

NEW USCIS POLICIES:

- UNLAWFUL PRESENCE FOR F, M, AND J
NONIMMIGRANTS
- NOTICES TO APPEAR

PRESENTATION #1 IN THE SERIES

Steve Springer, Director of Regulatory Practice Liaison

NAFSA: Association of International Educators

August 20, 2018



THIS SERIES

1. A closer look at the new unlawful presence and NTA policies
2. The basics of unlawful presence and the bars on returning to the U.S. and an introduction to removal (deportation)
3. Advising implications and advocacy, litigation, and other responses to the new policies

NEW UNLAWFUL PRESENCE POLICY

USCIS Initial Memo May 10, 2018

USCIS Final Memo August 9, 2018

Effective August 9, 2018



USCIS Policy Memorandum: “Accrual of Unlawful Presence and F, J, and M Nonimmigrants”

-Issued: May 10, 2018

-“Final Version” issued August 9, 2018

-Effective date: August 9, 2018

-www.nafsa.org/ULP

Summary: with some narrow exceptions, Fs, Js, and Ms, will begin to accrue unlawful presence the day after a violation of status, and this may subject them to a 3-year or 10-year bar on returning to the U.S. when they depart the U.S.

Issued by USCIS

SEVP, CBP, and DOS have not issued related guidance

AM360 Newsfeed and Trending Issues [web page](#)

NEW UNLAWFUL PRESENCE POLICY

Review of Prior USCIS Policy

Prior INS and USCIS policy (1997-2018):

- Status violation did not initiate unlawful presence
- Nonimmigrants with a ***date-specific I-94*** began to accrue unlawful presence only when:
 - The I-94 expired
 - An immigration judge determined a status violation, or
 - INS/USCIS determined a status violation in the adjudication of an application/petition
- Nonimmigrants ***admitted “D/S”*** began to accrue unlawful presence only when:
 - An immigration judge determined a status violation, or
 - INS/USCIS determined a status violation in the adjudication of an application/petition

NEW UNLAWFUL PRESENCE POLICY

Key New Provisions

New USCIS policy:

F, J, and M nonimmigrants (including dependents) who failed to maintain status **before August 9, 2018** begin to accrue unlawful presence on August 9 or the earlier of:

- Expiration of date-specific I-94
- USCIS denial of an application/petition due to a violation of status, or
- Removal order by an immigration judge

F, J, and M nonimmigrants (including dependents) who fail to maintain status **on or after August 9, 2018** begin to accrue unlawful presence on the earliest of the day after:

- Expiration of date-specific I-94
- Failing to pursue the course of study or authorized activity
- Engaging in unauthorized activity
- Completing course of study, program, or practical training and any grace period, or
- Removal order by immigration judge

NEW UNLAWFUL PRESENCE POLICY

Key New Provisions: Exceptions

New USCIS policy:

Fs “generally do not accrue unlawful presence”:

- During annual vacation, the 30 day period of admission before program start date, and any authorized grace period
- While pursuing authorized full course of study or authorized reduced course load
- During practical training, including allowed periods of unemployment
- During a change of level transition process
- During authorized H-1B “cap gap” period
- While an application for post-completion OPT is pending
- During a school transfer transition process
- While a “timely-filed” reinstatement application is pending with USCIS
- During the time she/he failed to maintain status *if* reinstatement application is **approved**

NEW UNLAWFUL PRESENCE POLICY

Key New Provisions: Exceptions, ctd.



New USCIS policy:

Js “generally do not accrue unlawful presence”:

- During the program period indicated on Form DS-2019 plus the allowed 30 day period preceding the program and any grace period
- During any extension of program period indicated on Form DS-2019
- During the time she/he failed to maintain status *if* reinstatement application is **approved**
- During any “cap gap” period (if ever authorized and published in FR by the director)

Ms “generally do not accrue unlawful presence”:

- During the period of admission indicated on Form I-94
- During an authorized period of practical training
- During any authorized grace period
- **While “timely-filed” reinstatement application is pending with USCIS**
- During the time she/he failed to maintain status *if* reinstatement application is **approved**

