I

- Pursue “full course of study” at authorized school
  - Report to ISO promptly upon arrival to UR
  - Enroll timely each term, for FT credits/equiv.
  - Maintain normal progress toward degree reqs.
  - Obtain authorization for Reduced Course Load, prior to dropping below full-time enrollment
  - Extend program prior to current completion date
  - Report changes in address to ISO within 10 days

Maintenance of F-1/J-1 Status II

- Work ONLY with valid & active authorization
  - Limit on-campus employment to 20 hrs/wk during academic term; Full-time at breaks
    - F-1: Valid I-20 documents work permission
    - J-1: All work activities reported via SEVIS
  - Obtain off-campus permission: CPT, OPT, AT
  - Maintain all employment reporting obligations
  - Adhere to unemployment limits during OPT

Implications of new policies

- Uncertainty around USCIS & DOS interpretations
- Officers have broad discretionary authority
- No notice or awareness of some minor violation(s)
- Previous activities remain subject to review
- Difficult to anticipate consequences in advance
- Options to correct common errors are more risky
- Reinstatement or travel to regain F-1 status; Delays likely to result in a 3- or 10-year bar

Be Aware / Plan Ahead / Ask

- Critical to know and follow immigration rules!
  - Requirements, permissions, & reporting
  - Check validity of immigration documents
  - Life happens, plans change … talk to ISO!
- Continued monitoring of policy & case scenarios
  - Much unknown about USCIS implementation
  - Support & advocacy from ISO, as viable

Officers have broad discretionary authority

Uncertainty around USCIS & DOS interpretations