Dependent’s authorized stay ends with principal’s

NEW UNLAWFUL PRESENCE POLICY

Time That Does Not Count,
Generally Toward UP

In general, unlawful presence does not accrue:

Prior to an individual's 18th birthday

While unlawful presence is “tolling for good cause” for up to 120 days while a change of status or extension of status application/petition is pending with USCIS

- Must be timely filed, non frivolous, and no unauthorized employment
- Approval of COS or EOS results in a new “period of stay,” retroactive to previous expiration, so no unlawful presence accrues

While a bona fide asylum application is pending (unless applicant works unauthorized)

When an individual is the beneficiary of family unity protection (a special legal provision that applies in very narrow circumstances)

If an individual is a battered spouse under a specific legal provision with very narrow conditions

NEW UNLAWFUL PRESENCE POLICY

Penalties for Unlawful Presence

The simplest way of stating INA 212(a)(9)(B) is that someone found to be unlawfully present is barred from returning to the U. S.:

- for 3 years if unlawfully present for 180 days but less than one year
- for 10 years if unlawfully present for one consecutive year or more

after departing the U. S.

For purposes of these bars, days of unlawful presence are not counted in the aggregate over multiple visits to the U.S.; rather, unlawful presence is counted only during any single stay (*USCIS AFM 40.9.2(b)(4)(A)*)

The 3-year bar applies only if you voluntarily depart the U.S., but the 10-year bar applies if you depart voluntarily or are removed

An alien must leave the U. S. to trigger a bar (they are specifically bars on **returning** to the U. S.)

NEW NOTICE TO APPEAR POLICY

New Exercise of an Existing Authority

USCIS Policy Memorandum: “Updated Guidance for the Referral of Cases and Issuances of Notices to Appear (NTAs) in Cases Involving Inadmissible and Deportable Aliens”

- Issued: June 28, 2018
- July 30, 2018: USCIS has delayed implementation until it issues internal operating procedures
- www.nafsa.org/NTA for links and info

NTA = Notice to Appear for removal (deportation) proceedings – *more details in a future presentation*

Summary: although USCIS could issue NTAs prior to this policy, it generally initiated removal proceedings only in cases of criminal activity, fraud, and abuse of the immigration system. Now USCIS may issue an NTA any time it denies an application/petition and renders an alien out of status.

Issued by USCIS

Other entities (ICE/SEVP, CBP, etc.) that may issue NTAs have not published new guidance

ADVISING IMPLICATIONS

Food for Thought

A future presentation will focus on advising considerations, but here are some initial ideas to consider:

Exactly what constitutes a failure to maintain status will become more important

The specific date on which a failure to maintain status occurred will become very important

Upon discovery of a failure to maintain status, an individual will need to consider whether reinstatement or departing the U.S. is the best strategy and **legal counsel will usually be necessary**

- Departing the U.S. could stop the accrual of unlawful presence, but if the individual is already subject to a bar on returning this may not be the best approach
- A reinstatement application filed 5+ months after status violation will not stop accrual of UP and, given current Form I-539 reinstatement application processing times, if denied would result in 180+ days of unlawful presence (3-year bar), maybe even 365+ days (10-year bar)

Will USCIS in the future take a more adversarial approach to “beyond the student’s control” in reinstatement applications?

Denials of applications/petitions that leave an alien out of status may result in the initiation of removal proceedings (an NTA)

NEW USCIS POLICIES

Resources

Resources:

[NAFSA Adviser's Manual 360](#)

- chapter 11 on “Nonimmigrants” covers unlawful presence and the new policies

[New USCIS Unlawful Presence Policy](#)

[NAFSA comment letter](#)

[New USCIS NTA Policy](#)

[Resource: Identifying an Immigration Attorney](#)

[AILA's Immigration Lawyer Referral Service](#)

[Dept. of Justice Executive Office for Immigration Review List of Pro Bono \(Free\) Legal Services Providers](#)

THANKS!

Stay tuned for other presentations in this series

For a copy of the slides, go to the NAFSA AM360 page:

www.nafsa.org/am

